Section 6 of Great Britain’s Protection of Trading Interests Act: The Claw and the Lever

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The Protection of Trading Interests Act\(^1\) received royal assent on March 20, 1980. It represents the most recent attempt by Great Britain to curb the extraterritorial application of United States antitrust law.\(^2\) The Act enables the British Secretary of State to prohibit compliance with requests by foreign courts for discovery of commercial documents.\(^3\) It also establishes criminal penalties for disregarding that prohibition\(^4\) and prohibits the enforcement in British courts of multiple damage judgments obtained in overseas countries.\(^5\) The most important and novel section of the Act, however, is the "claw-back" provision of section 6. Where a qualifying defendant has paid multiple damages pursuant to a foreign judgment, section 6 allows the defendant to recover from the original plaintiff that portion of the judgment which exceeds compensation.\(^6\) Because the intended

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2. In his introduction of the bill, Mr. Nott, the British Secretary of State, explained: My objective in introducing this Bill is to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us.
   . . . [T]he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America.
   . . . [T]he United States has shown a tendency in certain respects over the past three decades increasingly to try to mould the international economic and trading world in its own image.
4. Id. § 3.
5. Id. § 5.
6. Section 6 of the Act provides:
   (1) This section applies where a court of an overseas country has given a judgment for multiple damages within the meaning of section 5(3) above against—
      (a) a citizen of the United Kingdom and Colonies; or
      (b) a body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible; or
      (c) a person carrying on business in the United Kingdom,
   (in this section referred to as a "qualifying defendant") and an amount on account of the damages has been paid by the qualifying defendant either to the party in whose favour the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of the damages.
   (2) Subject to subsections (3) and (4) below, the qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attrib-
effect of section 6 is to undermine American antitrust judgments against British defendants, its operation is significant in light of several pending U.S. antitrust cases which involve British interests. More important, section 6 illustrates the tensions created when the effect of one nation's regulation of its own economic environment is felt world-wide.

This note first examines the United States' practices in the field of trade regulation that spurred the passage of the Protection of Trading Interests Act. Second, it examines the probable operation of section 6. Third, the note analyzes that operation in terms of the intended goals of Parliament in passing the Act. Finally, the note evaluates proposals that might alleviate problems created by the extraterritorial application of U.S. antitrust laws.

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I

THE PROBLEM: THE UNITED STATES, EXTRATERRITORIALITY, AND BRITISH SOVEREIGNTY

When introducing the Protection of Trading Interests bill to Parliament, British Secretary of State Nott identified three objectionable practices the United States had engaged in that prompted the British action. Nott identified the first objectionable practice as the expansive extraterritorial application of U.S. antitrust laws. Second, he criticized U.S. government agency regulations over persons the British believe are outside U.S. jurisdiction. Third, Nott objected to the United States' claim of personal jurisdiction over foreign subsidiaries of U.S. companies and over other companies in which U.S. citizens hold substantial ownership interests when those companies are domiciled and operating outside the United States.

The following section analyzes each of these objections in greater detail.

A. THE EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAWS

1. Evolution and Application of the "Effects:" Doctrine

The controversy surrounding the extraterritorial application of U.S. antitrust law focuses on the exercise of subject matter jurisdiction. It is well-settled in international law that a nation has the right to exercise jurisdiction over persons located or conduct occurring within its territorial boundaries. However, the United States has pioneered the concept of claiming jurisdiction over the economic and commercial activities of nonnationals who act outside U.S. territorial boundaries but affect U.S. domestic concerns.

The Sherman Act is the United States' main vehicle for the control of restrictive business practices in foreign commerce. It provides: "every contract, combination . . . or conspiracy, in restraint

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8. See remarks of British Secretary of State Nott, 973 PARL. Deb., H.C. (5th ser.) 1534-37 (1979) [hereinafter cited as NOTT REMARKS].
9. Id. at 1537.
10. Id.
of trade or commerce . . . with foreign nations, is declared to be illegal.”

Initially, the Sherman Act was thought to apply only to acts that occurred within the territorial boundaries of the United States. But this interpretation proved to be short-lived. The landmark case of *United States v. Aluminum Co. of America (Alcoa)* drastically altered territorial concepts of antitrust jurisdiction by extending the reach of the Sherman Act to foreign combinations even when no American firms are involved. *Alcoa* established what has become known as the “effects” doctrine in American antitrust jurisprudence.

*American Banana v. United Fruit Co.*, 213 U.S. 347 (1909), was the first Supreme Court case dealing with the issue of extraterritorial application of U.S. antitrust law. *American Banana* sued for treble damages under §7 of the Sherman Act. It alleged that United Fruit had instigated the Costa Rican government’s seizure of American Banana’s plantation and railroad in order to monopolize the banana trade. United Fruit then allegedly forced American Banana and other purchasers out of the market by outbidding them. The Supreme Court held that these acts fell outside the scope of the Sherman Act because the acts causing the damages were done . . . outside the jurisdiction of the United States and within that of other states.

The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. Giving to this complaint every reasonable latitude of interpretation, we are of opinion that it alleges no case under the act of Congress and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Within four years of the *American Banana* decision the Supreme Court began to expand its theories of extraterritorial jurisdiction. In *United States v. Pacific & Arctic Ry & Navigation Co.*, 228 U.S. 87 (1913), defendants conspired to monopolize certain transportation facilities operating both within the United States and abroad. The agreement was made in the United States. Even though one of the combining parties was a foreign corporation, the Supreme Court held that such acts were prohibited by the Sherman Act. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), further eroded *American Banana*. In *Sisal Sales*, defendants conspired to gain a complete monopoly over the production and sale of sisal. Although discriminatory foreign legislation aided the conspiracy, the defendants made it effective by performing deliberate acts in the United States and abroad. These acts brought about a monopoly in the United States. The Supreme Court held that jurisdiction existed under U.S. antitrust laws. *Id.* at 271.

*Alcoa* involved two cartel agreements between British, French, Swiss, German, and Canadian ingot producers. Both agreements took place outside the United States’ territorial boundaries. In reversing the district court’s judgment for the defendants, Judge Learned Hand wrote for the majority:

> It is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.

Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were
This doctrine allows a court to assert jurisdiction over any conduct occurring outside U.S. territorial boundaries if the conduct was both intended to affect U.S. commerce and did have such an effect.

The *Alcoa* effects doctrine has been criticized principally on two grounds. First, critics complain that, although the doctrine purportedly accords with the objective territorial principle, it exceeds the bounds of accepted principles of jurisdiction. Second, critics characterize *Alcoa* and its progeny as attempts to export American political and economic notions.

unlawful, though made abroad, if they were intended to affect imports and did affect them.

*Id* at 443-44.


21. The degree of effect on U.S. domestic or foreign commerce necessary to trigger extraterritorial application of the Sherman Act has never been settled. The *Alcoa* court assumed that an intent to affect imports and some actual effect was sufficient. 148 F.2d at 443-44. Other courts have required a substantial and material effect upon U.S. foreign and domestic commerce. *See*, e.g., United States v. Watchmakers of Switzerland Information Center, Inc., [1963] TRADE CASES ¶ 70,600 (S.D.N.Y. 1962). The Department of Justice has posited a somewhat stricter formulation requiring that the effects be both substantial and foreseeable. *See* ANTI-TRUST DIVISION, U.S. DEPT OF JUSTICE, ANTI-TRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), reprinted in [1977] 799 ANTI-TRUST & TRADE REG. REP. (BNA) E1, and [1977] TRADE REG. REP. (CCH) No. 266, pt. II.

22. Under the objective territorial principle, a state has jurisdiction over an offender accused of a crime that consists partly of an act committed outside its territory and partly of consequences that occur within its territory. 18 HALSbury's LAWS OF ENGLAND ¶ 1525 (Lord Hailsham of St. Marylebone 4th ed. 1977); *see*, e.g., The S.S. Lotus, [1927] P.C.I.J. Ser. A., No. 10.

23. Two commentators have concluded that the facts of *Alcoa* support only a tenuous connection between the foreign activities at issue and U.S. commerce. Professor R. Y. Jennings recognizes the validity of the objective territorial principle, but limits its applicability to those instances where the consequences of the act are an essential or constituent element of the crime alleged. *Alcoa*, he asserts, overextends this concept by covering effects that are mere repercussions of foreign conduct—even going as far as covering repercussions that are ancillary to the purpose of the scheme, as in *Alcoa* itself. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, [1957] BRIT. Y.B. INT'L L. 146, 159-60, 164-70, 175. Another critic argues that *Alcoa* establishes a "negative" effects doctrine. The agreement complained of in *Alcoa* resulted only in the reduction of imports of aluminum. Although the defendants had no legal obligation to continue importing the same amount of aluminum to the United States, the *Alcoa* court found that this failure to import came within the scope of the Sherman Antitrust Act. Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558 (1967).

To counter these criticisms, recent decisions have injected international comity considerations into Alcoa’s effects doctrine. In *Timberlane Lumber Co. v. Bank of America*, the Ninth Circuit ruled that “[a]n effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness.” The *Timberlane* court employed a tripartite analysis. First, to trigger the Act, a foreign restraint must affect or have been intended to affect American foreign commerce. Second, the effect must be “sufficiently large [so as] to present cognizable injury to the plaintiffs.” Third, the “interests of, and links to, the United States—including the magnitude of the effect on foreign commerce—[must be] sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.” The court cited several factors that lower courts should weigh in balancing the foreign interests involved in such an analysis.

The Third Circuit expressly adopted the *Timberlane* approach in *Mannington Mills v. Congoleum Corp.* Under the Alcoa doctrine, the foreign activities alleged in *Mannington Mills* had a sufficient effect on U.S. foreign commerce to justify an assertion of subject matter jurisdiction. Nevertheless, the Third Circuit thought it necessary first to balance the interests of international comity against domestic concerns before deciding whether it should exercise jurisdiction.

Not all courts have agreed with the approach taken by the *Timberlane* and *Mannington Mills* courts. The Seventh Circuit recently refused to order such a balancing of interests in *In re Ura-

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25 549 F.2d 597 (9th Cir 1976).
26 *Id.* at 613 (emphasis in the original).
27 *Id.* at 615.
28 *Id.* at 616.
29 *Id.*
30 The cited factors include the degree of conflict with foreign law or policy; the nationality or allegiance of the parties and the situs of the business or corporation; the extent to which enforcement by either state can be expected to achieve compliance; the impact on the United States as compared with the effects on other nations; the extent to which there is an explicit purpose to harm or affect American commerce; the foreseeability of such effect; and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. *Id.* at 614.
31 595 F.2d 1287 (3d Cir. 1979). In *Mannington Mills*, an American manufacturer of floor coverings brought an antitrust action against a second American manufacturer. Plaintiff alleged that defendant secured foreign patents by fraud, which, if perpetrated in securing a domestic patent, would lead to antitrust liability.
32 *Id.* at 1297-98. The court concluded that it was error for the lower court to dismiss the plaintiff’s complaint absent a record that would allow adequate evaluation of the *Timberlane* factors.
ium Antitrust Litigation. The Seventh Circuit considered the tests set forth in Mannington Mills and Timberlane inapplicable on two grounds. First, the court noted the Mannington Mills factors are not the law of the Seventh Circuit. Second, the court considered the circumstances in In re Uranium factually distinct from those in Timberlane and Mannington Mills.

2. The British Objection

The British view the extraterritorial application of U.S. antitrust law as an invasion of their sovereignty. In accordance with earlier concepts of American territorial antitrust jurisdiction, the British believe that each sovereign should have exclusive jurisdiction over persons and acts within its own territorial boundaries. Furthermore, by applying the Alcoa effects doctrine, the British assert the United States is unilaterally passing judgment on economic problems that concern more than one country.

Not only do the British object to the assertion of jurisdiction by American courts, but they also object to the actual operation of U.S. antitrust law as well. If a plaintiff in a civil action successfully proves a Sherman Act violation, he may recover treble damages. 

33. 617 F.2d 1248 (7th Cir. 1980). In In re Uranium Antitrust Litigation, Westinghouse instituted a U.S. antitrust action against twenty-nine world-wide producers of uranium and their subsidiaries. Several of the defendants, including Rio Tinto Zinc (RTZ), a British corporation, refused to appear. The trial court entered default judgments against the absent defendants and ordered a proceeding to determine damages. The answering defendants appealed, claiming that their cases would be severely prejudiced by a determination of damages against the defaulting defendants. The governments of Australia, Canada, South Africa, and the United Kingdom submitted amicus curiae briefs challenging the jurisdiction of the trial court to enter judgments against the absent defendants.

34. Id. at 1255.

35. In Timberlane and in Mannington Mills the defendants appeared and contested the district courts' jurisdiction. In In re Uranium, the defendants defaulted, "contumaciously [refusing] to come into court and [present] evidence as to why the District Court should not exercise its jurisdiction." Id. at 1255-56. The court noted application of the Mannington Mills factors in this instance would have placed the district court "in the impossible position of having to make specific findings with the defaulters refusing to appear and participate in discovery." Id. at 1256. For a critical analysis of the In re Uranium opinion, see 21 HARV. INT'L L.J. 515, 521-23 (1980). The Westinghouse uranium suit has been the subject of much consternation in Great Britain. See NOTT REMARKS, supra note 8, at 1535-37.

36. See NOTT REMARKS, supra note 8, at 1535.

37. See note 16 supra and accompanying text.

38. See NOTT REMARKS, supra note 8, at 1535. Nott believes U.S. courts and agencies, in applying the Alcoa effects doctrine, pay too little attention to the interests of foreign states.

39. Id. See also remarks of Lord Mackay of Clashfern, 404 PARL. DEB., H.L. (5th ser.) 556 (1980) [hereinafter cited as MACKAY REMARKS].

The British, however, view treble damages as a penalty. Because the U.S. government can also prosecute a Sherman Act violation, the British perceive the possibility of concurrent criminal and civil treble damage proceedings as a form of double jeopardy. Furthermore, because the British regard treble damage actions as penal proceedings, they object to the lack of certain safeguards that are normally present in criminal prosecutions.

Finally, the British and American philosophies on restrictive trade practices differ in emphasis. U.S. antitrust law embodies a strong suspicion of concentrated economic power. For example, restrictive agreements are per se illegal even though in particular instances they may produce procompetitive results. Conversely, British institutions are designed to facilitate the exercise of power. The economic power of private business in Great Britain is unrestrained unless and until there is substantial evidence of abuse. Because it is less concerned about the mere existence of private economic power, British law focuses on the way in which monopolies and restrictive associations exercise their power. Thus, the United Kingdom emphasizes the protection of small business as a primary goal of restrictive trade law.

B. Extraterritorial Regulation by U.S. Government Agencies

The British not only object to extraterritorial application of U.S. antitrust law, but to the operation of other U.S. regulatory statutes. These laws empower U.S. agencies to "pursue inquiries or launch proceedings against persons, who, according to [the British] view of international law, are outside the jurisdiction of the United States." As with antitrust laws, the British object to American agencies'...
attempts to exercise unilateral control over any activity that has an effect on U.S. commerce. The British name the Federal Trade Commission, the Federal Maritime Commission, the Securities and Exchange Commission, and the Commodity Futures Trading Commission as among the offending agencies.

C. PERSONAL JURISDICTION OVER FOREIGN SUBSIDIARIES

Although a court may have jurisdiction over the subject matter of an action, it may lack control over the individual parties. Generally, a British court may assume personal jurisdiction over a company only if it is incorporated or registered in the United Kingdom. A company incorporated in a country other than Great Britain is subject to British company registration provisions only if it has established a place of business in Great Britain. Thus, a for-

51. See Mackay Remarks, supra note 39, at 559.
52. See Nott Remarks, supra note 8, at 1537. As an example of their complaint in this area, the British point to the recent Transatlantic Shipping Cases. United States v. Atlantic Container Line, Ltd., Crim. No. 79-00271; United States v. Bates, Crim. No. 79-00272 (D.D.C. filed June 1, 1979), described in [1979] 917 Antitrust & Trade Reg. Rep. (BNA) A25-A26. In June 1979 a federal grand jury indicted, among others, two British nationals and two shipping consortia in which there was a substantial British representation. The indictments alleged that the firms conspired to fix prices outside the scope of the rate-fixing agreements regulated by the Federal Maritime Commission. The shipping firms and the indicted individuals plead nolo contendere to the charges. The two British firms, Atlantic Container Line Ltd. and Dart Container Line Co. Ltd., were fined $1 million and $800,000, respectively. The chief executives of each shipping company were fined the maximum $50,000 on misdemeanor charges. The settlement, according to Justice Department officials, is the largest ever in a criminal case under the Sherman Act. [1979] 918 Antitrust & Trade Reg. Rep. (BNA) A29. Numerous civil damage claims have been instituted against the defendants alleging the same conspiracy. See Nott Remarks, supra note 8, at 1539. At present the civil cases are pending.

The British object to the Transatlantic Shipping Cases on two grounds. First, they object to unilateral regulation of shipping. Since the high seas are under no particular sovereign's control, Great Britain maintains that shipping regulation should be multilateral. Id. at 1538. The Federal Maritime Commission, in this instance however, asserted rule-making jurisdiction over all pricing agreements concerning shipment of freight in United States/Europe trade. Second, the British believe that limited regulation of shipping promotes lower costs and greater efficiency. Id. at 1538-39. Not only does the assertion of U.S. regulation over international shipping undermine this goal, but the heavy fines imposed in settlement of the criminal proceedings, coupled with the potential civil damages from the pending treble damage suits, pose serious financial consequences for the British shipping industry. Id. Moreover, the British estimate that, without the deterrent effect of U.S. regulation, there could be a ten to fifteen per cent increase in the Western allies' sea trade with the United States. See remarks of Mr. Lawrence, 973 Parl. Deb., H.C. (5th ser.) 1574 (1979).

53. F. James, Civil Procedure 534-35 (1965).
55. Id. at 223. Section 406 of the Companies Act, 1948, 11 & 12 Geo. 6, c. 47, defines an "overseas company" as a company incorporated outside Great Britain that has established a place of business in Great Britain. Every "overseas company" must, within one month from the establishment of the place of business, deliver—in English—(1) a certified copy of its charter; (2) a list of its directors and secretary; and (3) the name and
eign corporation operating outside Great Britain is not subject to the jurisdiction of British courts. This is true even if the foreign corporation is wholly owned by British interests.56

American courts, however, are more likely to consider the subsidiary and parent corporation as a single enterprise for the purposes of exercising personal jurisdiction.57 A foreign corporation, even though it does no business in the United States per se, might be subject to the power of U.S. courts and agencies merely because U.S. citizens hold substantial ownership interests.58

The British object to the application of this American enterprise entity doctrine. They believe U.S. courts and agencies claim jurisdiction over foreign subsidiaries and affiliates of American companies without regard to the interests of the incorporating country. For example, U.S. companies' subsidiaries and affiliates incorporated in Great Britain are required to conform to U.S. regulatory provisions. The British claim that enforcement of these U.S. regulations is prejudicial to British commercial and economic policies59 and

addresses of one or more persons resident in Great Britain authorized to accept service of process on behalf of the company. Id., §407(1). In addition, such a company must file annual accounts in the same manner as a British company. Id., §410(1).

56 See Schmitthoff, supra note 54, at 223. British law maintains a general distinction between a subsidiary and parent, regarding them as two separate legal persons even if one is wholly owned by the other and, for practical purposes, the two constitute one economic unit. This concept of corporate separateness was explored in the seminal case Salomon v. Salomon & Co., [1897] A.C. 22.

British courts, however, have admitted two broad qualifications to the rule in the Salomon case. First, the rule does not apply if the parent employs the controlled company as its agent. See, e.g., Firestone Tire & Rubber Co. v. Lewellin, [1957] 1 W.L.R. 404. Second, if the controlled company constitutes an abuse of corporate form by operating as a "device and sham, a mask—which [the incorporator] holds before his face," the court may hold the parent responsible for the acts of its subsidiary. Jones v. Lipman, [1962] 1 W.L.R. 832, 836. For a more detailed analysis of lifting the corporate veil in Great Britain, see L. GOWER, MODERN COMPANY LAW 189-202 (1969); Markson, Corporate Unveiling: Judicial Attitudes, 123 SOLICITORS' J. 831, 831-33, 848-50 (1979).


58 See note 57 supra.

59 For example, The Export Administration Act of 1979, 50 U.S.C. app. §§2401-2420 (Supp. III 1979), imposes penalties upon a United States person who fails to report to the Department of Commerce that he has received a request to "take any action which has the effect of furthering or supporting a restrictive trade practice or boycott fostered or imposed by a foreign country against a country friendly to the United States or against any United States person . . . ." 15 C.F.R. §369.6(a)(1) (1980). A United States person is defined as "any person who is a United States resident or national, including . . . controlled in fact foreign subsidiaries . . . of domestic concerns . . . ." 15 C.F.R. §369.1(b) (1980). A foreign subsidiary is presumed to be controlled in fact if

(i) the domestic concern beneficially owns or controls . . . more than 50 percent of the outstanding voting securities of the foreign subsidiary or affiliate; [or]
(2) has a direct bearing on the well-being of British citizens who work for U.S. regulated corporations in Great Britain.

II

A REACTION: SECTION 6 OF THE PROTECTION OF TRADING INTERESTS ACT

In reaction to objectionable U.S. practices, the British Parliament passed the Protection of Trading Interests Act in 1980. To deal with the problem of the extraterritorial scope of private U.S. antitrust actions, the Act contains a so-called "clawback" remedy in section 6. In essence, section 6 states that a qualifying defendant who has paid an amount pursuant to a multiple damage judgment in an overseas country may recover from the awarded party that part of the judgment that exceeds compensation. A proper analysis of the section must answer questions concerning who may recover, against whom, under what circumstances, and in what amount.

A. Who May Recover?

Section 6 limits recovery under the statute to "qualifying defendants." A qualifying defendant is defined as a citizen of the United Kingdom, a corporation incorporated in the United Kingdom, or a person carrying on business there. Because British law defines person to include a corporation, a foreign corporation that carries on business in the United Kingdom is eligible to use the statute. If, however, the defendant is ordinarily resident in the over-

(ii) the domestic concern beneficially owns or controls . . . 25 percent or more of the voting securities of the foreign subsidiary . . . if no other person owns or controls . . . an equal or larger percentage.

15 C.F.R. § 369.1(c) (1980). For an explanation of the British objection to the Export Administration Act and other instances where the U.S. extends its jurisdiction over the foreign subsidiary of a domestic corporation, see NOTT REMARKS, supra note 8, at 1537; MACKAY REMARKS, supra note 39, at 559-60.

60. See NOTT REMARKS, supra note 8, at 1537; MACKAY REMARKS, supra note 39, at 559-60. United States interests are responsible for over nine per cent of employment in Great Britain. See remarks of Lord Hacking, 405 PARL. DEB., H.L. (5th ser.) 1520 (1980).

61. Protection of Trading Interests Act, 1980, c. 11.

62. Id. § 6(1) and (2). This provision allows a qualifying defendant suing in British courts to recover two-thirds of any treble damage award the defendant paid a U.S. plaintiff as a result of a U.S. antitrust claim.

63. Id. § (1)(a)-(e).

64. See Interpretation Act, 1978, c. 30, § 5, sched. 1.

65. In order to "carry on business" under British law, the activity must be of a somewhat permanent character, as opposed to an isolated transaction, and must involve some degree of management and control. See Brown v. London & N.W. Ry., 122 Eng. Rep. 481; Graham v. Lewis [1888] 22 C.B.D. 1; But see Cornelius v. Phillips, [1918] A.C. 199. See also Transport & General Credit Corp. v. Morgan, [1939] 1 Ch. 531, 549-52; Re Brauch, Ex parte Britannic Securities & Investments Ltd. [1978] 1 All E.R. 1004. Pre-
seas country in which the multiple damage proceedings were brought or is a corporation whose principal place of business is in the overseas country, section 6 does not apply. Hence, a U.S. corporation that does business in the United Kingdom would not ordinarily qualify as a defendant for the purposes of this section. Interestingly, a foreign subsidiary of the same U.S. corporation could use the statute so long as it had been brought in as a defendant in the original action and was either incorporated or carried on business in Great Britain.

B. AGAINST WHOM MAY THE STATUTE BE USED?

The qualifying defendant may recover against the party in whose favor the judgment was given. If the awarded plaintiff is not located within British territory, the Act provides for service of process outside the United Kingdom. Moreover, if the plaintiff fails to appear, the qualifying defendant may obtain a default judgment. The defendant may then execute the judgment against any property presumably this would include all foreign corporations that register in Great Britain as "overseas companies" under § 406 of the Companies Act, 1948. See note 55 supra.

Curiously, a foreign corporation that does business in both the United States and Great Britain may invoke the statute. If, for example, a French corporation has branch offices in both the U.S. and in Great Britain and engages in restrictive business practices affecting U.S. commerce, the American courts could claim jurisdiction and a plaintiff could recover treble damages. For the purposes of the Protection of Trading Interests Act, the French corporation would be carrying on business in Great Britain and could recover so long as the restrictive practices did not occur "exclusively" within the United States. See remarks of British Secretary of State Nott and Mr. Ogden, 973 PARL. DEB., H.C. (5th ser.) 1032-33 (1979). Diplomatic Note from American Embassy, London to British Secretary of State Nott (Note No. 56, dated Nov. 9, 1979) (copy on file at the Cornell International Law Journal).

60. Protection of Trading Interests Act, 1980, c. 11, § 6(3).

61. Protection of Trading Interests Act, 1980, c. 11, § 6(2).

62. Protection of Trading Interests Act, 1980, c. 11, § 6(5). In order to give effect to this provision, the Rules of the Supreme Court, Order 11, rule 1(1)(f) was amended to allow service of writ out of the jurisdiction for all actions brought under the Act. [1980] Stat. Inst. No. 629.

of the awarded plaintiff that is located in Great Britain. A different result occurs if the awarded plaintiff is a company incorporated outside the jurisdiction of Great Britain and owns or controls a subsidiary in Great Britain. This “property” cannot be used in satisfaction of a section 6 judgment.

An awarded plaintiff cannot escape liability by assigning his claim to another party. Finally, the section does not apply to criminal antitrust actions or to agency regulations.

C. Under What Circumstances May a Defendant Recover?

A qualifying defendant may recover “where a court of an overseas country has given a judgment for multiple damages” and the qualifying defendant has paid an amount on account of the damages. Because a sum must be paid pursuant to a judgment, a defendant may not sue for damages he anticipates paying. A court of an overseas country must have “given a judgment for multiple damages.” Hence, if an antitrust case is settled before a judgment is rendered, the section has no application.

Where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country, the statute does not apply. The British courts’ interpretation of “exclusively” is uncertain, however. It is conceivable the British

73. The subsidiary’s assets may conceivably be used in satisfaction of a § 6 judgment if the subsidiary was a named plaintiff in the original antitrust action. Several amendments were proposed that would have allowed recovery against a subsidiary even if it was not a named party; all, however, were defeated. See Report of Standing Committee F, Protection of Trading Interests Bill 66-69 (Second Sitting 1980). 404 PARL. DEB., H.L. (5th ser.) 938-43, 950-52 (1980); 973 PARL. DEB., H.C. (5th ser.) 1025-39 (1979).

Although under British law legislative history is not authoritative, see R. Cross, Statutory Interpretation 139-41 (1976), and thus Parliament’s refusal to adopt specific language allowing such recovery would not necessarily determine how a British court would interpret the Act. British case law maintains the distinction between a subsidiary and parent. See note 56 supra and accompanying text.

74. Protection of Trading Interests Act, 1980, c. 11, § 6(6).
76. Protection of Trading Interests Act, 1980, c. 11, § 6(1). The Act defines multiple damages as “an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given.” Id. § 5(3).
77. Id. § 6(1).
78. Id. Under the Act, a defendant is considered to have paid damages if he paid an amount to either the awarded plaintiff or to a co-defendant entitled to contribution. Id. § 6(4).
courts will interpret "exclusively" so broadly that, if only one of the prohibited activities was carried on outside of the overseas country, the qualifying defendant could still claim the benefit of the section.\(^8\)

**D. What May a Qualifying Defendant Recover?**

A successful plaintiff in an American antitrust action is entitled to recover a sum equal to three times his proven damages.\(^{82}\) The Protection of Trading Interests Act allows a qualifying defendant to recover from the plaintiff that portion of the amount he has paid "as exceeds the part attributable to compensation."\(^{83}\) If an American court forces the defendant to pay treble damages, the part attributable to compensation will always be one-third of the amount the defendant has actually paid in satisfaction of the judgment.\(^{84}\) For example, if an American court determined that the plaintiff sustained damages of $6 million, it would award a judgment of three times that, or $18 million. If the defendant paid the full $18 million, the qualifying defendant could recover two-thirds of the award, or $12 million. Because the recovery is tied to the actual amount paid, regardless of whether the U.S. judgment has been satisfied in full, the qualifying defendant may recover two-thirds of whatever he has paid. Therefore, in the example above, if the defendant paid only $6 million of the $18 million judgment, he would be able to recover $4 million (two-thirds of $6 million) under section 6. When used in this circumstance, the statute not only cuts against the treble damage portion of the judgment but also against the compensatory portion.

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\(^8\) British Attorney General Sir Michael Havers indicated that "exclusively" would be interpreted so as to exclude only those businesses operating wholly within the United States from using the statute.

Where there is a subordinate, or subsidiary, business which is acting in, say, the United States, all of its activities are there and nowhere else, we think that it would be unfair to give it the clawback protection under subsection (1). We are trying to distinguish what one might call a wholly domestic operation within the United States jurisdiction.


\(^{83}\) Protection of Trading Interests Act, 1980, c. 11, § 6(2).

\(^{84}\) Section 6(2) defines the amount attributable to compensation under a proportional formula. The part attributable to compensation "shall be taken to be such part of the amount [paid] as bears to the whole of [the amount paid] the same proportion as the sum assessed . . . as compensation for loss or damage . . . bears to the whole of the damages awarded." *Id.*
The goal of Parliament in enacting the Protection of Trading Interests Act was to restrict the extraterritorial application of U.S. trade regulation. An analysis of section 6 shows that the Act functions both as a counterforce and as an invitation to negotiate; that is, both as a "claw" and a "lever."

A. Section 6 as a Counterforce

I. Potential Effects

Section 6 is a significant attempt to curb the extraterritorial application of U.S. trade regulation. Not only does it provide a novel remedy for its own citizens and corporations, but it is available to both foreign corporations and U.S. subsidiaries so long as those companies carry on business within the United Kingdom. Moreover, even if the awarded plaintiff is not within British jurisdiction, a section 6 action may be brought in British courts and a qualifying defendant may obtain a default judgment and execute against the awarded plaintiff's property in Great Britain. Finally, in some situations, the section 6 remedy can cut into the compensatory portion of the overseas judgment.

Section 7 of the Act provides for the reciprocal enforcement of any clawback provision of a country that enforces a section 6 judgment. The reciprocal enforcement provision is intended to have two effects. First, the provision may serve as an incentive for other countries to pass clawback provisions similar to the British version, thus increasing the number of antitrust defendants who would be able to recover the noncompensatory portion of treble damage judgments. Second, reciprocal enforcement of the British clawback provision will allow a British qualifying defendant to execute against the property of an awarded plaintiff even if that plaintiff had no

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85. See notes 63-68 supra and accompanying text.
86. See notes 70-72 supra and accompanying text.
87. See note 84 supra and accompanying text.
88. Section 7 provides:
(1) If it appears to Her Majesty that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of judgments given under any provision of the law of that country corresponding to that section.
recoverable assets in Great Britain. At present, Canada, Australia, and a number of other Commonwealth nations are considering similar clawback provisions. If such provisions are enacted elsewhere, section 6, in conjunction with the reciprocal enforcement provision of section 7, present a formidable threat to U.S. antitrust plaintiffs.

2. Limitations

Despite the seemingly broad scope of the Act, section 6 has some severe limitations. Its most significant limitation concerns the fact a qualifying defendant may not recover against a subsidiary of the awarded plaintiff unless that subsidiary was a party to the original action. Because subsidiaries incorporated in Great Britain account for nearly all U.S. investment in that country, it is unlikely that section 6 will have any significant impact on American antitrust plaintiffs unless the subsidiaries are parties to the U.S. antitrust actions. Further, plaintiffs who have unincorporated assets in Great Britain could easily withdraw those assets from the country or

89. If the British Crown, by Order in Council, provided for the reciprocal enforcement of a foreign country's clawback provision in Great Britain, conflict of law problems would arise concerning the scope of recovery. If the foreign clawback provision allowed recovery against a nonparty subsidiary of an original plaintiff, it is questionable whether British courts would enforce the judgment against such a subsidiary in Great Britain. A foreign defendant seeking such recovery would need to overcome two obstacles. First, a British court could decide that the question of whether a foreign defendant seeking to enforce a judgment against a subsidiary of an awarded plaintiff is one of procedure. In that case, British procedural law would apply. Generally, British choice of law rules dictate what law is to apply in substantive matters. But procedural questions are governed by the law of the forum. See 8 Halsbury's Laws of England § 769 (Lord Hailsham of St. Marylebone 4th ed. 1977). Methods of enforcement of judgments are considered procedural. Id. § 786. However, the question of who is the appropriate party to an action can be either substantive or procedural. Id. § 772. Second, British courts will not enforce a judgment if it is contrary to public policy. Id. §§ 728, 762. A court could decide that, because British law maintains a strict distinction between parent and subsidiary corporations, see note 56 supra, it would be contrary to British public policy to allow recovery against the subsidiary.


91. See note 73 supra and accompanying text.

92. The subsidiary is the "most favored form of organization of U.S. affiliates in the U.K., [accounting] for 80% of the number of large investment companies and for 90% of their assets." J. Dunning, U.S. Industry in Britain 12 (1976). Although figures for small investment companies are unavailable, large investment companies represent the most significant share of U.S. investment in Great Britain. Small investment companies account for only 6.8% of the total value of U.S. investment in the United Kingdom. Id. at 32.

93. See note 73 supra and accompanying text. Parliament was particularly concerned that § 6 would have little deterrent value or practical application. See, e.g., remarks of Mr. Jeffrey Thomas, 973 Parl. Deb., H.C. (5th ser.) 1027 (1979); remarks of Lord Lloyd of Kilgerran, 405 Parl. Deb., H.L. (5th ser.) 938 (1980).
incorporate them, thus circumventing the operation of the statute.\textsuperscript{94}

In addition, section 6 does not apply to antitrust settlements where no judgment is given.\textsuperscript{95} In theory, then, section 6 will give a British defendant incentive not to settle. Because section 6 provides a clawback remedy, the defendant risks only the damages the plaintiff can actually prove. Given the difficulties of recovery in Great Britain,\textsuperscript{96} however, it is doubtful that the statute will provide a realistic inducement not to settle. Thus, in settlement situations, a British corporation could still be subject to the broad scope of U.S. trade regulations while lacking feasible recourse to British courts.

Finally, section 6 does not apply to public antitrust actions.\textsuperscript{97} In those actions, a British defendant corporation continues to be subject to American theories of extraterritorial jurisdiction with little chance of protection.

B. SECTION 6 AS AN INVITATION TO NEGOTIATE

Section 6 also attempts to restrict the scope of U.S. trade regulation by encouraging negotiation. Throughout the consideration of the Protection of Trading Interests Act, the British government repeatedly emphasized that it prefers to resolve the problem of extraterritoriality through negotiation.\textsuperscript{99} Although the United States and Great Britain have attempted to resolve the problem through negoti-
ation in the past, according to the British the attempts have accomplished little. Despite its limitations, the Act now allows Great Britain to negotiate and bargain from strength.

1 Britain's Increased Bargaining Strength

As stated above, the greatest limitation on the effectiveness of section 6 is that it normally does not allow recovery from the subsidiaries of an awarded plaintiff. Parliament was aware of this limitation when it enacted section 6. Parliament nonetheless resisted taking steps that would further strengthen section 6, believing that the clawback provision in its present form was a drastic enough measure. The Act's legislative history indicates, however, that absent a significant restriction in the scope of U.S. trade regulation, Great Britain would consider an amendment to allow recovery by a qualifying defendant against the assets of a subsidiary owned by the awarded plaintiff—even if the subsidiary was not a named party to the action. Such an amendment, coupled with the reciprocal enforcement provision of section 7, would significantly disrupt overseas enforcement of U.S. antitrust law.

2 Britain's Disinclination to Retaliate

Section 6 is clearly an invitation to negotiate and not to retaliate. The Protection of Trading Interests Act has two basic goals: the reassertion of British sovereign rights in the area of trade regulation and the protection of vital domestic and economic interests. Parliament did not intend to export British economic policies, to disturb British obligations concerning recognition of judgments, or to challenge domestic enforcement of U.S. antitrust law.

Both Parliamentary debates and the plain language of the statute illustrate that Parliament carefully drafted the Act with the intent of avoiding retaliatory action. For example, the Act was deliberately drafted to stay within traditional British views regarding both sub-

100 See *Nott Remarks*, supra note 8, at 1542-48; *Mackay Remarks*, supra note 39, at 1518
101 See note 93 *supra* and accompanying text.
102 See *Nott Remarks*, supra note 8, at 1035-36; *Mackay Remarks*, supra note 39, at 942.
104 See remarks of Mr. Thomas, 973 *Parl. Deb.*, H.C. (5th ser.) 1577 (1979).
105 Id.
106 See Diplomatic Note from British Embassy, Washington, D.C. to U.S. Department of State (Note No. 225, dated Nov. 27, 1979) (copy on file at *Cornell International Law Journal*).
107 See remarks of Mr. Lawrence, 973 *Parl. Deb.*, H.C. (5th ser.) 1572 (1979).
ject matter and personal jurisdiction.\textsuperscript{108} A qualifying defendant must demonstrate a cognizable connection to British economic interests—only British citizens, British corporations, and persons doing business in the United Kingdom are entitled to bring actions under the Act.\textsuperscript{109} Furthermore, under section 6 a British court will assert personal jurisdiction only over parties to the original proceedings.\textsuperscript{110} Assets belonging to an independent economic entity, even if that entity is a wholly-owned subsidiary of the original plaintiff, are not normally subject to the reach of the clawback.\textsuperscript{111} Finally, Parliament knowingly restricted the effectiveness of the clawback provision to avoid inviting retaliatory action by the United States.\textsuperscript{112}

Considering the threat posed to the application of U.S. trade regulation, it is in the interest of the United States to negotiate. What is needed, however, is a proposal that will be acceptable to all sides.

IV

ACCOMODATING THE INTERESTS OF EXTRA- TERRITORIALITY AND SOVEREIGNTY: A PROPOSAL

An acceptable and workable solution to the present conflict over regulation of transnational commercial activities must strike a balance between the interests of extraterritoriality and sovereignty. The United States' expansive extraterritorial application of antitrust law is ultimately aimed at protecting the U.S. economy.\textsuperscript{113} The United States believes this protection is best accorded by pursuing a policy

\textsuperscript{108} See Nott Remarks, supra note 8, at 1033, 1035. The traditional British view of subject matter jurisdiction is that a sovereign has exclusive jurisdiction only over persons and acts within its own territorial boundaries. See note 38 supra and accompanying text. A British court may assume personal jurisdiction over a company only if it is incorporated or registered in the United Kingdom. See note 54 supra and accompanying text. In addition, British law embodies a strict theory of corporate separateness. See note 56 supra.

\textsuperscript{109} See note 63 supra and accompanying text.

\textsuperscript{110} See generally Protection of Trading Interests Act, 1980, c. 11, § 6(1). See also note 73 supra and accompanying text.

\textsuperscript{111} See note 73 supra and accompanying text.

\textsuperscript{112} The fact that assets owned by a subsidiary of the original plaintiff are not recoverable under § 6 significantly reduces the effectiveness of the clawback provision. See notes 91-93 supra and accompanying text. The British, however, feared that a stronger provision would invite retaliation by the United States. See remarks of British Under-Secretary of State Tebbit, 973 Parl. Deb., H.C. (5th ser.) 1590 (1979).

that promotes competition through the dispersion of economic power.\textsuperscript{114} Because the U.S. economy is so affected by activities in the international marketplace, some control over those activities is justified.\textsuperscript{115}

As the strenuous objections of the British government illustrate,\textsuperscript{116} however, other nations have an interest in asserting their sovereign rights to control activities within their own territorial boundaries. Central to this assertion of sovereign rights is the interest of an individual nation in protecting its companies and citizens and in promoting general economic well-being. The right to exclude burdensome or conflicting regulation by nations only peripherally connected to these concerns must be recognized.

\textbf{A. Inadequacy of Recent Attempts}

Recent unilateral attempts at solving the complex problem of balancing these national interests have proved to be inadequate and unacceptable. The United States' unilateral assertion of jurisdiction over international commercial activities has drawn criticism for its 'failure to accommodate other nations' interests.'\textsuperscript{117} Section 6 of the Protection of Trading Interests Act, if accompanied by similar legislation in other countries, might provide some inducement to the United States to eliminate or curtail use of the effects doctrine. But such an approach will not solve the problem. Section 6, in its present form, provides little realistic protection to British persons subject to U.S. treble damage judgments\textsuperscript{118} and thus does not effectively represent British interests in preserving sovereignty and protecting the British economy. The British, however, are reluctant to enact a stronger provision because they do not want to violate their own

\textsuperscript{114} See Baker, note 44 supra.

\textsuperscript{115} Extraterritorial application of antitrust law is not unique to the United States. Several other countries have adopted an effects doctrine in one form or another. For example, German antitrust law applies to all restraints of competition "which have effects... [in West Germany]... even if they result from acts done outside... [the country]." \textit{Acts Against Restraints of Competition of July 27, 1957, [1957] Bundesgesetzblatt [BGBI] § 98(2) (W. Ger.) (as amended).} According to the Canadian Restrictive Trade Practices Commission, "where any overt act which takes place in Canada flows from an agreement which is contrary to the public policy, public interest or public order of Canada, such agreement comes within Canadian jurisdiction even if it were not made in Canada." \textit{Restrictive Trade Practices Commission, Shipping Conference Arrangements and Practices (Ottawa 1965), reprinted in W. Fugate, Foreign Commerce and the Antitrust Laws § 16.14 (2d ed. 1976).} The EEC has adopted a similar approach to extraterritoriality. \textit{See Imperial Chemical Industries, Ltd. v. Commission des Communautés Européennes, [1972] C.J. Comm. E. Rec. 619, 11 Comm. Mkt. L.R. 556 (1972), [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161.}

\textsuperscript{116} See, e.g., note 36 supra and accompanying text.

\textsuperscript{117} See, e.g., note 39 supra and accompanying text.

\textsuperscript{118} See notes 91-93 & 112 supra and accompanying text.
principles of jurisdiction or to invite retaliation by the United States.  

Thus, a unilateral approach on the part of either the United States or Great Britain will not solve the problem. Rather, a bilateral or multilateral solution reached through face-to-face negotiation and compromise would better accommodate all interests. Ideally, an international code on restrictive business practices would alleviate the problem of extraterritoriality as well as recognize and accommodate sovereign interests. The United Nations Conference on Restrictive Business Practices recently adopted an international code; however, it is only voluntary. Experts agree that given the "wide differences between countries in economic, social, political and legal institutions and policies, an international code on restrictive business practices is not a realistic possibility."  

B. A Bilateral Proposal  

Because a multilateral approach to solving the problem of international regulation of restrictive business practices is, at least for the present, unlikely, bilateral agreements between the United States and concerned nations present the most attractive alternative. The United States has employed a bilateral approach to the problem of extraterritoriality in the past. For example, it has executed agreements with Germany and with Canada providing for notification and consultation concerning antitrust actions affecting each

119. See note 08 supra and accompanying text.  
120. See note 112 supra and accompanying text.  
121. A code covering only transnational commercial activities would allow individual states to regulate purely domestic concerns. For example, the definition of affected enterprises under the OECD Competition Guidelines, OECD, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1979) introductory ¶ 8, suggests that such an agreement covers only multinational enterprises. If the code had its own enforcement mechanism, those injured by restrictive business practices abroad could obtain relief through that mechanism, thus eliminating the need for the American effects doctrine approach.  
other's interests. These agreements do not go far enough, however, to alleviate the problems where both the effects in the United States and foreign interests are strong.\textsuperscript{127} Several considerations should guide any future attempts to draft an effective bilateral agreement.

First, in order for any agreement to be reached, it is logical that the United States must surrender either subject matter or personal jurisdiction over foreign corporations in antitrust actions.\textsuperscript{128} Therefore, in antitrust actions, the United States should eliminate personal jurisdiction over foreign corporations, including foreign subsidiaries of U.S. companies, when those corporations are domiciled and operating wholly outside the United States.\textsuperscript{129} If the foreign corporation is conducting business in the United States, even if the acts giving rise to the antitrust violation are committed outside U.S. territorial boundaries, American courts could still exercise jurisdiction over the foreign corporation.\textsuperscript{130} In that instance, other nations may be assured that the United States has a cognizable and legitimate interest in the regulation of a foreign corporation's commercial activities.\textsuperscript{131}

Second, a joint tribunal should be set up to regulate the conduct of multinational corporations whose operations affect several different countries. The findings and orders of the tribunal would be given the force of law in each of the countries signing the treaty. Thus each affected state would have the opportunity to regulate industry affecting its trading interests.

Finally, because the United States will have declined jurisdiction over many foreign corporations, reactionary legislation such as section 6 of the Protection of Trading Interests Act would be unnecessary. Ideally, the activities of the joint tribunal would sufficiently protect British trading interests.

\textsuperscript{127} Canada is presently considering a clawback provision similar to Great Britain's in an attempt to combat U.S. extraterritorial antitrust jurisdiction. See note 90 supra and accompanying text.

\textsuperscript{128} For the British reaction to each of these areas of U.S. jurisdiction, see notes 36-39 & 59-60 supra and accompanying text.

\textsuperscript{129} This limitation of jurisdiction could be accomplished either through enabling legislation or as a provision of the treaty itself. See generally A. McNair, THE LAW OF TREATIES 79-81 (1961).

\textsuperscript{130} Jurisdiction through U.S. ownership is not the only way to show a foreign corporation is doing business in a country. For a general discussion of the "doing business" test of personal jurisdiction, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 35 (1971).

\textsuperscript{131} For example, regulation of foreign corporations doing business in the United States should be acceptable to the British because international law generally recognizes a corporation's "presence" in a country if it regularly conducts business there. Id.; see also J. Beale, CONFLICT OF LAWS § 41.4 (1935).
CONCLUSION

The British Parliament recently enacted the Protection of Trading Interests Act in reaction to the expansive extraterritorial application of U.S. antitrust law. The most controversial aspect of the Act, section 6, allows antitrust defendants suing in British courts to recover the noncompensatory portion of multiple damage awards paid to U.S. plaintiffs. The clawback provision, although representing a significant attempt to curb the extraterritorial application of U.S. antitrust law, is subject to severe limitations. In view of those limitations, the Act may be viewed as an attempt to curb extraterritorial application of U.S. antitrust law by inviting further negotiation with the United States.

Any future negotiation concerning the regulation of transnational commercial activities must strike a balance between the interests of U.S. extraterritoriality and the sovereignty of other nations. Past unilateral attempts have failed to reconcile these competing considerations and multilateral solutions to the problem are impractical at present. Future attempts will most probably take the form of bilateral agreements. They should have as their cornerstone a limitation on the U.S. exercise of personal jurisdiction over foreign corporations, the repeal of reactionary legislation such as section 6 of the Protection of Trading Interests Act, and the establishment of a joint tribunal to regulate the conduct of multinational corporations. It is only in this manner that interested nations may accommodate competing interests of sovereignty and extraterritoriality.

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