

May 2020

## The Extraterritorial Enforcement of U.S. Antitrust Laws and Retaliatory Legislation in the United Kingdom and Australia

Anthony J. Carroll

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

---

### Recommended Citation

Anthony J. Carroll, The Extraterritorial Enforcement of U.S. Antitrust Laws and Retaliatory Legislation in the United Kingdom and Australia, 13 *Denv. J. Int'l L. & Pol'y* 377 (1984).

This Comment is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [digitalcommons@du.edu](mailto:digitalcommons@du.edu).

# DEVELOPMENTS

## The Extraterritorial Enforcement of U.S. Antitrust Laws and Retaliatory Legislation in the United Kingdom and Australia

### I. INTRODUCTION

In an effort to curb extraterritorial enforcement of U.S. antitrust laws by American courts, the United Kingdom (U.K.) and Australia began enacting retaliatory legislation in the 1960s and 1970s known as "blocking statutes." This article will briefly examine these laws, the evolution of U.S. antitrust laws and methods of judicial enforcement of U.S. antitrust laws overseas.

### II. THE ORIGINS AND DEVELOPMENT OF U.S. ANTITRUST LAWS AND EXTRATERRITORIAL ENFORCEMENT MECHANISMS

The origin of U.S. antitrust law is derived from the passage of the Sherman Act of 1890.<sup>1</sup> With the zeal of what one British scholar deemed "national religion,"<sup>2</sup> the Sherman Act was enacted in an era heightened by the Populist movement's mistrust of the growing concentration of American corporate and political wealth.<sup>3</sup> Enforcement of the Act adopted to changing economic realities, as evidenced by the later passage of the Clayton Antitrust<sup>4</sup> and Robinson-Patman Acts.<sup>5</sup>

Amid a growing world economy, Congress enacted the Webb-Pomerene Export Trade Act,<sup>6</sup> in 1917. The primary purpose of the Act was to reduce trade deficits, encourage economies of scale resulting from joint international marketing efforts and foster combinations of small business so as to limit barriers of entry into the arena of international trade.<sup>7</sup> Significantly, much of the fervor behind British and Australian reactions to the Webb Act, and more recently, the Export Trading Company Act of

---

1. Sherman Act of 1890, 15 U.S.C. §§ 1-7 (1976).

2. SHONFIELD, *MODERN CAPITALISM* 2 (1965).

3. Rowe, *Industrial Organization Law in the U.S.*, in *ENTERPRISE LAW OF THE 80'S* 178 (Rowe ed. 1980).

4. Clayton Act, 15 U.S.C. §§ 12-27 (1976).

5. Robinson-Patman Act, 15 U.S.C. §§ 13-136, 21a (1976).

6. Webb-Pomerene Export Trade Act, 15 U.S.C. §§ 61-65 (1976).

7. See FEDERAL TRADE COMMISSION, *ECONOMIC REPORT, WEBB-POMERENE ASSOCIATIONS: A FIFTY YEAR REVIEW*, 8-14 (1967).

1982,<sup>8</sup> originates in the seemingly relaxed antitrust provisions governing export trade in these Acts. As one author opined: "[i]n view of the fact that American law condones domestic export cartels, the argument that the Sherman Act must be enforced extraterritorially to protect free trade in the international would seem hallow."<sup>9</sup>

The first major international enforcement effort of antitrust laws by U.S. courts was undertaken in the landmark case of *United States v. Aluminum Co. of America*.<sup>10</sup> In that 1945 decision, Judge Learned Hand established the "effects doctrine" by stating that "[a]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences with which the state reprehends."<sup>11</sup>

The effects doctrine was applied in *United States v. Imperial Chemical*.<sup>12</sup> The court in *Imperial Chemical* ruled that a conspiracy to divide territories on the part of British and American companies, although occurring overseas, was in violation of the Sherman Act. Since that ruling, most courts have modified the effects doctrine by holding that it applies only to anti-competitive behavior having a "substantial and material effect"<sup>13</sup> upon U.S. commerce. A series of recent American decisions has even begun to affix greater credence to the principal impact of antitrust enforcement<sup>14</sup> and its effect on international comity.<sup>15</sup>

Despite the more relaxed extraterritorial application of the effects doctrine by American courts, there continues to be instances where evidence is sought from foreign nationals merely to substantiate antitrust allegations upon which subject matter jurisdiction is based under U.S. laws.<sup>16</sup> These so-called "fishing expeditions" may be distinguished from discovery requests made through an appointed domestic commission or letter rogatory<sup>17</sup> and pursuant to a formal judicial proceeding, of which the foreign company is a party, relating to acts by that company within the territory of the plaintiff seeking the information. Such formal investigations are usually covered by bilateral or multilateral conventions, such

---

8. Export Trading Company Act of 1982, 12 U.S.C. §§ 1841, 1943, 635a-4, 372 (1982) and 15 U.S.C. §§ 4001-4003.

9. Sornarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise*, 31 INT'L & COMP. L.Q. 127 (1980).

10. 148 F.2d 416 (2d Cir. 1945).

11. *Id.* at 443-44.

12. 100 F. Supp. 504 (S.D. N.Y.), *final decree*, 105 F. Supp. 215 (S.D. N.Y. 1952).

13. *United States v. Watchmakers of Switz. Information Center, Inc.*, TRADE REGULATION REPORTS (CCH) (p) 70,600 (S.D. N.Y. 1962).

14. *Timberland Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976).

15. *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

16. Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 4, 90 Stat. 1383 (1976).

17. A formal communication in writing, sent by the court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court be formally taken under its direction and transmitted to the first court for use in the pending action. FED.R.CIV.P. 28.

as the 1970 Hague Convention on Taking Evidence Abroad.<sup>18</sup>

Despite less harsh application of U.S. antitrust laws on foreign companies, certain American courts and administrative agencies have continued to champion their ideal of free competition through extraterritorial enforcement of the Sherman Act and its progeny, "provided [that] there is some minimal contact between American market and the foreign conspiracy."<sup>19</sup>

The recent promulgation of blocking statutes, or laws designed to limit the extraterritorial application of U.S. antitrust laws, by the U.K., Australia, and other nations, can be blamed on the failure of U.S. courts to realize that the complex political and economic issues raised by anti-trust cases are more appropriately resolved by consultation and negotiation between governments.<sup>20</sup>

### III. BRITISH AND AUSTRALIAN REACTIONS TO EXTRATERRITORIAL ENFORCEMENT OF U.S. ANTITRUST LAWS

#### A. *British Blocking Laws*

British attitudes toward extraterritorial enforcement of U.S. commerce and antitrust laws began to harden upon issuance of the *Imperial Chemical* decision in 1951. This sentiment increased when the Federal Maritime Commission (F.M.C.) attempted to impose American shipping laws on the British shipping industry.<sup>21</sup> In response, Parliament enacted the Shipping Contracts and Commercial Documents Act of 1964<sup>22</sup> (Shipping Contracts Act). The aims of this Act were twofold: first, to offer some protection to British shipowners against excessive claims of jurisdiction by the F.M.C. and U.S. courts; and second, to strengthen the British position during any international negotiation or arbitration process. The British viewed the assertion that U.S. law should fill the vacuum of international trade laws as patently violative of the "rules of international law concerning jurisdiction and not simply offending against principles of comity."<sup>23</sup>

The Shipping Contracts Act allowed the British Minister of Transport to prohibit compliance with any foreign request to produce commercial documents, which requests were felt to be an infringement of British jurisdiction under international law.<sup>24</sup> Furthermore, to prevent surrepti-

18. 1970 Hague Convention on Taking Evidence Abroad in Civil Commercial Matters, 758 U.N.T.S. 113 (1970).

19. Sornarajah, *supra* note 9, at 130.

20. Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INT'L LAW 645 (1979).

21. The British shipping and rail industries are state-owned enterprises that frequently enter into price-fixing agreements concerning manufactured goods bound for the U.S.

22. United Kingdom Shipping Contracts and Commercial Documents Act, 1964, ch. 87.

23. PARL. DEB., H.C. (5th Ser.) 1282 (1964).

24. United Kingdom Shipping Contracts and Commercial Documents Act, 1964, ch. 87, §§ 1(1), (2).

tious compliance with foreign discovery requests, shippers were required to notify the Minister of Transport of any such requests or pay a fine of 1,000 pounds sterling for failure to do so.

Despite its innovative terms, the Shipping Contracts Act's jurisdictional infringement requirement became difficult to enforce "in cases where jurisdiction might have been considered to be concurrent, or where an activity spanned more than one jurisdiction."<sup>25</sup> To further curtail the abhorred "fishing expeditions," Parliament passed the Evidence Act of 1975.<sup>26</sup> Section 2(4) of the Evidence Act generally provides that a person shall not be required to state what relevant documents are in his possession, custody or power, nor to produce documents other than those specified in the Court order as appearing to be documents in a person's possession, custody or power. This statute was cited by the British Attorney General in *Rio Tinto Zinc v. Westinghouse Electric Corp.*<sup>27</sup> where it was maintained that "the wide investigatory procedures under the U.S. anti-trust legislation against persons outside the U.S. who are not U.S. citizens constitutes an infringement of the proper jurisdiction and sovereignty of the United Kingdom."<sup>28</sup> Additionally, the U.K. prohibits certain disclosures of sensitive commercial data obtained by the government under the Fair Trading Act of 1975.<sup>29</sup> As a last resort, the general protections of "crown privilege" may be asserted by a government minister or by injured private parties, pursuant to a court order, where disclosure would be harmful to the national defense or to diplomatic relations.<sup>30</sup>

Fearing a growing ethnocentric trend of U.S. antitrust laws<sup>31</sup> and in response to the heavy press following the Seventh Circuit's assessment of treble damages against several British shipping companies,<sup>32</sup> and the attempt to obtain similar punitive damages against a British uranium producer denied access to American markets,<sup>33</sup> the British government decided to take dramatic action in defense of British trading overseas. Thus, in 1980 the Protection of Trading Interests Act was passed<sup>34</sup> as a "response to a situation of a very particular nature which had been developing over several decades, and which in the past few years [had] become

---

25. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM.J.INT'L L. 257 (1981).

26. Evidence (Proceedings in Other Jurisdictions) Act, 1975, ch. 34.

27. [1978] 2 W.L.R. 81.

28. Jacobs, *supra* note 20, at 656-57.

29. Fair Trading Act, 1973, ch. 41 *under* Statistics of Trade Act, 1947, 10 & 11 Geo. 6, ch. 39.

30. See *Conway v. Rimmer*, 1968 A.C. 910 and *Burmah Oil Co. v. Bank of Eng.*, [1979] 2 W.L.R. 473.

31. See ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6 (1977).

32. *Westinghouse Elec. Corp. v. Rio Algon Ltd.*, 617 F.2d 1248 (7th Cir. 1980). See also 973 PARL.DEB., H.C. (5th Ser.) 1538 (1979).

33. *Rio Tinto Zinc*, [1978] 2 W.L.R. 81.

34. The British Protection of Trading Interests Act, 1980, ch. 11.

much more acute."<sup>35</sup> The Protection of Trading Interest Act superseded and repealed the Shipping Contracts Act of 1964. The direct retaliatory nature of the Act is evidenced by a recent comment stating that "[t]he Protection of Trading Interests Act was passed in retaliation [of] U.S. antitrust enforcement efforts such as prosecution of the uranium cartel and of several British ocean shipping companies . . . which were found to be offensive to British interests."<sup>36</sup>

According to the Explanatory Memorandum accompanying the Bill, the Protection of Trading Interests Act has six substantive provisions. Clause 1 generally provides the requisite means for the British government to circumvent measures taken or proposed to be taken under the laws of a foreign country pertaining, and potentially damaging, to the trading interests of the U.K. The Act specifically directs the Secretary of State (Secretary) to take blocking action if it appears "that those [anti-trust] measures, in so far as they apply or would apply to things done outside the territorial jurisdiction of [the foreign] country by persons carrying on business in the U.K. are damaging or threaten to damage the trading interest of the U.K."<sup>37</sup>

Once this threshold determination is made, the Secretary may not only issue specific orders necessary to prevent damage ensuing from compliance with extraterritorial proceedings, but may also require persons in the U.K., who carry on business in a foreign country, to notify their office of any requirement threatened or imposed pursuant to antitrust, general trade or security regulations. If such proceedings are perceived as threatening to British interests, the Secretary is authorized to prohibit compliance with them.

Clause 2 of the Act provides that when a person in the U.K. is required to produce for a foreign authority a commercial document which is not within the territorial jurisdiction of the compelling country the Secretary may forbid such production. This prohibition covers all requests for commercial data not made pursuant to an instituted civil or criminal proceeding, or of a general discovery nature. These requirements, however, must be found to infringe upon the jurisdiction or sovereignty of the U.K., or to be prejudicial to the U.K.'s relations with other countries.

Clause 3 of the Protection of Trading Interests Act imposes fines of up to 1,000 pounds sterling for an unexcused or knowing violation of the Act. It should be noted that such fines may be a less drastic penalty for British companies to pay than would be noncompliance with U.S. antitrust proceedings.

Pursuant to proceedings under the 1975 Proceeding in Other Jurisdictions Act, clause 4 forbids British courts from complying with a re-

---

35. Letter from the British Embassy in Washington, D.C., to the U.S. Government (Nov. 12, 1978), reprinted in *LOWE, EXTRATERRITORIAL JURISDICTION* 184 (1983).

36. 44 Antitrust & Trade Reg. Rep. (BNA), at 721 (Apr. 10, 1983).

37. The British Protection of Trading Interests Act, 1980, ch. 11, § 1(2).

quest from a foreign court when the Secretary certifies that the request infringes upon British jurisdiction or is otherwise judicial to the U.K. This provision in effect codifies the holding in *Rio Tinto Zinc v. Westinghouse Electric Corp.*, which permitted blocking of a discovery request made pursuant to an American antitrust proceeding.

Clause 5 of the Act provides that any multiple damages awarded by a foreign antitrust tribunal and determined to be detrimental by the Secretary "may neither be registered nor enforced by British Courts."<sup>38</sup> Furthermore, the Secretary has broad discretion under this provision to designate rulings as merely "concerned with the prohibition or regulation of [competition] agreements."<sup>39</sup>

Clause 6 of the Act is a "lawback" provision and allows British citizens or corporations to recover from the British assets of a foreign party awarded multiple damages any amount assessed above actual damages incurred, or treble damages. Neither this nor any other clause of the Act proscribes compensation for the activities of British companies or their subsidiaries occurring principally in England or overseas.

Clause 6 has proven to be the most controversial of the six substantive provisions of the Protection of Trading Interests Act because it permits a "qualifying defendant" to recover, in a British court, against a successful claimant not otherwise within the court's jurisdiction. Significantly, clause 6 provides that "[n]o infringement of British jurisdiction has to be proved nor is application of the section a matter for ministerial discretion. It is a definite right to recovery, which courts are obliged to enforce."<sup>40</sup>

The capability of clause 6 to nullify antitrust judgments sparked an immediate hostile reaction in the U.S. Particularly, the U.S. Department of State questioned the propriety of allowing a non-British corporation doing business in the U.S. and the U.K., but principally resident elsewhere, to sue in British court in order to undo an American court's ruling. An official Department of State communication also questioned the reasonableness of a law insisting that an antitrust judgment relate to behavior exclusively undertaken within the territory of one state.<sup>41</sup>

However, it is the American scheme of allowing enforcement of public law in the field of private remedies, through the mechanism of treble

---

38. The British Protection of Trading Interests Act, 1980, ch. 11, § 5(1). See Mirabito & Friedler, *International Antitrust* 6 SUFFOLK TRANSNAT'L L.J. 1 (1981).

39. The British Protection of Trading Interests Act, 1980, ch. 11, § 5(4).

40. The British Protection of Trading Interests Act, 1980, ch. 11, § 6(5). "Qualifying defendant" in section 6(5) of the Act pertains to the ordinary residence or place of business of the defendant and judgments relating exclusively to activities within the forum state. However, courts are unlikely to allow a defendant to secure the right to such "clawback" protection by going outside the U.S. to find a course of conduct that was in reality a "domestic operation." See Lowe *supra* note 25, at 279.

41. Letter from Brian J. Atwood to Senator Edward M. Kennedy (Sept. 27, 1979), reprinted in part in 74 AM.J.INT'L L. 179 (1980).

damages, that the British vehemently object to. In diplomatic correspondence, Britain took exception to a legal scheme which permits a "plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature" and further suggested that "where criminal and civil penalties coexist, those engaging in international trade are exposed to double jeopardy . . . [and] a limited countervailing remedy should be provided."<sup>42</sup>

### B. *Australian Blocking Statutes*

Australia was an early leader among Commonwealth nations in the passage of blocking statutes designed to protect a foreign government's economic policies from the unwelcome effects of American antitrust judgments. Due to Australia's high level of concentration on and state support of its natural resources and shipping industries, the Australians took a decidedly hostile approach to the regulation of the international marketplace by American courts, especially via the effects doctrine. After citing the decision of *In Re Uranium Antitrust Litigation*<sup>43</sup> in his address to the American Bar Association in 1981, Peter Durate, a former Australian Attorney General, revealed Australian attitudes toward extraterritorial enforcement of U.S. antitrust laws by American courts when he offered that:

[I]t is not merely that the courts lack the expertise; it is rather that it is not part of the judicial function to decide whether a law or policy is justified by what a court conceives to be in the national interest. That is the political function. There is even less warrant for a court to attempt that task in relation to the law or policy of a foreign country.<sup>44</sup>

In response to American attempts to obtain sensitive documents held by Australian uranium producers through letters rogatory,<sup>45</sup> the Australian Parliament enacted the Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976.<sup>46</sup> The Foreign Proceedings Act, as it is known, allows the Attorney General of Australia to issue directives "to ensure that documents in [Australia] are not able to be produced to courts or tribunals in other countries."<sup>47</sup> Once the Attorney General determines that a foreign tribunal has exercised jurisdiction in a manner inconsistent

---

42. *Rio Tinto Zinc*, [1978] 2 W.L.R. at 85.

43. 480 F. Supp. 1138 (N.D. Ill. 1979).

44. Address by Australian Attorney General, Senator the Hon. Peter Durack before the American Bar Association (Aug. 12, 1981). See Ognman, *Is Somebody Crying "Wolf?" An Assessment of Whether Antitrust Impedes Export Trade*, 1 Nw. J. INT'L L. & Bus. 163 (1976) for an expression of the perceived hypocrisy of U.S. antitrust enforcement.

45. Note, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking statutes*, 28 LOY. L. REV. 213 (1982).

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

47. PARL.DEB., S. (Austl.) 2186 (Weekly Hansard No. 18, 1976).



with international law or emity, or detrimental to Australian interests, he may take appropriate measures to block discovery requests or to prohibit Australian citizens or residents from producing oral testimony. The Act has been amended so as to render such orders of the Attorney General free of judicial challenges.<sup>48</sup> Parliament, however, has the power to disapprove any order given by the Attorney General within fifteen days of the order's issuance.

Despite this legislation, U.S. courts persist in their attempts to secure both documents and testimony pursuant to uranium litigation. Fearing a succession of damaging default judgments against key uranium producers, the Australian Parliament enacted the Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979.<sup>49</sup> The Foreign Antitrust Judgments Act of 1979 supplemented existing legislation and vested broad discretionary power in the Attorney General to determine whether an order should be issued declaring that a foreign judgment not be recognized in Australian, either in whole or in part. As in the Foreign Proceedings Act, the Foreign Antitrust Judgments Act directed the Attorney General to act only when the foreign judgments are violative of international law or inimical to Australian interests.

The Foreign Antitrust Judgments Act also failed to block encroachments upon Australia's sovereignty resulting from U.S. antitrust enforcement overseas. This dilemma was characterized by one author who maintained that:

The Australian government and other uranium producers [were] in an invidious position. Either they secure[d] compliance with the U.S. antitrust legislation, implying acquiescence in an assertion of jurisdiction not supported by international law, or they export[ed] uranium in accordance with perceived national interests and risk[ed] the probability of U.S. prosecution where these export practices violate[d] antitrust provisions.<sup>50</sup>

In light of repeated discovery attempts made by American courts pursuant to uranium and shipping legislation,<sup>51</sup> the Australian government proposed to its parliament,<sup>52</sup> in 1981, the enactment of the Foreign Antitrust Judgments (Restriction of Enforcement) Amendment Act.<sup>53</sup> The purpose of the Act was to give the utmost protection to Australian

---

48. Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 202, Austl. Acts (1976).

49. Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979, No. 13, Austl. Acts. (1979).

50. Triggs, *Extraterritorial Reach of the United States Antitrust Legislation: The International Law Implications of the Westinghouse Allegations of a Uranium Producers' Cartel*, 12 MELB. U.L. REV. 251, 280 (1979).

51. See Pacific/New Zealand Shipping Conference Investigation, 43 Antitrust & Trade Reg. Rep. (BNA), at 23 (July 1, 1979).

52. PARL. DEB., S (Austl.) 127 (Weekly Hansard No. 21, 1979).

53. This bill was introduced in the Australian Senate by the Australian Attorney General. See PARL. DEB., S. (Austl.) 3067 (Weekly Hansard No. 12, 1981).

laws and policies.<sup>54</sup>

The three important provisions of the proposed Act were Clauses 4-6. Clause 4 requires the Attorney General of Australia not to issue an order pursuant to the 1979 Foreign Antitrust Judgments Act if the conduct in question took place in the country in which the ruling court is situated. Going further than the British Protection of Trading Interests Act, Clause 5 permitted an Australian party to recover all damages, not just punitive damages, paid pursuant to overseas antitrust judgment against the initial plaintiff, provided that the Attorney General first ordered that the judgment was wholly or partially unenforceable in Australia. Furthermore, this "clawback" provision pierced the corporate veil by allowing a corporation connected to the defendant corporation in the antitrust proceeding to have the same right of recovery back.<sup>55</sup> Finally, Clause 6 provided that any party resident in a country with blocking statutes similar to those of Australia, namely Commonwealth nations, may sue to enforce an overseas antitrust judgment against the original plaintiff, as long as the Attorney General had found the underlying judgment enforceable.

Due to protracted discussions between the governments of Australia and the United States, the proposed 1981 bill was not enacted. In its place, a "Landmark Agreement"<sup>56</sup> on the extraterritorial reach of United States antitrust laws and judgments was signed by the two governments.<sup>57</sup>

The agreement is broadly framed so as to promote ongoing consultations on matters of mutual interest. However, affirmative obligations are imposed upon both governments so as to forestall a reoccurrence of the hostility which frequently arose in the antitrust arena. Specifically, Australia may inform the United States of any Australian policy which has antitrust ramifications for the United States. Similarly, the United States Federal Trade Commission and Department of Justice must inform the Australian government of any antitrust investigations which offset Australian laws, policies or interests. If either government feels that the actions of the other have antitrust implications, the notified party may request a consultation to avoid any conflict between the laws, policies or material interests of the two countries. In the area of litigation, the Australian government may request the United States to participate in private antitrust proceedings before United States courts when such litigation involves matters which have been the subject of intergovernmental consultations. The court must be informed of the substance and outcome of these negotiations.<sup>58</sup> Lastly, both governments are to give general re-

---

54. See Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 *BUS. LAW.* 697 (1982).

55. *Id.* at 711.

56. See 55 *AUSL. L.J.* 773 (1981).

57. Agreement on Antitrust Cooperation, United States-Australia, June 29, 1982, 21 *I.L.M.* 702 (1982).

58. Pengilly, *Extraterritorial Effects of United States Commercial and Antitrust Leg-*

gard to the interests of the other in the enactment of antitrust laws or implementation of antitrust policies.

While the agreement resulted in three notifications from the United States to the Australian government in its first year,<sup>59</sup> the spectre of hostile "blocking" or "clawback" legislation still exists. Australian Attorney General Gareth Evans, a sponsor of the proposed 1981 bill,<sup>60</sup> recently declared that he is "actively considering" whether to recommend that Prime Minister Hawke's Labor government take further action to protect Australian companies from treble damage awards resulting from violations of United States antitrust laws.<sup>61</sup> Such recommendations are likely to be in the form of "clawback" legislation to allow Australian firms to recover part of any such treble damage awards.

Nonetheless, a fragile balance still exists between the two governments which is very much dependent upon a sustained attitude of communication and cooperation.

#### IV. CONCLUSION

As the preceding discussion has shown, nations such as Britain and Australia have begun to implement their opposition to the extraterritorial enforcement of U.S. antitrust laws by American courts through the enactment of blocking statutes. These laws may require a major reassessment of U.S. antitrust laws by Congress in order to limit the reach of such laws overseas while still preserving American trading interests in the international marketplace.

*Anthony J. Carroll*

---

*isolation: A View from "Down Under"*, 16 VAND. J. TRANSNAT'L L. 833 (1983).

59. *Id.* at 885.

60. Interview with Peter Gallegher, Commercial Attache, and David Edward, Chief Counsel, Australian Embassy, in Washington, D.C. (August 24, 1983).

61. Antitrust Trade Reg. Rep. (BNA), at 1269 (June 30, 1983).