Enjoining the Application of the British Protection of Trading Interests Act in Private American Antitrust Litigation

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NOTES

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"I admit that our approach . . . is rather novel and will, no doubt, cause a fair amount of fluttering in the legal dovecotes."

— British Secretary of State for Trade, John Nott

Great Britain has often objected to the “juridical imperialism” reflected in the American antitrust laws, but its new Protection of Trading Interests Act (PTIA) represents the most significant departure yet from the quiet, behind-the-scenes approach adopted in earlier protests. The British believe that the Clayton Act’s


3. 976 PARL. DEB., H.C. (5th ser.) 1028 (1979) (remarks of Charles Fletcher-Cooke). See N.Y. Times, Nov. 1, 1979, § D, at 11, col. 1 (Secretary of State for Trade John Nott stating that purpose of the new Bill is to counter “American economic imperialism”).


6. See 973 PARL. DEB., H.C. (5th ser.) 1533 (1979) (remarks of John Nott). The British government sent the United States a diplomatic note to the effect that “these measures only come after repeated attempts to settle these matters by diplomatic means — attempts which
imposition of treble damages\(^7\) on British corporations for acts done largely outside of the United States\(^8\) infringes upon British sovereignty\(^9\) and violates international law.\(^{10}\) The new Act gives this view the force of positive law: Its sixth section authorizes a losing British antitrust defendant to sue a prevailing American plaintiff in Britain for the return of the noncompensatory two thirds of the award.\(^{11}\) This provision threatens to undermine the integrity of the treble damages award, a cornerstone of American antitrust enforcement.\(^{12}\)

The PTIA applies to a small but important class of private Amer-

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7. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.

8. The doctrine in American law to which the British particularly object is the “effects” test, first propounded by Learned Hand in United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945): “[I]t 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.” See 973 PARL. DEB., H.C. (5th ser.) 1541 (1979) (remarks of John Nott) (“Our objection arises . . . at the point where a country attempts to achieve the maximum beneficial regulation of its own economic environment by ensuring that all those having any contact with it abide by its laws and legal principles.”)

9. See, e.g., Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547, 616 (1977). The sovereignty argument, however, was never pressed too hard in Parliament. See PARL. DEB., H.C. STANDING COMM. F., Dec. 4, 1979, at 19-20 (remarks of John Nott) (“I do not doubt that there have been occasions on which the United Kingdom has sought to exercise extra-territorial jurisdiction; I should be amazed if we had not.”)

10. “International law” is an ambiguous term. To violate international law, an act may: (1) violate a ruling of the International Court of Justice; (2) violate generally accepted norms of behavior for “civilized” nations; or (3) simply show a “politically unwise disrespect for the interests and prerogatives of other nations.” K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 286 (1st ed. 1958). A United States court may ignore international law unless it is also American law. See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1178-79 (E.D. Pa. 1980). A recent British attempt to rely upon international law in an American antitrust case did not succeed and helped to cause a minor diplomatic incident. See In re Uranium Antitrust Litigation, 617 F.2d 1248, 1256 (7th Cir. 1980) (“[S]hockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction.”); Letter from Roberts B. Owen, Legal Advisor, United States Department of State, to John Shenefield, Associate Attorney General, United States Department of Justice (Mar. 17, 1980), forwarded to Thomas F. Strubbe, Clerk of the United States Court of Appeals for the Seventh Circuit (Mar. 18, 1980), reprinted in Gill, Two Cheers for Timberlane, REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE, Sept. 1980, at 19-20 (“For reasons that may not have been apparent to the Court, this language has caused serious embarrassment to the United States in its relations with some of our closest allies.”).

11. The Act reads in pertinent part: “[T]he qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the . . . ["judgment for multiple damages"] as exceeds the part attributable to compensation.” Protection of Trading Interests Act, 1980, c. 11, § 6(2) (referring back to § 5(3)). The cause of action resists categorization. See note 131 infra.

ican antitrust cases. There are three main prerequisites to its application. First, the party instituting the clawback suit must be a "qualifying defendant" — a citizen or corporation of the United Kingdom, or an entity that both "carries on business in the United Kingdom" and does not have its principal place of business in the United States. Second, no defendant may invoke the Act for "activities exclusively carried on" within the United States. And third, the Act effectively applies only against a plaintiff that has attachable assets in Great Britain and "in whose favour the judgment was given." Although the drafters deliberately introduced considerable uncertainty into the Act, it typically applies when a British company actively engaged in trading with the United States loses a treble damage suit to a plaintiff with vulnerable British assets. The main exception to the typical case — the Act does not apply to British subsidiaries of an American-based parent — should prove insigni-

13. This Note will refer to the parties according to their status in the typical American antitrust case described in the text at note 19 infra.

14. The pertinent section provides:

This section applies where a court of an overseas country has given a judgment for multiple damages . . . against —

(a) a citizen of the United Kingdom and Colonies; or

(b) a body corporate incorporated in the United Kingdom . . . ; or

(c) a person carrying on business in the United Kingdom, (in this section referred to as a "qualifying defendant") . . . .

Protection of Trading Interests Act, 1980, c. 11, § 6(1). Thus a corporation from any country may qualify under the Act by carrying on some sort of business within the United Kingdom. See PARL. DEB., H.C. STANDING COMM. F, Dec. 6, 1979, at 71-74 (colloquy between John Nott and Eric Ogden). Section 6(3) then qualifies § 6(1) by excluding individuals "ordinarily resident in the overseas country" and corporations that have their "principal place of business there" at the time of the offense. The question of what constitutes "carrying on business" under British law lies beyond the scope of this Note.

15. Protection of Trading Interests Act, 1980, c. 11, § 6(4). The meaning of "exclusively carried on" is open to a variety of interpretations. When politely asked whether "exclusive is exclusive, period," the British Attorney General, Sir Michael Havers, replied not very helpfully, "We are trying to distinguish what one might call a wholly domestic operation within the United States jurisdiction." PARL. DEB., H.C. STANDING COMM. F, Dec. 6, 1979, at 70-71 (colloquy between David Crouch and Attorney General Sir Michael Havers). The drafters apparently had in mind instances in which a subsidiary of a British parent carried on "all its activities" within the United States "and nowhere else." Id. at 71 (remarks of Sir Michael Havers).

16. See 404 PARL. DEB., H.L. (5th ser.) 579 (1980) (remarks of Lord Renton); The Daily Telegraph, Nov. 1, 1979, at 21, col. 2 (qualifying antitrust defendant can "seize assets and goods of United States concerns in this country"); Comment, supra note 1, at 499 (1980).

17. Protection of Trading Interests Act, 1980, c. 11, § 6(2). For the text, see note 11 supra.

18. Secretary of State for Trade John Nott, for example, said of one provision: "I am anxious not to have too close a definition simply because we might exclude something." PARL. DEB., H.C. STANDING COMM. F, Dec. 6, 1979, at 75 (remarks of John Nott).


The Act's real importance lies not in its actual implementation, but in a British defendant's power to invoke it. Most antitrust cases are settled. The Act's drafters did not anticipate that a significant number of American antitrust judgments would be clawed back; rather, they designed the Act primarily to encourage "out-of-court settlements at realistic levels." Even if the Act is never actually used, in other words, its *in terrorem* effect alone should insulate all British defendants from the full force of section 4 of the Clayton Act.

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21. Most American plaintiffs will either find it impracticable to do business through a subsidiary, see also Ongman, *Is Somebody Crying "Wolf"?: An Assessment of Whether Antitrust Impedes Export Trade*, 1 *Nw. J. Int'l L. & Bus.* 163, 200-01 (1979) (problems of small exporters), or will discover that their shares in the subsidiary and even their right to collect dividends from it may be confiscated in absentia. Section 6(5) of the Act, Protection of Trading Interests Act, 1980, c. 11, § 6(5), provides for long-arm style service of process, and the British rules of civil procedure provide that to satisfy a judgment the court may seize "any stock of any company registered under any general Act of Parliament ... [and] any dividend of or interest payable on such stock." R. Sup. Ct. 50(2)(3), 1965 Stat. Inst. 4995, 5144. See Danaher, *supra* note 1, at 960 n.94 ("[T]he United Kingdom might ... permit attachment of all the property of the parent located in the United Kingdom — including shares of stock in the subsidiary and income streams in the form of dividends, royalties or licences."); Financial Times (London), Mar. 22, 1980, at 4, col. 5 ("Such assets would include export shipments, or shares in a subsidiary."); N.Y. Times, Nov. 1, 1979, § D, at 11, col. 2 ("These [vulnerable] assets would have to be those of the parent company, perhaps its shares of a British subsidiary ... ").


This Note argues that American courts should mitigate the impact of the PTIA on American antitrust litigation by enjoining British defendants from pursuing their rights under the Act. Part I examines the Act's principal effects on antitrust enforcement and the settlement process, and concludes that these effects are serious enough to warrant judicial intervention. Part II establishes a court's power to issue transnational antisuit injunctions, and considers the propriety of doing so. After briefly rejecting two practical objections to such injunctions — that they are impossible to enforce and will provoke international retaliation — Part II analyzes the doctrine of comity — the deference that American courts accord the laws and courts of other nations — and finds that it does not demand that courts refuse to enjoin parties from bringing suit under the PTIA. The Note then concludes that since courts lack the authority to change the antitrust laws to accommodate the views of the British, ultimate responsibility for resolving the dispute rests with Congress.

I. THE EFFECTS OF THE ACT AND THE NEED FOR RELIEF

The PTIA represents Britain's most recent effort "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." But the American antitrust laws, against which the Act is primarily directed, express values that are fundamental to the American economy. These laws may well be "the Magna Carta of free enterprise." By eliminating two thirds of a plaintiff's recovery in fully litigated cases and substantially reducing the settlement value of all other cases against British defendants, the PTIA will have far-reaching effects on American antitrust enforcement.

The Act affects most directly those successful plaintiffs against whom clawback suits are instituted. It establishes a cause of action that may be loosely termed a tort of successful litigation, and provides no defenses. Vulnerable plaintiffs will lose a major portion of the awards to which the Clayton Act explicitly entitles them.

27. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws... 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."). But see R. Bork, THE ANTITRUST PARADOX (1978); R. Posner, ANTITRUST LAW (1976).
28. Unless one of the Act's two "jurisdictional" exceptions apply, Protection of Trading Interests Act, 1980, c. 11, § 6(3)-(4), a qualifying defendant is "entitled" to recover. Protection of Trading Interests Act, 1980, c. 11, § 6(2).
Under these circumstances, the statutorily mandated treble damages award would be tantamount to an award of only simple damages. Fortunately, however, the British government does not foresee its courts’ ordering the return of judgments rendered in the United States.30

Because most British defendants will settle, few treble damage judgments will be entered, and the PTIA’s real impact will be felt in pretrial negotiations.31 The Act carries the obvious potential for at once protracting32 and complicating33 antitrust litigation, while diminishing a plaintiff’s expected ultimate return.34 Parliament has thus substantially improved the bargaining position of British defendants in American antitrust litigation. Defendants, secure in the knowledge that treble damages are a hollow threat, will spurn previously attractive settlement offers; plaintiffs, faced with the prospect of enormously expensive35 litigation from which they will ultimately receive only their actual damages, will be forced to settle for a fraction of the former value of their claims.

By changing potential plaintiffs’ cost-benefit calculations,36 the PTIA will reduce the vigor and effectiveness of antitrust enforcement. Because the Act leaves intact the compensatory portion of an antitrust award,37 it challenges not so much the general economic policies of the antitrust laws as it does their enforcement in private treble damages suits. Although American plaintiffs can count on keeping one third of their awards, this result would do violence to the Clayton Act’s enunciated “legislative purpose in creating a group of ‘private attorneys general’ to enforce the antitrust laws.”38 Private suits are far more numerous than the cases initiated by the Justice Department,39 and have come to play a pivotal role in antitrust en-

30. Wall St. J., Nov. 2, 1979, at 26, col. 3. See note 23 supra. But if a qualifying defendant sues an American plaintiff, the British court may have no choice but to order clawback. See note 28 supra; Lowe, supra note 1, at 277 (1981).

31. See text at notes 22-23 supra.

32. In addition to the time that a suit under the PTIA would itself take, a possible counterinjunction would further protract the litigation. See text at notes 109-21 infra.

33. Since the provisions of the PTIA are themselves replete with uncertainty, see note 18 supra and accompanying text, the settlement negotiations, if any, would also be complicated.

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


36. See Comment, supra note 1, at 513.

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


39. According to the Annual Report of the Administrative Office of the United States Court for the twelve-month period ending June 30, 1980, private suits are about 185 times
forcement.\textsuperscript{40} Without the prospect of treble damages, private parties often\textsuperscript{41} would lack sufficient "incentive . . . to instigate costly and uncertain litigation."\textsuperscript{42} The private action would then no longer provide "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."\textsuperscript{43} This result would not change even if private parties pursued antitrust violators as vigorously as ever. British defendants would still be more inclined to engage in anticompetitive behavior than would American defendants because simple damages deter far less effectively than treble damages.\textsuperscript{44} British companies could violate the law secure in the knowledge that at the very most they would have to disgorge their gains. The Act thus challenges the clearly articulated policies of Congress,\textsuperscript{45} the courts,\textsuperscript{46} and the Justice Department.\textsuperscript{47}

The PTIA mainly calls into question the importance of enforcing the antitrust laws in foreign trade. Since the Act excludes "activities exclusively carried on within the United States,"\textsuperscript{48} it effectively applies only in international transactions. The Act thus directly attacks the jurisdictional provisions of the Clayton and Sherman Acts, which proscribe anticompetitive conduct in "trade or commerce . . . with foreign nations."\textsuperscript{49} The question, then, is whether private treble damages suits brought under the "foreign commerce" provisions of the antitrust laws play an important part in furthering competition in the United States. International antitrust enforcement is controversial.\textsuperscript{50} Transnational suits may not be worth what they cost the
United States abroad,51 but both the courts52 and the Justice Depart­
ment53 agree that effective domestic enforcement often depends
heavily on vigorous international enforcement. Recognizing that
the two stand or fall together, the courts have given foreign nations
standing to sue under section 4,54 and have construed the act-of-state
doctrine narrowly to enable American plaintiffs to sue foreign gov­
ernments.”

51. The disadvantages of vigorous international enforcement may be greater than they first
appear. The diplomatic disadvantages, expressed in the PTIA itself, are obvious. See, e.g.,
Burnham, Data Show U.S. Rejected Uranium Cartel Prosecution, N.Y. Times, Dec. 4, 1979, at
1, col. 2 (possibility of “diplomatic furor” if international suit vigorously prosecuted); from
the Embassy of the United Kingdom to the United States State Department, Oct. 1, 1979,
reprinted in Energy Antimonopoly Act of 1979, S. 1246: Hearings Before the Senate Comm. on
the Judiciary, pt. 2, 96th Cong., 1st Sess. 902-04 (1979) (subject of hearing subsequently
redesignated the Oil Windfall Acquisition Act of 1979) [hereinafter cited as
Senate Oil Hear­ings] (diplomatic protest of the United Kingdom to the international application of proposed
anti-merger statute).

There may also be economic disadvantages. The principal drawback appears to be the
chilling effect that that international enforcement may have on United States export trading.
See generally Ongman, supra note 21; J. Townsend, Extraterritorial Antitrust (1980).
The Senate has recently conducted hearings on the matter. See Senate Comm. on
Government Affairs, Commission on the International Application of the U.S.
S. 1010) (“The Committee has been troubled by widespread complaints of these [antitrust]
laws may have straightjacketed U.S. firms in international trade.”).

52. See notes 54-58 infra. Courts commonly apply the antitrust laws in international trade.
See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962);
Timken Roller Bearing Corp. v. United States, 341 U.S. 593 (1951); United States v. Alumi­
num Co. of America, 148 F.2d 416 (2d Cir. 1945). See generally J. Atwood & K. Brewster,

53. The Justice Department vigorously supports antitrust enforcement in international
transactions. See ANTITRUST GUIDE, supra note 47, at 1-9. A recent head of the Antitrust
Division remarked that the Department takes this position “because the economic arguments
are convincing, the potential harm is great and the policy enunciated by our legislature is
unequivocal.” Shenefield, The Perspective of the U.S. Department of Justice, in PERSPECTIVES,
1979, at 21, cols. 1, 2 (“[L]aw that stops at the water’s edge may well stop short of fulfilling its
national function.”).

now pending that would somewhat limit the holding in Pfizer. See note 75 infra.
ernments that restrict international trade. The economic justifications for pursuing international antitrust violators as doggedly as domestic violators are in some respects uncertain. The Supreme Court nonetheless has emphasized unequivocally the importance of vigorous international enforcement: "If . . . potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators." The Court, in other words, has accepted the view that restricted enforcement "would not only fail to promote the economic goals furthered by the antitrust laws, but . . . would run contrary to them and could have an overall detrimental impact upon the domestic American economy." Whatever the legislative history of the Clayton and Sherman Acts may have been, vigorous international enforcement has become an established component of American antitrust law.

In addition to reducing the effectiveness of antitrust enforcement, the PTIA will undermine its fairness. The specific role of such traditional jurisprudential notions as "equity, fair play, and justice" in antitrust litigation remains unsettled, but most commentators agree

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56. See note 51 supra. See generally Seki, The Justice Department's New Antitrust Guide for International Operations—A Summary and Evaluation, 32 Bus. LAW. 1633, 1637 (1977) ("This [enforcement policy], of course, assumes that the same economic policy considerations which caused the courts to condemn these practices as illegal per se in their domestic counterparts will also be found to be present in the international sphere.").
59. See 1 J. Atwood & K. Brewster, supra note 2, at 2.03 (describing elusive legislative intent of the Sherman Act Congress).
60. See note 52 supra. Cf. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951) (acceptance of view contrary to Alcoa opinion "would make the Sherman Act a dead letter insofar as it prohibits contracts and conspiracies in restraint of foreign trade").
62. In Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061 (1981), the Supreme Court held that antitrust defendants have no right to contribution from fellow violators because there are no grounds in federal statutory or common law upon which federal courts may recognize such a claim. The Court declined to evaluate the policy issues, including fairness, that the contribution question raises. 101 S. Ct. at 2070. But cf. 101 S. Ct. at 2064 (contribution's proponents "presuppose a legislative intent to allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing. . . . Traditional equitable standards have something to say about the septic state of the hands of such a suitor in the courts."). Since the refusal to recognize claims for contribution was based on the absence of a proper foundation for the right of action, Texas Industries says nothing about the
that fairness is an essential consideration. An analysis of the several types of relationships affected by the Act reveals that it may introduce a number of distinct inequities.

The PTIA has its most marked effect on negotiations in cases involving only one defendant and one plaintiff. On the one hand, the shift in bargaining power engendered by the Act may itself be unfair because the amount of the settlement will turn not on the merits of the case, but on whether the plaintiff has vulnerable assets in Britain. On the other hand, some claims may be frivolous, and eliminating the coercive threat of treble damages may promote fairer settlements. There is obviously no guarantee that the Act will affect only frivolous claims. Depending upon one's point of view, the smaller settlements in cases involving only one plaintiff and one defendant may be either unfair or merely more "realistic." It only remains certain that the PTIA will effect a transfer of wealth from plaintiffs to defendants that is completely unrelated to any American law or policy.

That the PTIA will in fact introduce new inequities into antitrust settlements can also be seen by considering cases involving multiple plaintiffs and defendants. An American plaintiff possessing vulnerable assets in Great Britain will be forced to settle earlier and for less money than its more fortunate co-plaintiffs. The unfairness of this situation remains difficult to assess, but it is clear that the settlements will be unrelated to the relative merits of the plaintiffs' cases. The Act's effect is even more pronounced from the defendants' perspective. Because defendants who combine to violate the antitrust laws are jointly and severally liable for all damages sustained,


64. See note 16 supra and accompanying text. Removing all assets from Britain is probably not a realistic alternative for persons doing business there.


66. See note 23 supra and accompanying text.

67. The simplest kind of litigation would only involve plaintiffs with equally meritorious cases; however, in actual practice, the merits of co-plaintiffs' cases may vary considerably.

plaintiffs need not sue all violators, but may choose which of the conspirators they will name as defendants.69 Defendants so selected are not entitled to contribution from their PTIA-shielded co-conspirators;70 similarly, litigating defendants' liabilities are not reduced by the shares of damages attributable to settling defendants.71 These aspects of American law often lead to unfair results,72 but the PTIA will increase that unfairness in two ways. First, astute American plaintiffs will simply not sue British defendants, and will choose instead to recover their entire loss from defendants who cannot institute claw back suits; second, even if British conspirators are sued, the lower settlements that the Act enables them to negotiate will leave their co-defendants liable for the lion's share of the plaintiffs' damages. This result would seem especially unfair if the British conspirator were more culpable than its American counterpart, or if the American defendant had unintentionally violated the law.73

By altering the relationships among actual litigants in antitrust cases, the PTIA alters the relationships among potential litigants, and gives British companies a competitive advantage. British companies doing business in this country now enjoy a lower risk of being named defendants in private antitrust suits and thus are freer to engage in anticompetitive practices than their competitors from other nations. The likely reaction of other countries to Britain's competitive edge — enacting their own clawback legislation74 — would both undermine American enforcement efforts and place domestic companies at a competitive disadvantage. In this respect, the Act clashes with basic notions of fairness in international commercial practices, which call for the creation of "conditions throughout the world in which the enterprises of all countries can compete on essentially the same terms."75

Execution upon a judgment under the PTIA also undermines an


72. See, e.g., Olson Farms, Inc. v. Safeway Stores, Inc., 649 F.2d 1370 (1979), aff'd, en banc, per curiam, 649 F.2d 1382 (10th Cir. 1981) (defendant held liable for 24 times its pro-rata share of damages). Many commentators have noted the unfairness of such results. See, e.g., Kirkham, Complex Civil Litigation — Have Good Intentions Gone Awry?, 70 F.R.D. 199, 207 (1976); Note, supra note 63, 903-10.

73. Cf. Note, supra note 63, at 903-10 (discussing unfairness of denying contribution).

74. The British have attempted to encourage this response. See Protection of Trading Interests Act, 1980, c. 11, § 7 (reciprocal enforcement rights for citizens of countries that enact similar clawback legislation).

American court’s authority to issue a judgment for treble damages. Since the clawback suit attacks only the parties to the litigation and not the American court itself, the jurisdiction of the American court and the propriety of its application of American law remain technically unchallenged. But an American court charged with furthering Congress’s antitrust policies may surely look to the substance and not the form of the British suit. American policies should prevail. In attacking the antitrust policies that an American court is duty bound to uphold, a clawback suit has the practical effect of diminishing that court’s authority. The syllogistic niceties of equity jurisprudence should yield in an American court to the practical necessity of protecting the court’s final judgment for treble damages.

Some form of relief thus seems appropriate. Part II discusses the propriety of one type of relief — an antisuit injunction barring British defendants from resorting to the PTIA. An antisuit injunction could nullify, at least in part, the effects of the PTIA. Actual injunctions, in theory, could preserve both treble damage awards and the authority of American courts. And the availability of injunctive relief would put British defendants on notice that they could not securely rely upon the Act’s protection. The possibility of an antisuit injunction, unfortunately, would further complicate antitrust litigation, but in a way that would favor plaintiffs by at least partially ameliorating the effect of a threatened clawback suit. Similarly, the enforcement scheme associated with a previously issued antisuit injunction would provide an important bargaining chip in settlement negotiations arising from PTIA litigation. In either case, by increasing the size of settlements, the injunction should mitigate the Act’s discouraging effect on private antitrust enforcement, and promote deterrence. Because antisuit injunctions will help ensure that American or other foreign defendants will not have to pay for the damages caused by British companies, the injunctions also will promote fairness. Several compelling arguments, then, favor the issuance of antisuit injunctions.

II. THE PROPRIETY OF A TRANSNATIONAL ANTISUIT INJUNCTION

“There is little purpose to be served,” according to one court, “in discussing the legal authorities dealing with the question of the power of a court to enjoin a party from litigating in another forum.

76. See note 82 infra and accompanying text.
77. See text following note 82 infra.
78. The antisuit injunction is an incomplete remedy because regardless of any action that an American court may take, the PTIA, simply by virtue of its existence, means that private antitrust suits carry greater risks of complexity, longevity, and uncertain return, see notes 32-34 supra and accompanying text, than had existed before its enactment.
79. See notes 100-08 infra and accompanying text.
The court clearly has such power, in appropriate circumstances."
That the court in which the litigation would occur is one of a foreign sovereign concerns the advisability of issuing an injunction, rather than the court's authority to do so. Less clear, however, is the basis of that authority. The traditional view is that antisuit injunctions are appropriate because they operate against the defendant, over whom the court has personal jurisdiction, and not against the foreign tribunal itself. But this is surely a fiction. Enjoining the parties restrains the foreign court and interferes with its jurisdiction. The better reasoned approach recognizes that there is no practical difference between addressing an injunction to the parties and addressing it to the foreign court itself.

Whether an injunction is warranted in a particular case is a mat-

897 (2d Cir. 1968), the court ordered the defendants to produce secret German banking documents for an American antitrust investigation, even though the defendant could not comply without violating German banking customs and incurring potential civil liability to its customers under German law. 396 F.2d at 901. The common thread running through all of these cases is the paramount interest of the United States courts in furthering American policies even when doing so requires the court to issue a transnational injunction.

Cases concerning choice-of-law and choice-of-forum clauses in contracts law also implicity support a decision to issue an antisuit injunction. Courts routinely uphold these clauses, see R. Leflar, American Conflicts Law §§ 52, 147 (3d ed. 1977), even when the forum chosen is another country, see Scherz v. Albiero-Culver Co., 417 U.S. 506 (1974); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), when the law chosen would mandate a result opposite to that called for by American law, 407 U.S. at 8 n.8, and when the forum chosen is a foreign arbitration panel, not a court, 417 U.S. at 508. Enforcing forum selection clauses may require an injunction against proceedings in another forum. Cf. Dahlgren Mfg. Co. v. Harris Corp., 399 F. Supp. 1253, 1256-57 (N.D. Tex. 1975) (injunction against foreign suits issued by American court adjudicating international contracts dispute); United Cigarette Mach. Co. v. Wright, 156 F. 244, 246 (C.C.E.D.N.C. 1907), affd. per curiam, 193 F. 1023 (4th Cir. 1912) (same). Since the policies underlying the antitrust laws should be considered at least as compelling as the public interest in the bargained-for predictability of forum selection clauses, see generally The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-11 (1972) (brief history of forum-selection clauses in American law), a court could well justify enjoining the British defendant from suing under the PTIA.


82. See Steelman v. All Continent Corp., 301 U.S. 278, 291 (1937). In Steelman, the Court stressed that it was "unable to yield assent to the statement . . . that the restraint of a proper party is legally tantamount to the restraint of the court itself." 301 U.S. at 291. The Court made the quoted comment to explain why it was reversing the court below and upholding a New Jersey injunction against proceedings in Pennsylvania. The Court's logic applies equally well in transnational cases. See, e.g., Velisicol Chem. Corp. v. Hooker Chem. Corp., 230 F. Supp. 998, 1017 (N.D. Ill. 1964) (injunction against suit in Canada) (citing Cole v. Cunningham, 133 U.S. 107 (1890) (the leading domestic antisuit injunction case)). Cf. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 427 (1922) (domestic context) ("The proceeding in the enjoining court is solely in personam and does not affect the power or function of the court whose decree is in question."). But cf. Donovan v. City of Dallas, 377 U.S. 408, 412-13 (1964) (doctrine of federal preemption enables federal courts to prevent their proceedings from being enjoined by state courts).


83. Compagnie des Bauxites de Guinea v. Insurance Co. of North America, 651 F.2d 877 (3d Cir. 1981); 11 C. Wright & A. Miller, supra note 81, § 2942, at 377-78.
ter left to the court's discretion. 84 Injunctions are extraordinary remedies, and courts employ them sparingly. 85 This is particularly true of transnational antisuit injunctions since "the direct effect of the . . . court's action on the jurisdiction of a foreign sovereign requires that such action be taken only with care and great restraint." 86 Among the circumstances that may justify such an injunction are the need to protect the issuing court's jurisdiction and the need to prevent the frustration or circumvention of some important policy of the forum. 87 A British defendant suing under the PTIA would frustrate basic American policies, but a court should consider various equitable and practical considerations, and the doctrine of comity, before deciding to enjoin those defendants from pursuing their clawback remedy under the Act.

A. Equitable Considerations

Traditional equity doctrines continue to guide a court in determining whether to grant or deny injunctive relief. Courts generally will issue antisuit injunctions only if the plaintiff satisfies "the usual equitable tests of irreparable injury and absence of an adequate remedy at law." 88 The test, no longer as important as it once was, 89 essentially amounts to a one-stage determination of whether the legal remedies are inadequate. 90 Irreparable injury is presumed if there is no adequate legal remedy. 91

American plaintiffs facing the prospect of a British clawback suit would almost certainly satisfy this equitable requirement. Dis-

84. See Lemon v. Kurtzman, 411 U.S. 192, 200-01 (1973) ("In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . ."); Conner v. Brierley, 57 F.R.D. 144, 145 (W.D. Pa. 1972) ("Except in unusual cases, whether an injunction should issue is a decision that rests with the sound discretion of the court."); 11 C. Wright & A. Miller, supra note 81, § 2942, at 365-70.

85. See Sharp v. Lucky, 266 F.2d 342, 343 (5th Cir. 1959) (per curiam); Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681, 711 (N.D. Ill. 1960), affd. in part, revd. in part, 286 F.2d 222 (7th Cir. 1961).

86. Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969).

87. Cf. 11 C. Wright & A. Miller, supra note 81, § 2942, at 379 (discussing federal court injunctions against state court proceedings).


89. See D. Dobbs, supra note 88, § 2.5, at 61.

90. See id. § 2.10, at 108.

91. Id.
gorging two thirds of an award\(^2\) usually will leave a plaintiff with no effective remedy for antitrust violations: it will lose the multiplied portion of the award provided for in section 4 of the Clayton Act.\(^3\) An antisuit injunction often will provide the only effective means for protecting treble damages awards. Although removing vulnerable assets from Britain before initiating antitrust litigation is a possibility, plaintiffs pursuing this option would have to cease doing business in Britain, and perhaps in other countries as well.\(^4\) Legal damage actions are similarly unattractive; it is difficult to develop a theory grounded in either tort or contract that would allow a plaintiff to recoup the lost two thirds of its award. The only judicial alternative to an antisuit injunction that readily suggests itself is a subsequent action for restitution in an American court for the money taken in the British clawback suit.\(^5\) But even if such an action were successful,\(^6\) it would prevent neither the disruption of the plaintiff's business caused by the clawback suit, nor the filing of subsequent suits by the defendant.\(^7\) Perhaps most importantly, the uncertainty and delay associated with these alternative legal remedies minimize their potential equalizing role in settlement negotiations, where the PTIA has its most pronounced effects.\(^8\) Under these circumstances, a court reasonably could conclude that it should enjoin threatened clawback suits.\(^9\)

\(^{92}\) Protection of Trading Interests Act, 1980, c. 11, § 6(2).


\(^{94}\) See Protection of Trading Interests Act, 1980, c. 11, § 7.

\(^{95}\) In the context of debtor-creditor relations, for instance, restitution is often given for wrongful proceedings and attachments. See 2 G. PALMER, THE LAW OF RESTITUTION §§ 9.8-.9 (1978); RESTATEMENT OF RESTITUTION § 73 (1937).

\(^{96}\) A suit for restitution, supported by an allegation of unjust enrichment, could easily fail. Because “unjust enrichment” has never been precisely defined, see 2 G. PALMER, supra note 95, at § 1.1, it is not clear that an American court would conclude that a clawback suit authorized by British law would unjustly enrich the British defendant. Although strong countervailing interests may induce British defendants to leave assets in the United States, it is possible that defendants will remove themselves from the jurisdiction of American courts to make themselves judgment-proof. An injunction could substantially reduce this possibility. See notes 100-08 infra and accompanying text.

\(^{97}\) Cf. text at notes 114-18 infra (general difficulties in pursuing litigation in two competing jurisdictions).

\(^{98}\) See text at notes 31-36 supra.

\(^{99}\) Before issuing an injunction, however, the court must determine that a suit is threatened. Courts grant injunctions only if satisfied “that there is a real danger that the act complained of actually will take place.” 11 C. WRIGHT & A. MILLER, supra note 81, § 2942, at 369. Although the question is primarily one of timing, the international character of the threatened litigation gives it considerable importance. The court must decide whether it should enjoin all British defendants, only those defendants who threaten to institute clawback suits, or only those who actually institute such suits. The substantial benefits provided by the Act suggest that it is not unwarranted to assume that most British defendants will take advantage of the Act. But some defendants may refrain from suing under the PTIA for business reasons. A court that waits until actions under the PTIA have been filed before enjoining the British defendant may heighten the insult to the British courts inherent in any transnational injunction by forcing the abandonment of cases over which the British courts have already
The difficulties associated with antisuit injunctions are more practical than legal. First, the injunctions may prove difficult to enforce. Since courts of equity historically have refused to issue unenforceable decrees, a court must first determine that it can enforce an antisuit injunction. This issue should rarely pose serious problems. To insure compliance with its order, an American court may sequester a British defendant's American assets, or permit the defendant instead to post an indemnity bond. Because these procedures in some respects resemble an assessment of quintuple damages — treble damages for the original antitrust claim, plus two more multiples to protect against a two-thirds clawback — a court may choose the less draconian alternative of a simple injunction against transferring funds or assets out of the country except in the ordinary course of business. These remedies would establish compliance with the antisuit injunction as a prerequisite to the British defendant's participation in American markets. If the defendant defied the injunction, it could be found in contempt of court and

assumed jurisdiction. (On the other hand, by enjoining all defendants, including those who would not have instituted clawback suits, American courts will insult their British counterparts more frequently.)

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100. See W. De Funiaq, Handbook of Modern Equity § 14 (2d ed. 1956) ("Where the court has the theoretical power to grant an injunction but enforcement is impracticable or impossible, the court will not grant the injunction. It would be derogatory to the dignity of the court to enter orders it could not enforce."); D. Dobbs, supra note 88, § 2.12, at 132.

101. See W. De Funiaq, supra note 100, at §§ 10-13. In New York, for example, "[a]n order of attachment may be granted in any action . . . where the plaintiff has demanded and would be entitled . . . to a money judgment against one or more defendants" in order to insure that a judgment against the defendant, if rendered, could be enforced. N.Y. Civ. Prac. Law § 6201 (McKinney 1980).

102. Bond posting procedures are controlled by state law, Fed. R. Civ. P. 64, and many states have such procedures. See 79 C.J.S. Sequestration § 16 (1952).

103. See In re Uranium Antitrust Litigation, 617 F.2d 1248, 1258-61 (7th Cir. 1980). The injunction against transfer would have to stand for six years, the period within which the defendant must sue under the PTIA. See Limitation Act, 1939, 2 & 3 Geo. 6, c. 21, § 2(1)(d); Parl. Deb., H.C. Standing Comm. F., Dec. 6, 1979, at 65 (remarks of Attorney General Sir Michael Havers).

104. See also Engineered Sports Prods. v. Brunswick Corp., 362 F. Supp. 722, 729 (D. Utah 1973). In this patent infringement suit against a European defendant, the court commented:

The international aspects of this case may . . . recommend jurisdictional restraint on the ground that to exert jurisdiction in the present circumstance could at best result in a money judgment against the defendants which is unenforceable here because no assets are here and dishonored in Europe as an extrajurisdictional act and a violation of comity. . . . However this ground is faulty since injunctive relief is available which, through nationwide domestic enforcement, may protect the plaintiffs from the domestic introduction of infringing [ski] boots by the defendants or those acting in concert or participation with them.

362 F. Supp. at 729. The injunction thus effectively bars the defendant from all American markets while the judgment remains unpaid.
The defendant would then have to pay the fine, abandon its sequestered assets, or forfeit its bond. The resulting proceeds could be used to reimburse the American plaintiff for the money lost in the British clawback suit. An injunction against use of the PTIA is, therefore, no less enforceable than any other injunction involving a foreign party.

A second practical consideration for courts contemplating antisuit injunctions is the possibility of retaliation. The fundamental nature of the right of access to the courts and the importance that the British attach to the PTIA heighten the possibility that some form of judicial or diplomatic retaliation might follow the issuance of an injunction. This retaliation could take the form, for example, of a British counterinjunction. Like American courts, British courts

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105. See W. De Funiak, supra note 100, § 9, at 20 n.49 (citing Blackmer v. United States, 284 U.S. 421 (1932)).
106. See W. De Funiak, supra note 100, at § 9.
107. See Vuitton et Fils, S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979) (compensatory damages in civil contempt proceedings to be awarded to plaintiff for defendant's violation of injunction against producing fake handbags); Parker v. United States, 153 F.2d 66, 70-71 (1st Cir. 1946) (leading case).
108. Foreign defendants may always escape the reach of a court's authority by fleeing with their assets. See W. DeFuniak, supra note 100, § 9, at 20. This may not always be quickly accomplished, of course, as in the case of real estate holdings.
109. See notes 139-44 infra and accompanying text.
110. In a climate of worsening trade relations, Parliament might amend the Protection of Trading Interests Act to clawback the entire American antitrust award. The British have threatened in so many words to enact such an amendment, which was seriously proposed while the Bill was in committee. The amendment read in pertinent part: "the person against whom the judgment was given shall be able to recover the full amount of damages paid if the judgment related exclusively to matters or acts committed outside the jurisdiction of that overseas country." Parl. Deb., H.C. Standing Comm. F., Dec. 6, 1979, at 65 (remarks of David Crouch) (proposing amendment No. 23) (emphasis added). In tabling the amendment, John Nott mused, but failed: "Government might later reconsider it if the United States did not in the meantime prove cooperative: "We did consider the question of total recovery, . . . but decided that, at this stage anyhow, it was sensible to give a right purely for the recovery of the penal element rather than for the compensation itself." Parl. Deb., H.C. Standing Comm. F, Dec. 6, 1979, at 73 (remarks of John Nott). The inference of a threat seems ineluctable: "We hope that the American authorities will notice our reluctance and draw the conclusion that it is for them now, in the fullness of time, after the Bill is enacted, to come forward with their ideas on how we should proceed beyond that." 973 Parl. Deb., H.C. (5th ser.) 1591 (1979) (remarks of Under-Secretary of State for Trade Norman Tebbit). See 405 Parl. Deb., H.L. (5th ser.) 946 (1980) (remarks of Lord Mackay) (noting that § 6 of the PTIA "is an effective initial attack on the problem") (emphasis added).
Parliament might then further amend the Act to take this strengthened clawback directly from British subsidiaries of American parent corporations. Such an amendment was also actually proposed, but failed. See note 20 supra.
have the power to enjoin parties before them from instituting proceedings in foreign courts.\textsuperscript{112} If the Act applies,\textsuperscript{113} the only prerequisite to a counterinjunction scenario is that both parties have sufficient assets within the jurisdiction of the opposing court\textsuperscript{114} to support a series of injunctions and attachments — a war of attrition. This possibility typically might involve the following events:

1. The American plaintiff wins his antitrust suit, secures and executes a judgment for treble damages, and gets an injunction to prevent the British defendant from using the PTIA;
2. the British defendant ignores the injunction, secures and executes a clawback judgment under the Act, and persuades the British court to issue a counterinjunction that prohibits the American plaintiff from instituting contempt proceedings in the United States to enforce the original, American-issued injunction; and
3. the American plaintiff ignores the counterinjunction, institutes contempt proceedings, and thereby retrieves (for a while) the full value of his treble damages award.

At this point, each party is subject to contempt proceedings and theoretically could begin a series of counterinjunctions that extends far beyond this simple three-stage scenario.

Alternatively, an American contempt judgment itself might form the basis for a second clawback suit.\textsuperscript{115} Since the Act's legislative history at every stage reveals Parliament's desire to have it read as liberally as possible and to close all its loopholes,\textsuperscript{116} the difference should "sedulously avoid[d]" the "humiliating spectacle" of jurisdictional conflict; Peck v. Jenness, 48 U.S. (7 How.) 612, 625 (1849) (war of injunctions would leave parties "without remedy" and so should be avoided); State ex rel. Gen. Dynamics Corp. v. Luten, 566 S.W.2d 452, 460-61 (Mo. 1978) (court should avoid starting war of injunctions because "[a]n impasse ... could ensue").


\textsuperscript{113} See notes 13-21 supra and accompanying text.

\textsuperscript{114} See notes 100-08 supra and accompanying text.

\textsuperscript{115} The PTIA defines "a judgment for multiple damages" as one "for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given." Protection of Trading Interests Act, 1980, c. 11, § 5(3).

\textsuperscript{116} In amending the original Bill, Protection of Trading Interests Bill, H.C. No. 66, Oct.
between an award for contempt and one for treble damages is not likely to prevent a second clawback suit.\textsuperscript{117} Still a third scenario might involve a British suit for restitution.\textsuperscript{118} But whatever the actual events, the jurisdictional conflict would remain.

Few would doubt that the "dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade."\textsuperscript{119} Although no entirely satisfactory legal resolution seems possible,\textsuperscript{120} the practical consequences of the conflict should prove far less troublesome than the theoretical consequences. As the dispute moves from one stage to the next in the scenario, the need for compromise and restraint would become clear. The parties' resolve to carry on the litigation would break as soon as they realized that a settlement offered the only realistic chance of ending the dispute.\textsuperscript{121} Thus, a court may properly ignore the chimerical counterinjunction scenario, and issue an antisuit injunction.

C. Comity

A judicial determination that an antisuit injunction would serve compelling American interests, could easily be enforced, and would not provoke substantial retaliation does not necessarily end the matter. A court also may refuse an injunction on the ground that the principle of comity between nations\textsuperscript{122} advises against its issuance.

31, 1979, Parliament closed several possible loopholes. After several of the Lords noted in committee that assignees of claims for multiple damages might fall outside the purview of the statute,\textit{see, e.g.}, 404 \textit{Parl. Deb.}, H.L. (5th ser.) 1541 (1980) (remarks of Lord Hacking), § 6(6) was added on amendment. \textit{See} Protection of Trading Interests Act, 1980, c. 11, § 6(6); 980 \textit{Parl. Deb.}, H.C. (5th ser.) 1107 (1980) (remarks of John Nott). Other additions cover payees of claims for contribution between codefendants, Protection of Trading Interests Act, 1980, c. 11, § 6(7), and recipients of payments ordered by any "tribunal or authority," whether judicial or administrative, Protection of Trading Interests Act, 1980, c. 11, § 6(7); however, the Supreme Court's refusal to recognize claims for contribution in antitrust litigation, \textit{see} Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061 (1981), renders the former provision vestigial.

117. It would appear that the second clawback suit would be for two thirds of the full treble damages award rather than for two thirds of the two thirds recovered in the American contempt proceedings. \textit{See} note 115 \textit{supra}.


121. Antitrust litigants commonly settle out of court, whatever the merits of their cases, when corporate survival leaves them no other choice. \textit{See} \textit{Note, supra} note 63, at 906-08.

122. Comity defies precise definition. It amounts to little more than "a blend of courtesy and expedience," Canadian Filers (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969), and expresses not so much a hard-and-fast rule as a general philosophy of "good sense, mutual respect and forebearance." Willoughby, \textit{Remarks by an English Solicitor}, in
Although it has been said that comity is "a general mode of expression that at most expresses an attitude or disposition and on analysis is simply circular," American courts have often used the term to express a willingness to exercise "care and restraint" in cases that touch upon the sovereignty of a foreign power. "Comity" itself has no precise meaning. Rather, the doctrine takes on whatever shape the exigencies of the moment require. Indeed, courts and commentators have not agreed whether comity applies as part of the antitrust jurisdiction test, or operates like an abstention doctrine at some later stage of the litigation. Those who argue for the jurisdictional theory seem to have the stronger case, but resolution of the controversy is unnecessary: a court deciding whether to grant a plaintiff's plea for an injunction clearly has the equitable power to deny the request. No statutory imperative absolutely requires a court to issue an injunction. Despite the uncertainties concerning its scope, comity does provide courts with a ready-made frame of refer-


125. See generally Comment, Ordering Production of Documents from Abroad in Violation of Foreign Law, 31 U. CHI. L. REV. 791, 794-96 (1964) (general background and origin of the doctrine of comity in common-law jurisprudence).


127. See Case Comment, supra note 127; Case Note, supra note 127.

128. See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294-98 (3d Cir. 1979) (court must first determine that it has jurisdiction; it then determines whether comity should apply); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1188-89 (E.D. Pa. 1980) (following two-stage test adopted in Mannington). C.f. Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680, 688 (S.D.N.Y. 1979) ("Regardless of whether considerations of international comity are reviewed as part of the threshold decision or in connection with a subsequent determination regarding abstention, the record in the case at bar is insufficient for a thorough review of all the relevant factors.").

129. See Case Comment, supra note 127; Case Note, supra note 127.

130. See, e.g., The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (plaintiff's plea for a transnational antisuit injunction refused); Phillip v. Macri, 261 F.2d 945 (9th Cir. 1958) (injunction against suit in Peru refused). Note, however, that the same equitable discretion would arguably not obtain in a Mannington Mills situation, where the court is called upon to interpret the jurisdictional provisions of a specific statute.
ence for deciding a novel question in international law: Should an American court indirectly, but nonetheless clearly, challenge the decision of a foreign legislature to make successful litigation under American law a tort?131

1. The Justifications for Using a Comity Analysis

The essence of comity is judicial self-restraint. Maintenance of international order depends upon at least a show of respect for the legitimate concerns of other nations.132 The principal justification for this judicial restraint is that an antisuit injunction "represents a challenge, albeit an indirect one, to the dignity and authority of [the foreign tribunal]."133 It cannot be doubted that British courts would consider themselves "challenged" by an injunction against proceedings brought under the PTIA. The leading British case holds that such an injunction would in effect "require that our [British] courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to . . . statutory rights belonging to an English national."134 Even the traditional fiction that an injunction operates against the parties and not against the British courts, though perhaps still technically correct on both sides of the Atlantic,135 cannot conceal the fact that it deprives the enjoined parties of "access to the courts of their own country."136

A second, more tenuous justification for restraint is based on the respect that the courts of one nation often accord the legitimate pub-

131. The cause of action resists categorization. One Member of Parliament referred to it as "this new, strange but nevertheless legitimate form of clawback." 976 PARL. DEB., H.C. (5th ser.) 1028 (1979) (remarks of Charles Fletcher-Cooke); PARL. DEB., H.C. STANDING COMM. F., Dec. 6, 1979, at 65 (remarks of Fletcher-Cooke, Jeffrey Thomas, and Attorney General Sir Michael Havers).


133. Arpels v. Arpels, 8 N.Y.2d 339, 341, 170 N.E.2d 670, 671, 207 N.Y.S.2d 663, 665 (1960) (refusal to enjoin party from pursuing divorce action in French courts). See Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969) ("The issue is not one of jurisdiction, but one, almost as important when a foreign sovereign is involved, of comity"); Roberts Realty of the Bahamas, Ltd. v. Miller & Solomon (Bahamas), Ltd., 234 So. 2d 417, 418 (Fla. Dist. Ct. App. 1970) ("But the circuit court's injunction directly affects the jurisdiction of a foreign sovereign . . . .").


lic policies of another. 137 The British have a fundamental interest in protecting the integrity of the PTIA. The British government introduced the Bill 138 because the variegated diplomatic demarches of the last “several decades” have failed to resolve Great Britain’s concern over extraterritorial antitrust enforcement. 139 A recent antitrust case threatens the orderly regulation of the British shipping industry. 140 Another case, now settled, threatened to destroy an important British mining conglomerate, Rio Tinto Zinc. 141 Although the British naturally object in principle to the punitive aspects of treble damages, 142 their main objection is more practical. Extraterritorial enforcement achieves “the maximum beneficial regulation of . . . [the United States’] own economic environment” 143 at the direct expense of the British economy. 144

Still a third justification for exercising judicial restraint may be

137. See, e.g., United States v. First Natl. City Bank, 396 F.2d 897, 901-03 (2d Cir. 1968). But see Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977) (“Foreign law may not control local law. It cannot invalidate an order which local law authorizes.”).


141. See In re Uranium Antitrust Litigation, 473 F. Supp. 382 (N.D. Ill. 1979), affd., 617 F.2d 1248 (7th Cir. 1980); 973 PARL. DEB., H.C. (5th ser.) 1540 (1979) (remarks of John Nott) (giving the reasons for the introduction of the PTIA in Parliament). It had been widely reported in Great Britain that the total award against the defendants in the Uranium case could have theoretically reached $6 billion. See 404 PARL. DEB., H.L. (5th ser.) 566 (1980) (remarks of Lord Elwyn-Jones); The Daily Telegraph (London), Nov. 1, 1979, at 21, col. 3. The British press had similarly reported that Rio Tinto Zinc, the principal British defendant in the Uranium case, could be “[t]he major beneficiary from the new” PTIA. See Dunn, Britain Fights US “Legal Hi-jacking,” The Sunday Telegraph (London), Nov. 11, 1979, at 23, col. 2. Only a timely settlement prevented what could have been a disastrously large damages award. See Westinghouse’s Suit on Uranium Settled, N.Y. Times, Mar. 18, 1981, at 21, col. 5; Westinghouse, TVA Settle More Uranium Suits, Wall St. J., Mar. 18, 1981, at 7, col. 1.


143. 973 PARL. DEB., H.C. (5th ser.) 1541 (1979) (remarks of John Nott).

144. The British feel that antitrust enforcement against the shipping conferences would result in “excess tonnage and higher costs” that would seriously damage the industry, see [1980] ANTITRUST & TRADE REG. REP. (BNA) No. 969, June 19, 1980, at A-6, A-8, which is particularly “important to the United Kingdom economy,” PARL. DEB., H.C. STANDING COMM. F, Dec. 4, 1979, at 17 (remarks of John Nott). The Government’s spokesman in the House of Lords noted that Rio Tinto Zinc and the shipping concerns were “companies vital in our trading structure.” 404 PARL. DEB., H.L. (5th ser.) 559 (1980) (remarks of Lord Mackay). The members further discussed the effect that the Act would have on British Petroleum’s worldwide operations, PARL. DEB., H.C. STANDING COMM. F, Dec. 6, 1979, at 49-53 (colloquy between Eric Ogden & John Nott).
found in the separation of powers doctrine.\textsuperscript{145} The foreign relations of the United States are “committed by the Constitution to the Executive and Legislative . . . Departments.”\textsuperscript{146} The separation of powers doctrine was the Second Circuit’s justification for extensively considering West Germany’s policies on bank secrecy in \textit{United States v. First National City Bank},\textsuperscript{147} which involved a subpoena for German banking records in an American antitrust case. Although the court eventually issued the production order, it plainly felt that it would have been unwise to do so without an opinion that went considerably beyond a simple assertion of raw power.\textsuperscript{148}

There are, in sum, at least three basic arguments upon which a court might plausibly rely in deciding to exercise judicial restraint: respect for the jurisdiction of the British courts, respect for British economic and trade policies, and concern for the separation of powers between the executive and the judiciary. Each is superficially appealing. Each also, however, is ultimately unpersuasive. The theoretical justifications for not issuing a transnational antisuit injunction are weak, and the practical difficulties, surmountable.

2. \textit{Why the Comity Approach Must Inevitably Fail}

Although interference with a foreign court’s jurisdiction counsels restraint, it has never absolutely barred American courts from issuing antisuit injunctions.\textsuperscript{149} A court that used a comity analysis, therefore, would balance “the individual interests and policies” of Great Britain against “our nation’s legitimate interest in regulating anticompetitive activity.”\textsuperscript{150} Before undertaking this balancing process, the court should determine what it must weigh against American interests. Comity does not demand deference to, or even consideration of every foreign interest. For example, American

\begin{itemize}
\item \textsuperscript{145} Cf. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 612 (9th Cir. 1976) (congressional power to regulate foreign commerce limited by “respect for the role of the executive” in foreign affairs); B. Hawk, \textit{United States, Common Market and International Antitrust} 120 (1979) (discussing act-of-state doctrine). \textit{See generally L. Henkin, supra} note 125, at 205-24.
\item \textsuperscript{146} Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).
\item \textsuperscript{147} 396 F.2d 897 (2d Cir. 1968).
\item \textsuperscript{148} 396 F.2d at 900-01. \textit{Compare In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979), affd., 617 F.2d 1248 (7th Cir. 1980)} (express refusal to apply comity in case involving the discovery of documents located in Canada), \textit{with Gulf Oil Corp. v. Gulf Canada Ltd., 111 D.L.R.3d 74, 86 (Can. 1980)} (noncompliance with the American request and implementation of a Canadian nondisclosure law is “an assertion of Canadian sovereignty to resist the extraterritorial application of United States anti-trust laws.”).
\item \textsuperscript{149} \textit{See notes} 80-82 \textit{supra} and accompanying text.
courts often disregard foreign statutes or policies that transgress international law.\textsuperscript{151} They should similarly be unwilling to defer to foreign legislation that itself violates basic principles of comity. Although the mere fact that American and foreign interests are incompatible does not justify disregarding the foreign interests, comity does not require deference to a foreign statute enacted solely to reverse what an American court has already done.\textsuperscript{152}

The PTIA is such a statute.\textsuperscript{153} The Act not only directs British courts to refuse to enforce certain American antitrust judgments,\textsuperscript{154} but also requires them, in effect, to reverse American courts' treble damage awards in clawback suits.\textsuperscript{155} Moreover, the Act applies to many classes of cases that do not violate British sovereignty or jurisdiction.\textsuperscript{156} The Act thus may constitute "an unprecedented offense against those principles of comity . . . that urge respect for the operations of foreign courts."\textsuperscript{157} The Act's anti-American intent makes balancing British and American interests before issuing an injunction inappropriate. At that stage, there is no way to strike a balance

\textsuperscript{151} See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 441 (1964) (White, J., dissenting) ("I do not believe that the act of state doctrine, as judicially fashioned in this court, and the reasons underlying it, require American courts to decide cases in disregard of international law and of the rights of litigants to a full determination on the merits."); W. Bishop, Jr., International Law 78-82, 898, 898 n.179 (3d ed. 1971); Morgenstern, Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which Are Contrary to International Law, 4 Int'l L.Q. 326, 343 (1951) ("There is nothing revolutionary in the suggestion that municipal courts may . . . exclude foreign law on the ground that it is contrary to public international law."). Cf. Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966) (Friendly, J.) (foreign ordinance confiscating property without compensation and in a manner contrary to forum court's public policy and shocking to its sense of justice will not be honored).

\textsuperscript{152} Cf. Somportex Ltd. v. Philadelphia Chewing Gum Corp. 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972) ("Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.").

In the context of recognizing foreign judgments, Willis Reese has suggested: American and English courts most certainly do not make a practice of discriminating in favor of their nationals and against foreign litigants. But they would hardly enforce without question a judgment where there was substantial reason to believe that one of their nationals had been the victim of serious prejudice at the hands of the foreign court. And a similar fate might well befall a judgment rendered either in contemptuous disregard of the forum's law or contrary to its public policy.


\textsuperscript{153} The Act's primary purpose is to undermine the effectiveness of American antitrust enforcement. 973 Parl. Deb., H.C. (5th ser.) 1533-46 (1979) (remarks of John Nott).

\textsuperscript{154} Protection of Trading Interests Act, 1980, c. 11, § 5.

\textsuperscript{155} Protection of Trading Interests Act, 1980, c. 11, § 6.

\textsuperscript{156} See Danaher, supra note 1, at 962 n.101.

\textsuperscript{157} Danaher, supra note 1, at 961 (1980). Danaher also argues that the Act may violate international law. Id. He admits that "international law and comity encourage, but do not require, the enforcement of foreign judgments," id. at 961 n.98, but argues nevertheless that the Act goes so far to undo what American courts have done that it may violate "customary international law." He offers no precedent for his position, however, and the argument appears to overstate the case against the Act.
between each nation's interests; a court that grants an enforceable injunction asserts the primacy of American policy, while one that refuses to enjoin British defendants may virtually eliminate private antitrust enforcement against those protected by the PTIA. But there is an important difference between the two courses of action. Although denying an injunction allows British interests to prevail, granting one will lead to accommodation of both nations' interests in the vast majority of settled antitrust cases. British defendants would not go entirely unpunished, but neither would they be subjected to the full weight of the treble damages threat. At the same time, American plaintiffs would receive more than their actual damages, but would be forced to consider the possibility of British retaliation when negotiating settlements. Because the injunction would not fully offset the value of the PTIA as a negotiating tool, actual settlements should move to a level somewhere between the points that each nation would consider most appropriate.

Even if a court decided that it should attempt to balance American and British interests before enjoining British defendants, a number of objections remain. First, the court may not be well-equipped to balance the competing interests. After deciding which foreign interests it should consider, the court would have to assess the weight that each country assigned to its policies. For example, the jurisdictional version of the comity test developed in *Mannington Mills v. Congoleum Corp.* and *Timberlane Lumber Co. v. Bank of America* requires the court to consider the "[d]egree of conflict" of American law "with foreign law or policy." Whatever the value of this approach to the question of whether a court should assume jurisdiction, it cannot succeed here. The PTIA was enacted solely to undermine the effectiveness of the American antitrust laws.

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158. See text at notes 31-47 supra.
159. See text at notes 113-21 supra.
160. An extreme instance of this sort of balancing might involve weighing the policy considerations that attach to each part of the antitrust laws. Under this approach, a court would be less deferential in cases involving horizontal price fixing, see, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (horizontal price fixing per se illegal), than in cases involving only vertical nonprice restraints, see, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 (1977) (overruling United States v. Arnold Schwinn & Co., 388 U.S. 365 (1969)) (vertical nonprice restraints no longer per se illegal). See 1 J. ATWOOD & K. BREWSTER, supra note 2, § 7.20, at 205-07 (resale price maintenance and tying in foreign commerce far less harmful to the United States economy than in interstate commerce).
161. 595 F.2d 1287 (3d Cir. 1979).
162. 549 F.2d 597 (9th Cir. 1976).
163. 595 F.2d at 1297.
164. See 2 J. ATWOOD & K. BREWSTER, supra note 2, § 14.19, at 203-06 ("Whether one is impressed with this [comity] response probably depends on how broadly one reads the comity mandate of Timberlane, and on one's confidence in the court's ability to handle that role."); note 195 infra.
165. See note 153 supra.
Balancing the two is therefore impossible. In *In re Uranium Antitrust Litigation*, \(^{166}\) when confronted with a similar problem involving a Canadian nondisclosure law promulgated specifically to block American pretrial discovery procedures, \(^{167}\) Judge Marshall remarked: "The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. . . . It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions." \(^{168}\) Similarly, balancing British interests in the PTIA against those of the United States in its antitrust laws could amount to little more than a shallow attempt to clothe with a mantle of legitimacy what would essentially amount to a judicial repeal of section 4 of the Clayton Act in foreign commerce cases. \(^{169}\) A balancing test, in other words, becomes meaningless when a foreign power has enacted a law with the single purpose of destroying the effectiveness of a law that an American court is duty bound to uphold. \(^{170}\)

Closely related to the analytic difficulty in balancing the unbalanceable is a practical difficulty: even a successfully applied comity analysis would serve no useful purpose. A conscientious and articulate application of a comity analysis to a potential PTIA case could easily produce a result just as unacceptable to Great Britain as an opinion based upon nothing more than the court's flat assertion of its power to issue an injunction. \(^{171}\) An American court naturally will

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168. 480 F. Supp. at 1148.
169. Cases where a balancing-of-interests test has been used have, for the most part, involved separate and independent foreign interests. See *Société Internationale, S.A. v. Rogers*, 357 U.S. 197 (1958). In this case involving the Swiss banking laws, the Court reversed a default judgment that had been entered against the plaintiff for noncompliance with a discovery order for secret documents. The Court held that since it was unreasonable to require a party to run the risk of criminal prosecution abroad to comply with a discovery order, the trial judge should allow him to proceed with his case without the missing evidence. 357 U.S. at 211-13. In a similar instance involving the effect of the Bahamian foreign exchange laws on the resolution of an American tax fraud case, the Second Circuit held that no court should require a party to violate foreign law. *United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962). In each case, the foreign interest was independent of any interests that the United States had in the outcome of the controversy.

170. See text following note 190 *infra*. An analogous problem arises in conflict-of-laws cases, where courts are often called upon to choose between the competing interests of two sovereigns. One distinguished commentator has argued that in such situations the forum court should be required to apply its own law, because "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy." Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. REV. 171, 176, reprinted in J. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS 81, 81 (1980).

171. The most outstanding case in point is *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), affd. 473 F. Supp. 382 (N.D. Ill. 1979), where the court apparently used the multipart comity analysis suggested in K. BREWSTER, supra note 10, at 446, and considered the briefs amici curiae filed by the British, Canadian, and other governments opposing juris-
weigh American more heavily than foreign interests.\textsuperscript{172} Under these circumstances, the court would have to struggle to avoid leaving itself open to the charge, often leveled in conflict-of-laws cases,\textsuperscript{173} that the rationale advanced for the result is little more than an elaborate smokescreen to conceal the inevitability of the preordained conclusion.\textsuperscript{174} And the British have repeatedly stated that what they really care about are the results, not the reasoning in the American antitrust cases.\textsuperscript{175} Even if analytically sound, therefore, a comity analysis would not mend relations with the British.

In the unlikely event that the British expressed satisfaction with the comity approach, problems would remain. The approach is so vague\textsuperscript{176} that virtually no British company could rely upon it.

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\textsuperscript{172} In \textit{In re Uranium Antitrust Litigation}, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979), for example, the court concluded: "[W]e have earlier observed [that] a balancing test is inherently unworkable in this case, and were it not we would be hard pressed not to accede to the strong national policy of this country to enforce vigorously its anti-trust laws." And in United Nuclear Corp. v. General Atomic Co., -- N.M. --, 629 P.2d 231, 269 n.58 (1980), \textit{cert. denied}, 101 S. Ct. 1966 (1981), the New Mexico Supreme Court emphasized that the "fundamental public policy" expressed in the American antitrust laws must take precedence over notions of international comity. \textit{See} note 193 \textit{infra}.

\textsuperscript{173} A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS \S 122 (1962). \textit{See} R. LEFLAR, \textit{supra} note 80, at \S 91.

\textsuperscript{174} In any event, it is doubtful that Britain would "accept that American courts are the most suitable bodies to weigh" its interests. Lowe, \textit{supra} note 1, at 268. A Justice of the Supreme Court of Ontario has expressed especially vehement disagreement with those courts, \textit{e.g.}, \textit{Timberlane Lumber}, that venture to "balance" foreign political interests against those of the United States:

I suppose everybody else here is too polite to ask how it is that a judge of a Canadian court or of an American court can decide what is the proper balance of international interests, the interests for example, of Canada in the exploitation of its natural resources and the interests of this country [the United States] in the maintenance of competition. I feel that this is not a good area for the judiciary.


\textsuperscript{175} \textit{See} 980 PARL. DEB., H.C. (5th ser.) 1147-48 (1980) (colloquy between John Nott and Jeffrey Thomas) (agreeing that the \textit{Mannington-Timberlane} test represents only a step in the right direction, and not anything like an ultimate solution).

Support by analogy may be drawn from another instance wherein the United States sought to regulate international competition through an amendment to the antitrust laws. When the United States offered to temper the Oil Windfall Acquisition Act of 1979 with a statutory reference to "the principles of international law and comity," S. 1246, 96th Cong., 1st Sess., \S 7B(j) (1979), it was promptly rebuffed. Diplomatic Note of the Embassy of the United Kingdom to the United States Department of State (Oct. 1, 1979), \textit{reprinted in Senate Oil Hearings, supra} note 51, at 902. The British noted in particular that "[t]he safeguard proposed by the United States Administration with regard to the application of international law and comity is welcome as an indication that the international aspects are recognised but does not remove the British Government's basic concern." \textit{Id}.

\textsuperscript{176} \textit{See} text at notes 122-26 \textit{supra}.

\textsuperscript{177} In testifying on the Oil Windfall Acquisition Act of 1979 before the Senate Judiciary Committee, former Under Secretary of State George W. Ball commented: "Reliance on such vague principles [as "comity" and "international law"] and on the differing views of different
More importantly, however, applying a comity analysis to the question of whether to enjoin a British defendant from bringing suit under the PTIA would indicate an inclination to recognize the validity of similar laws, thereby encouraging other nations to enact them. Since several other countries have expressed their determination to pursue this course, a willingness on the part of American courts to respect foreign anti-Sherman Act laws would effectively nullify section 4 of the Clayton Act in many foreign commerce cases.

Finally, to the extent that balancing is appropriate and feasible, courts should refrain from striking a new balance at the post-judgment stage. There is ample opportunity to balance American and British interests before taking jurisdiction, during the trial, and when considering what form of relief is appropriate. If American interests were sufficiently important to induce the court to take jurisdiction and render judgment, they also are sufficiently important to justify enforcing that judgment. Fairness to plaintiffs, moreover, demands that courts enforce lawfully obtained judgments and courts that are unwilling to protect their final judgments because of judges would mean, in practical terms, that affected [foreign] companies would pass up profitable transactions — to the great disadvantage of our country." Senate Oil Hearings, supra note 51, at 686 (remarks of George Ball). The point is that the actual effect of applying a comity analysis, because of the uncertainty, is likely to be precisely the same as it would have been had comity not been used. British companies will tend to obey American laws simply to avoid running the risk of incurring possibly ruinous antitrust liabilities. See Lowe, supra note 1, at 269.

178. The invitation to do so is clear. As George Ball noted in his testimony before the Senate Judiciary Committee, comity could not succeed, in the long run, because:
I can't think of a government that wouldn't pass a law to direct its own firms, in its own country, to disregard the American statute. Then we would have a problem of conflict and comity [and] we would have to sort the whole thing out. But it would be a very big mess.
Senate Oil Hearings, supra note 51, at 696 (remarks of George Ball).

179. See note 50 supra.

180. To take adjudicatory jurisdiction over an antitrust case, the court need only find that the defendant's behavior slightly affected American commerce. See Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976). Although jurisdiction may be refused at this stage because the conduct does not strongly engage American interests, cf. [1979] ANTI-TRUST & TRADE REG. REP. (BNA) No. 959, Dec. 13, 1979, at A-3 (slight effect on U.S. commerce of uranium cartel helped persuade the Justice Department to drop suit since U.S. interests were not sufficiently engaged vis-à-vis the interests of the other nations involved), "American courts have given little sign of actually declining jurisdiction." Lowe, supra note 1, at 268 n.57. But the minimum effects threshold for proving a cognizable violation of the antitrust laws is much higher than that necessary to prove that an American court has jurisdiction over the case. See Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976). Once the American plaintiff prevails on the merits by proving that it has been injured, the court may enter a final judgment against the British defendant secure in the knowledge that the American interest in the case is substantial enough to warrant the issuance of a supporting antisuit injunction.

181. See notes 61-73 supra and accompanying text.

182. See note 35 supra.
the principle of comity should decline jurisdiction at the outset to preserve judicial and private resources.

Concern for the separation of powers between the executive branch and the courts (and for diplomatic repercussions) also should not lead a court to deny a transnational antisuit injunction. Although the British government may not sit idly by while American courts prohibit British nations from using the PTIA, simple judicial activity is unlikely to interfere substantially with the conduct of foreign affairs. Because no political question is presented here, a court need only attempt to balance American and British interests. When striking that balance, the court may wish to consider the views of the State Department, but the separation of powers doctrine is not offended if the court ultimately rejects those views.

183. See note 110 supra.

184. The political question doctrine, based upon the constitutional separation of powers between the judiciary and the executive branch, see Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). is applicable only in exceptional cases, such as those involving the validity of treaties. See, e.g., Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (plurality opinion) (declining to adjudicate dispute between Senate and President Carter over the unilateral Presidential termination of treaty with Taiwan).

185. The Court has commented:
Despite the broad statement in Oetjen v. Central Leather Co., 246 U.S. 297 (1918) that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments," 246 U.S., at 302, it cannot of course be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 423 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

In United States v. First Natl. City Bank, 396 F.2d 897, 901 (1968), the Second Circuit recognized that it "must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs." But complete deference to the policies of foreign governments is presumably not required. All that the courts need undertake is a "careful balancing of the interests involved." 396 F.2d at 901.

186. See United States v. First Natl. City Bank, 379 U.S. 378, 384-85 (1965). The conferences at a recent seminar on the Anglo-American antitrust dispute agreed that one possible solution to the impasse would be to require the United States courts to notify the State Department when international antitrust cases are filed so that the Department could furnish relevant information for accepting or not accepting jurisdiction. See Hermann, Sanctions, subsidiaries and the long arm of U.S. justice, Financial Times (London), May 6, 1980, at 13, col. 1; [1980] ANTITRUST & TRADE REG. REP. (BNA) No. 969, June 19, 1980, at A-6 to -8 (reporting on conference sponsored by the Ditchley Foundation).

187. The State Department, as the representative of the executive department of the government, may only recommend a given course of conduct to the courts, and may not decree the result. The final determination of the controversy at hand must rest with the courts. See L. Henkin, supra note 125, at 60, 60 n.*. In New England Merchants Natl. Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 133-34 (S.D.N.Y. 1980), for example, the court refused the government's request for a stay of the attachment proceedings pending the outcome of the Iranian Hostages affair. The court dismissed the government's claim perfunctorily:

In large measure . . . [the government's request] is based on foreign policy considerations. I must balance this request and the fact that the management of foreign affairs is the exclusive prerogative of the President with the duties imposed on my office by the Constitution to fairly and justly decide issues brought before this Court.
Finally, whatever the practical and analytic shortcomings of a comity approach to the antisuit injunction problem, one could argue that, in political terms, it remains the most expedient alternative. Parliament enacted the PTIA partly to promote "discussion and negotiation" by forcing the United States "to be reasonable about the matters with which the . . . [Act] deals." The flexibility of the comity approach may foster the nonconfrontational atmosphere of mutual cooperation and consultation so necessary to the conclusion of a negotiated settlement to the issues that divide Great Britain and the United States. But it will do so only by sacrificing American

505 F. Supp. at 133 (footnote omitted). Though the court did not feel called upon to cite authority for the quoted proposition, the law on this point seems well established. But cf. Dames & Moore v. Regan, 101 S. Ct. 2972, 2991 (1981) ("But where . . . the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where . . . we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims."). Over a century ago, the Supreme Court declared that it is beyond the legislature's — and impliedly also beyond the executive's — power to declare the result of any given case, once the court determines that it has the power fully to adjudicate the dispute. United States v. Klein, 80 U.S. (13 Wall.) 128, 146-48 (1872). See also Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."). Indeed, one commentator has gone so far as to suggest that "once it appears that a federal court has jurisdiction to decide a class of cases, the Constitution forbids foreclosing determination of the merits of such cases." Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 UCLA L. REV. 1135, 1177 (1970) (footnote omitted). The State Department, too, seems to recognize that its role in cases properly before the courts under article III, U.S. Const. art. III, §§ 1-2, must be purely advisory, and never determinative of the final outcome. See generally [1980] ANTITRUST & TRADE REG. REP. (BNA) No. 971, July 3, 1980, at A-12 (statement of William T. Lake, Deputy Legal Advisor, United States Department of State); Becker, The Antitrust Law and Relations with Foreign Nations, 40 DEPT. STATE BULL. 272 (1959). The Justice Department has commented that "in appropriate circumstances, the Department will intervene in private suits as a friend of the court to encourage rulings consistent with comity." [1981] TRADE REG. REP. (CCH) No. 483, Mar. 30, 1981, at 6 (Speech of Joel Davidow, Director of Policy Planning for the Antitrust Division of the United States Department of Justice, Mar. 12, 1981). This is encouragement, not dictation. Because the Executive is essentially powerless to intervene effectively, as it could, say, in a Government (non-private) suit, see, e.g., Burnham, Data Show U.S. Rejected Uranium Cartel Prosecution, N.Y. TIMES, Dec. 4, 1979, at 1, col. 2 (State Department required Justice Department to drop pending suit against foreign defendants), a recommendation from the State Department cannot bind a court.

188. 976 PARL. DEB., H.C. (5th ser.) 1048 (1979) (remarks of John Nott). See 405 PARL. DEB., H.L. (5th Ser.) 1518 (1980) (remarks of Lord Mackay) ("The right way to settle international difficulties in the economic field, as in so many others, is by discussion and negotiation between Governments. We believe that this Bill will contribute in an important manner to that process.").

189. 976 PARL. DEB., H.C. (5th ser.) 1032 (1979) (remarks of Ivan Lawrence). The Act strengthens the British bargaining position in the antitrust-law negotiations that the British feel must inevitably follow the Act's implementation. See 973 PARL. DEB., H.C. (5th ser.) 1549 (1979) (remarks of Under-Secretary of State for Trade Norman Tebbit); 405 PARL. DEB., H.L. (5th ser.) 943 (1980) (remarks of Lord Lloyd) ("It seems to me that the whole intention of the Government in relation to the Bill is to have a diplomatic flag called an Act of Parliament, which they can wave at some kind of [international] convention or meeting.").

190. Both the British and the American governments agree that a confrontational ap-
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interests to those of the British. Unless the PTIA is neutralized, at least in part, the United States will be unable to negotiate an acceptable agreement. Granting antisuit injunctions would move the starting point in the negotiations between the two nations toward some middle ground.

Even a court unwilling to take this affirmative step to equalize bargaining power would have difficulty basing a decision against issuing an injunction on the supposed diplomatic expediency of "flexibility." "There are," as the British realize quite well, "aspects of United States law which the State Department cannot change." Although no law commands the court to exercise its discretion to issue an antisuit injunction, the policies expressed in the antitrust laws leave the court little freedom to deny a plaintiff's request for injunctive relief. Refusing the antisuit injunction would be tantamount to awarding only simple damages, which section 4 of the Clayton Act impliedly forbids. An antitrust plaintiff is entitled to treble damages, and requires the aid of an antisuit injunction to secure them. Until Congress amends section 4, the court should issue the injunction.

proach could accomplish little since a "cooperative approach" is the one that holds out the most promise for an end to the differences that divide the two countries. See PARL. DEB., H.C. STANDING COMM. F, Dec. 4, 1979, at 30, 33 (remarks of Eric Ogden and John Nott) (quoting diplomatic dispatch from the United States to the United Kingdom; paraphrasing reply of the United Kingdom to the United States) (For extensive quotations from both dispatches, see J. ATWOOD & K. BREWSTER, supra note 2, § 4.18, at 104-05. See generally Marcus & Butland, Reconciling National Interests in the Regulation of International Business, 1 NW. J. INT'L. L. & BUS. 349, 356 (1979) ("As a practical matter, adherence to comity is facilitated when legislation which sets out policy objectives leaves wide latitude for administrative implementation.").


192. See text at note 130 supra.

193. Cf. United Nuclear Corp. v. General Atomic Co., — N.M. —, 629 P.2d 231 (1980), cert. denied, 101 S. Ct. 1966 (1981). In this case upholding an antitrust judgment under New Mexico law that "approache[d] one billion dollars," — N.M. at —, 629 P.2d at 237, the court quickly dismissed the notion that international comity should stay its hand: "We cannot subscribe to the idea that the fundamental public policy which the [New Mexico state] antitrust laws embody must be ignored in the interests of comity towards the policy of a foreign state . . . ." — N.M. at —, 629 P.2d at 269 n.58 (emphasis added).


In discussing similar problems that arise in conflict-of-laws cases, Brainerd Currie has noted that

[the sensible . . . thing for any court to do, when] confronted with a true conflict of interests, is to apply its own law . . . . It should . . . [do so] simply because a court should never apply any other law except when there is a good reason for doing so. That doing so will promote the interests of a foreign state at the expense of the interests of the forum state is not a good reason.


CONCLUSION

The PTIA threatens to deny treble damages to antitrust plaintiffs that do business in Great Britain. To protect these vulnerable plaintiffs, an American court should enjoin British defendants from pursuing their rights under the Act.

The analysis leading to this conclusion proceeds in two parts. First, the American interest in enforcing the antitrust laws in foreign commerce is compelling. Free competition is a far more important policy than those that courts often rely upon in issuing transnational antisuit injunctions. Since the private treble damages suit, directly threatened by the British Act, plays a key role in preserving this interest, the court should issue the injunction. Second, because the Act merely reflects the British financial and political interest in a controlled economy, it presents a case logically indistinguishable from the many instances in which American courts normally issue transnational antisuit injunctions. 196

Practical difficulties do not change the legal analysis. Fears of a ruinous series of counterinjunctions should prove illusory. Retaliation from the British government poses a harder problem, and the temptation to defer to the State Department may be great. But not issuing an antisuit injunction would constitute the functional equivalent of an award for only simple damages. Though the State Department may object to the injunction, the court cannot abdicate its responsibility to carry out the clear command of section 4 of the Clayton Act.

The argument for issuing the injunction is therefore compelling. Objections reduce to the proposition that the American antitrust laws are not “suitable instrument[s] for the regulation of world trade.” 197 Vigorous private extraterritorial enforcement of the antitrust laws may well “damage the fabric of international commerce,” 198 and Congress eventually may decide to amend the Clayton Act to provide for the award of simple, rather than treble damages in cases arising under the foreign commerce provisions of the antitrust laws. 199 But this decision cannot rest with the courts. Until Congress changes the law, an American court should do everything within its power to insure that the antitrust plaintiff continues to receive “threefold the damages by him sustained.” 200

196. See note 80 supra.
199. See 2 J. Atwood & K. Brewster, supra note 2, § 18.32, at 341 (proposing that § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), be amended to provide for the award of only simple damages in cases arising under the foreign commerce provisions of the antitrust laws).