THE LORD HACKING

The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*

Although I have chosen such a bold title for my talk, I do approach my address to you with some diffidence. You, Mr. Chairman, have made your introduction of me in most generous terms, and your Chief Justice has spoken frequently of his admiration for our legal profession, but I am aware that these views are not universally shared in your country. As a practicing English lawyer, I must face the criticism as well as receive the praise. Recently, former Dean Monroe Freedman of Hofstra University in New York State put, as you may think, the record right. He wrote an article entitled "The Myth of British Superiority." He ended that article with these words:

> In sum, I think it is a myth that the English Bar is superior to the American Bar, either in professional skills or in professional ethics. The same problems of ethics exist in England as in this country, and they are in no significant way mitigated by the dual system. Moreover, with respect to litigating skills, it is my estimation that barristers, as a group, are distinctly inferior.[1]

Mr. Chairman, you also referred to my position as a member of our English Parliament, but, in this democratic country of yours, I am mindful that I have never been voted into this office by the electorate, that I have no constituency and that I am there by no less, and no more,

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*This address was delivered to the Los Angeles County Bar Association on June 27, 1978. The text has been revised and updated to reflect events through October 1978.

[1]Freedman, *The Myth of British Superiority*, N.Y.L.J., Aug. 28, 1974, at 1, col. 1. Monroe H.Freedman was then Dean and Professor of Law at Hofstra University School of Law.

than the accident of birth and the chance of death. I am conscious too that some of you may even have witnessed proceedings in the House of Lords, and have seen some of my older colleagues coming stooped into the Chamber — a kind of living proof of life after death. You may even have heard that unkind (and wholly untrue) story of the English Lord who dreamt he was making a speech in the House of Lords and woke up and found it to be true.

In this talk I am going to take you to London, to Grosvenor Square under the great American eagle. The date is 14th June, 1977. We will go up together the wide front steps into the main entrance of the American Embassy and there, we will find Sir Mark Turner, Chairman of the Rio Tinto Zinc Corporation, and three other leading officers of the Rio Tinto Zinc Corporation and RTZ Services Limited. We will then witness a most unusual event. Before a Judge of the United States District Court for the Eastern District of Virginia, each of these three distinguished Englishmen, and one distinguished Frenchman, take the American Fifth Amendment. We would also have witnessed other unusual events if we had been in the Embassy, a few days earlier, on 8th and 9th June, when three other leading officers from these prominent companies, including Lord Shackleton, Deputy Chairman of Rio Tinto Zinc Corporation and former leader of the House of Lords, also took the Fifth Amendment before a Consular Officer.

Now these noble gentlemen were appearing at the American Embassy in U.S. court proceedings which were part of the Westinghouse/utility companies litigation in Virginia in which Westinghouse alleges there was an international cartel operating in the distribution and selling of uranium.

Before, however, we examine further these proceedings in London, let us examine our respective positions, in the United Kingdom and the United States, over the doctrines of jurisdiction and sovereignty in the practice of international law. In two parts we do not quarrel. First, we agree that every nation has the right to exercise jurisdiction over its own nationals, and over non-nationals, within its own territory. There are occasions when the exercise of this right offends our sense of justice, for example, when we believe that human rights have been infringed, but our position then is a moral one and not a sovereign one. We do not deny that a country *has* the right so to act but we protest at the *manner* in which this right is exercised. There may also be disputes over the

limits to jurisdiction into the air above the land, or over the sea surface or under the sea bed (with all it contains) but there is no dispute, per se, over a nation's right to exercise jurisdiction in its own territory. Second, we agree (subject to other nations' prior right to exercise their own territorial jurisdiction) that every nation has the right to exercise personal jurisdiction over its own nationals who are residing abroad. It is true to note that the United Kingdom generally seeks to exercise less jurisdiction over its own citizens abroad which, as an English taxpayer now resident out of the United Kingdom, I note with relief. We do not, however, quarrel over this part of the doctrine, when the exercise of jurisdiction concerns domestic taxation policies, nationality rights and the like.

There is, however, another part of the doctrine where we are in disagreement with you. Your law students are taught that when there has been a substantial and foreseeable effect from abroad upon a nation's persons or institutions (including the economy itself) then that nation has the right to exercise jurisdiction over those persons or corporations where activities, albeit abroad, have had this substantial and foreseeable effect *within* that nation. We have been aware for a number of years that you believe this to be a crucial part in the application of this doctrine in international law. It was well put, however much we may disagree with it, by Judge Learned Hand in 1945 in that well-known case (for students of U.S. antitrust law) *United States v. Aluminum Company of America,* known, I believe, as the *Alcoa* case. As you will all recall, Judge Learned Hand said:

> 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 . . . .[2]

Actually, the facts in this case, which concerned an alleged conspiracy (involving a Canadian company acting outside the territory of the United States) to restrain the sale of virgin aluminum ingot, did not have wholly the flavour of extraterritorial activities. Amongst other things, this Canadian company was wholly owned by a well-known U.S. family, the Mellon family, including Andrew Mellon, who had been Secretary of the U.S. Treasury.

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[2] 148 F.2d 416, 443 (2d Cir. 1945).

To put it bluntly, we simply disagree with Judge Hand's dictum. In the words of Viscount Dilhorne, in his speech in the *Westinghouse* case, on December 1, 1977:

> For many years now, the U.S. has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law . . . .[3]

This disagreement is now one of increasing worry to us. I am bound to tell you, in a voice of friendliness, and not hostility, that we are disturbed, for you, for us, and for international trade, that agencies of your Government, over an ever-widening field of international commerce are persistently making more and more attempts to impose U.S. laws on persons and corporations who are not "nationals" of the United States, and who are acting outside the territory of the United States. I do not think it is an unfair question to ask how you would respond if other nations attempted to do the same to you. Without putting it tritely, your nation was founded by those who took exception over little matters of taxation being imposed extraterritorially.

It will probably surprise you, as much as it surprised me, to learn how extensive is the application of U.S. laws abroad. Without burdening you with too much detail, allow me to provide support for my argument in several areas which give us concern.

First and foremost, it is in the field of antitrust law. You will be well familiar with the landmark cases. I have already referred to the *Alcoa* case. You will also be familiar with *United States v. Imperial Chemical Industries*[4] over the alleged attempt to prevent competition by dividing the market of the world into territories where monopolistic policies could be enforced. You will also be aware of *United States v. Watchmakers of Switzerland.*[5] As we see it, it has been a gradual but steady encroachment. It is not that we are opposed to the rationale of your antitrust laws. On the contrary, we recognize them to be laws of prime importance in the conduct of fair and good business within any free enterprise system. We have our own laws against monopolies[6] and unfair trade practices,[7] such as price-fixing. It is not therefore the concept of your antitrust laws which disturbs us, but your belief that

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[3] *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, [1977] 1 All E.R. 434, 460 (H.L. 1977), *reprinted in* 17 INT'L L. MATS. 38 (1978).

[4] 100 F.Supp. 504 (S.D.N.Y. 1951).

[5] United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. ¶ 71, 352 (S.D.N.Y. 1965).

[6] Fair Trading Act (1973) which (inter alia) replaced the Monopolies and Mergers Acts (1948) and (1965).

[7] Resale Prices Act (1976), Restrictive Trade Practices Act (1976) [also earlier Restrictive Trade Practices Acts (1956) and (1968)].

their objectives can only be achieved internationally by the extraterritorial application of your own laws. In a cogent argument your Department of Justice, in the recent *Antitrust Guide for International Operations*[8] put your case with admirable candour. I read extracts from the section entitled "Questions of Jurisdiction":

> The application of U.S. antitrust law to overseas activities raises some difficult questions of jurisdiction . . . . U.S. law in general, and the U.S. antitrust laws in particular, are not limited to transactions which take place within our borders. When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place . . . . Accordingly, considerations of jurisdiction, enforcement policy, and comity often, but not always, lead to the same conclusion: the U.S. antitrust laws should be applied to an overseas transaction where there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interest of foreign nations . . . .

It is at this point that the authors of this booklet glide so smoothly over the troubled waters. I continue reading from the *Guide:*

> For example, to use the Sherman Act to restrain or punish an overseas conspiracy whose clear purpose and effect is to restrain significant commerce in the U.S. market is both appropriate and necessary to effective U.S. enforcement . . . .
> The general trend of modern history has been to expand the personal jurisdiction of our courts to reach those who transact business in a certain place, even if they are not 'found' there in a traditional jurisdictional sense. The Department will utilize these principles to seek to exercise the fullest permissible jurisdiction over those who illegally cartelize our markets . . . .[9]

In securities laws, it has also long been recognized here that if they are to be effective, within the United States, there must be some extraterritorial application. Funnily enough section 30 (b) of your Securities Exchange Act (1934) expressly exempts transactions conducted "without the jurisdiction of the United States" but as one of your learned judges said in one case, the Act must:

> have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper transactions in American securities.[10]

One of the most recent examples of proposals to increase the extraterritorial application of U.S. securities laws lies in the November, 1977

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[8] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (Jan. 26, 1977).

[9] *Id.* at 6-8.

[10] Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968), *cert. denied sub nom.*, Manley v. Schoenbaum, 395 U.S. 906 (1969).

Release[11] in which the SEC propose to put upon foreign private issuers the same reporting requirements as upon domestic private issuers. As Richard Roeder said in his recent talk to you:

> The release also contains comments setting forth the SEC's view as to the need for the free flow of information in the international capital markets. The specific proposals are stated to reflect the Commission's opinion that new foreign issuer registration and reporting forms are necessary to further the goals of the federal securities laws, and that dual systems of reporting for foreign issuers and domestic issuers are contrary to the best interests of investors.[12]

In the field of international boycotts you again have found it necessary to seek extraterritorial application of your laws. Unlike U.S. foreign policy. U.K. foreign policy (the decision to impose mandatory sanctions against Rhodesia was a universal one by the U.N. and not a unilateral one by the United Kingdom) has not believed in the use of boycotts as an instrument of policy. Your trade embargoes, imposed under your Trading with the Enemy Act against Communist China, Cuba, Vietnam and other countries, have over the years caused difficulties, amongst others, to our ships, who for various lawful and proper reasons have entered into the harbours of these boycotted countries. The same problems have faced several other countries who are friendly to you. Take, for example, the problem which faced the Fruehauf-France company in December, 1964.[13] At that time, under powers exercised under your Trading with the Enemy Act it was unlawful here to trade with The People's Republic of China. On the other hand, France, who did not have such an embargo, was anxious to increase its exports, and, in particular, wanted to increase its trade with the Chinese mainland. When, therefore, a French exporter approached Fruehauf-France, which was a French corporation, and offered to purchase sixty of its trailers for delivery to The People's Republic of China, the exporter was providing an attractive offer to the French company. However, the French company was two-thirds owned by Fruehauf-International, which was a U.S. company. Hence, when the United States Government began to investigate the transaction, Fruehauf-International instructed Fruehauf-France to cancel the contract. This did not go down well in France. The minority shareholders of Fruehauf-France went to a French court and, using a concept in French law called "abuse de droit" (an abuse of a legal right), got the

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[11]Exchange Act Release No. 14128, Proposed Rules, Forms and Guidelines on Foreign Issuer Disclosure, [1977] FED. SEC. L. REP. (CCH) ¶ 81, 361 (Nov. 2, 1977).

[12]Address by Richard K. Roeder, Esq. to the Los Angeles County Bar Ass'n (May 26, 1978).

[13]Rosenfield, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005 (1976).

court to appoint an officer to run the company and had the sale completed. The grounds for this decision of the French court were strong. The trailers were being manufactured in France, finance was being provided by French creditors, and if Fruehauf-France had not supplied the trailers, then they would have lost the contract to other French competitors. Another matter of concern to the French court was that the rescission of the contract by Fruehauf-France could have resulted in reparation damages being granted to the French exporter to the tune of some 5 million French francs. This, in turn, could have driven Fruehauf-France into bankruptcy and deprived its employees of their employment. Whatever may have been the merits of the U.S. foreign policy towards Communist China, and, whatever may have been the merits of this policy in the interests of the Free World, the attempted extraterritorial application of U.S. laws would have had, if not resisted, serious consequences upon persons and a corporation operating *inside* the jurisdiction of another nation. It is well worth reading Bruce Rosenfeld's article on this case, and the subject at large, in the Stanford Law Review of May, 1976.

With these not altogether happy experiences of U.S. imposed boycotts, we took pleasure in your stand against boycotts in your Foreign Boycott Amendments (1977) to your Export Administration Act (1969) but, alas, once again, we found ourselves hitting the same problem of your need to seek extraterritorial application for your laws in order to make them sufficiently effective within your own country. In these amendments, which prohibit any participation with, or support of, those who are imposing (or who are seeking to impose) boycotts against countries friendly to the United States and which provide power for seeking information on these boycott activities, your Congress seeks jurisdiction, worldwide, against any "United States person." According to the definition clause these persons include not only present residents in the United States (such as myself — which is abundantly fair) but:

> any domestic concern (including any permanent domestic establishment of a foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern . . . .[14]

We all hope that we will think alike and we will want to join with you in outlawing boycotts but there will sometimes be good reasons for

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[14]Pub. L. No. 95-52, § 204, 91 Stat. 244 (1977) (to be codified as 50 U.S.C. app. § 2410).

your allies to impose, or cooperate with, boycotts of which your foreign policy makers disapprove. More than that in the fertile and troubled Middle East, which was the very area in the world upon which Congress, in passing the Foreign Boycott Amendments, was directing its attention, enormously difficult decisions face traders who find themselves caught between rival factions. With the Arab countries on one side saying to a trader, "if you do business with Israel," or, as we have experienced with one major insurance company "if you have a Jew on your Board," then "you will face penalties" and with you saying to the same trader "if you cooperate with their demands you will face penalties" that unfortunate trader is in a fair quandary. It may be easy to argue back that, on the definition of "United States person," few traders will be caught in this quandary but, viewing the labyrinth of national and international corporate structure, I venture to suggest "foreign . . . affiliate of any domestic concern which is in fact controlled by such domestic concern" has very wide implications or certainly gives wide scope for argument. In a sense these provisions are 'anti-boycott' boycotts carrying with them a lot of the problems of the former beasts. Enough of this comment, but let me end by noting with you that there are similar provisions (with similar problems) in the Tax Reform Act (1976) on reporting of boycott-related activities.

Sharing with you a concern over corrupt practices in international trade, we welcomed too your Foreign Corrupt Practices Act (1977) but, once again, we hit the problem of the extraterritorial application of your laws. Nobody could accuse Congress of a lack of enthusiasm for spreading the good news of your laws abroad. Here world-wide investigatory powers include certain accounting requirements which have worrying aspects. The recent accounting requirements for companies quoted on the New York Exchange have thrown more than one major multinational company upside-down in preparing its accounts. It remains to be seen how the Foreign Corrupt Practices Act's accounting requirements will work out, but dealing with the New York Stock Exchange requirements the Royal Dutch/Shell group of companies in a press release dated 18th May, 1978, reporting upon their trading results for the first quarter of 1978, stated:

> reported earnings are distorted to an extraordinary degree in this quarter by the application of the United States accounting standard on the translation of foreign currencies (FAS 8) which has resulted in a totally unrealistic net income figure.

One of your government agencies, which, for many years, has sought to exercise powers worldwide on the carriage of cargo outside the territorial waters of the United States, is your Federal Maritime Commis-

sion. Indeed, its activities in seeking to obtain merchant shipping documents caused us to pass, in 1964, The Shipping Contracts and Commercial Documents Act. Happily there are moments of light relief. The worldwide use of containers has brought to the F.M.C. new challenges. Of course one understands the logic, but the application of logic can be politically clumsy. We were relieved, therefore, that the suggestion by the F.M.C. that it has jurisdiction over barges going up the rivers of Europe (on the basis of jurisdiction over freight charges on "intermodal" carriage of containers) has, for the present, been dropped.

As I have attempted to argue to you, it is not over the substance of U.S. laws where lies most of the complaints, but over the means by which your Congress (and your courts) seek enforcement extraterritorially. Of all activities, therefore, the most conspicuous and the greatest source of trouble, has been with the attempts to apply the U.S. discovery procedures abroad. This was at the heart of the problem in the *Westinghouse* proceedings[15] in England. I know of no country, and this is a compliment, which in its civil proceedings tries so hard to seek out the truth. I am not sure, however, whether this should be the ultimate role of a court. This opens philosophical arguments which should be left to another day. It suffices to state, that in the United Kingdom there are only most limited powers which can be exercised against persons who are not parties to actions, and there are no means by which such parties can be compelled to give upon oath pre-trial evidence or to hand over all the files in their office for inspection by parties to an action. The problems upon your more extensive discovery procedures were considered at the 1970 Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters. In the end it was agreed that a contracting state to this Convention could declare, on ratifying it, that it would not execute letters of request issued for the purpose of obtaining "pretrial discovery of documents as known in common law countries."

Associated with discovery procedures, another weapon which has caused difficulty abroad is the use of Civil Investigative Demands (CID) by your Justice Department. When, for example, in 1976 your Justice Department used CIDs for investigating the activities of North Atlantic shipping companies, our Under-Secretary of State for Trade, Mr.Stanley Clinton-Davis, stated in our Parliament that the "disclo-

[15] *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, note 3 *supra*.

sure" of the documents then being sought from British companies "would constitute an infringement of the jurisdiction which, under international law, belongs to the U.K."[16] It has, therefore, been the inevitable response by other nations, who should be *assisting* the United States, and *not hindering* her, to put up barriers. Indeed it is salutary to list some of those countries and states, who, in direct response to U.S. discovery procedures, have enacted laws, with criminal penalties, to prohibit the extraterritorial removal or other disclosure of commercial documents:

England:	*The Shipping Documents and Commercial Documents Act* (1964)
Quebec:	*Business Concerns Records Act* (1964)
Netherlands:	*Netherlands Economic Competition Act* (1956) *as amended* (1958)
Switzerland:	*Article 47 Swiss Federal Bank Act*
Canada:	*Uranium Information Security Regulations: 22 September, 1976.*

As this ardent fight over the rights to see and obtain documents has raged between America and her allies, I am bound to comment that the last laugh has by no means been with us. Take *In re Ampicillin Antitrust Litigation*[17] (1973) concerning Beechams, one of our leading companies in the pharmaceutical industry. Here the argument by Beechams that to comply with a U.S. discovery order would have meant producing documents, which Beechams were prohibited from producing under U.K. law, did not cut much ice. The U.S. District Judge, who later became the scourge of the Watergate conspirators, dealt with Beechams' protest with a robustness which commends at least some admiration. He simply found that Beechams had "made no effort to seek reconsideration" of the U.K. imposed prohibition and "to negotiate with the British Government to achieve compliance" with the U.S. court order. He then proceeded to enter an order resolving all facts against Beechams on all issues upon which Beechams had, by not producing the documents, failed to comply. This did the trick. The U.K. Department of Trade, possibly now being rather harder pressed by

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[16] House of Commons, Hansard, Nov. 1976.

[17] M.D.L. Docket No. 50, Misc. 450-70 (D.D.C.), Further Order Relating to Failure of Beecham Group Limited to Comply Fully With Discovery Orders, filed May 25, 1973 (Sirica, J.). The order was later modified. *See* Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747, 761 (1974).

Beechams, relented and permitted the production of all documents except thirty-six which were treated as confidential. Honour was satisfied and the proceedings continued.

Let me now return to the *Westinghouse* case. Of the various proceedings currently taking place in the United States, we need only note the civil proceedings by thirteen of the utility companies against Westinghouse in Virginia, the civil antitrust proceedings commenced in Illinois in October, 1976, and the grand jury investigation in which the jury was empanelled in Washington, D.C. in June, 1976. The outline facts will be well known to you. Between 1966 and 1974 Westinghouse entered into contracts with sixteen utility companies to whom they contracted to supply, in total, about 79 million pounds of uranium at fixed prices, subject only to escalation with increases in cost of living. In the 1970s uranium underwent a dramatic increase in price. It rose from $6 per pound in February, 1973, up to $41 per pound in the middle of 1976. By September, 1975, Westinghouse found that it was short of about 75 million pounds of uranium. As a result, Westinghouse was forced to notify the utility companies that they were unable to supply the uranium at the contracted prices. They alleged that an international cartel, formed by the producers of the uranium, caused a lack of supply of uranium, and the steep rise in uranium prices. In doing so they have named forty companies of which twenty-six are Canadian, Australian, South African, French or English. In its defense in the Virginia proceedings Westinghouse pleaded that their performance of the contracts has been rendered "commercially impracticable" because of the existence and activities of this alleged international cartel of uranium producers.

In September, 1976, Westinghouse received in Australia, through a group called "The Friends of the Earth," documents which purported to show that there existed such an international cartel in which the Rio Tinto Zinc companies and several other uranium producers including governments from France, Canada, Australia and South Africa were allegedly members. Such a group as "The Friends of the Earth" is not an organization which one would have thought had a unity of purpose with such a major industrial company as Westinghouse, but in the litigation in which Westinghouse was, and is, currently engaged in the United States, this environmental group and this giant company found a strong common interest. Moving across to England quite a dramatic story was to unfold. It was to bring to a head this long-time difficulty, on your side in the enforcing, and on our side in the resisting, of your discovery procedures. Let us run through the chronology. We start in the state of Virginia.

21st October, 1976: the District Court in Richmond, Virginia, upon the application of Westinghouse, issued two letters rogatory which commenced with these solemn words:

> The People of the United States of America to the High Court of Justice in England. Greetings.
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> Whereas, certain actions are pending in our District Court for the Eastern District of Virginia . . . .

These letters rogatory sought the assistance of the English High Court under our Evidence (Proceedings in Other Jurisdictions) Act, (1975), for an order summoning certain former and present directors and officers of the RTZ companies, who were all named to attend before an examiner in London to give their depositions, and an order directed to the RTZ companies for the production of a long list of documents. Both letters rogatory ended with the language of international comity: ". . . and we shall be ready and willing to do the same for you in a similar case when required."

28th October, 1976: Master Creightmore granted both requests.

22nd February, 1977: the Senior Master in the High Court, Master Jacob, upheld the orders of Master Creightmore.

10th May, 1977: Mr. Justice MacKenna, in turn, upheld the order of Master Jacob.

26th May, 1977: the Court of Appeal, presided over by the Master of the Rolls, Lord Denning, after a hearing which had lasted four days, upheld the judgement of Mr. Justice MacKenna and declared both letters rogatory enforceable. The Court of Appeal, in reaching its decision, took it upon themselves to strike from the list of documents requests which they did not consider sufficient for identifying the required documents. The Court also stated that the named deponents, if they established the grounds, would be entitled to claim privilege from self-incrimination under the Fifth Amendment of the U.S. Constitution, and that the RTZ companies themselves might be entitled to claim privilege from the production of documents under the U.K. Civil Evidence Act (1968) because these companies could be vulnerable to penal proceedings under Article 85 of the E.E.C. Treaty of Rome which prohibits participation in cartels. A witness in the United Kingdom, who has been required (the appropriate letter rogatory having been received) to give evidence under the U.K. Evidence (Proceedings in Other Jurisdictions) Act, (1975) in support of U.S. civil proceedings, can claim protection under the U.S. Fifth Amendment because under Section 3 of this U.K. Act a witness cannot be compelled to give evidence which he could not be compelled to give in the civil proceedings

in the country from which the request has come.

Events now followed in quick succession:

8th June, 1977: one of the named witnesses attends before a Consular Officer in the U.S. Embassy in London and claims the Fifth Amendment. The Consular Officer does not make a ruling, but seeks (on the telephone) guidance from the Judge, Judge Merhige, who is presiding over the proceedings in Virginia, whether the Fifth Amendment was well taken.

9th June, 1977: two more named witnesses take the Fifth Amendment. The Consular Officer again takes guidance.

13th-16th June, 1977: Judge Merhige, having flown to England, takes charge of the proceedings in the American Embassy.

14th June, 1977: Judge Merhige rules that the claims by the seven named witnesses for privilege under the American Fifth Amendment are well-taken, and directs that the witnesses do not have to answer any questions except to give their names and addresses.

15th June, 1977: Judge Merhige, still in the U.S. Embassy in London, receives a letter from the Deputy Assistant Attorney General, Antitrust Division, Department of Justice, in which the Judge is informed that the Department of Justice requires the evidence of the named witnesses for the purposes of the grand jury investigation. The letter further represents to the Judge that the Department of Justice will not utilize the testimony of any of the named witnesses in any criminal prosecution against that witness in the United States.

16th June, 1977: the Deputy Assistant Attorney General, Mr. Bannan, himself appeared before Judge Merhige in the American Embassy. As a loyal Englishman, I would like to record, that such was the urgency, Mr. Bannan flew from Washington by Concorde, but alas, my information does not go that far. When at the U.S. Embassy Mr. Bannan seeks a ruling, in the light of the representation contained in the letter of the previous day, that the Fifth Amendment privilege was no longer available, but Judge Merhige rejects this submission.

These events were now causing concern in other quarters.

27th June, 1977: the British Government sends a note to the State Department stating: (a) its concern that the Department of Justice, in order to obtain evidence for a criminal antitrust investigation, had intervened in a civil case, (b) the great importance attached by the British Government to the strict observance of agreed international procedures for the protection of individual rights and (c) its "strong hope that the Department of Justice will desist from its attempts to

undermine these procedures and discontinue its intervention . . . ." This note addressed to the State Department was not of influence — at least in the Department of Justice.

11th July, 1977: Mr. Bannan, in the Department of Justice, sends a letter to the U.S. Attorney for the Eastern District of Virginia, granting authorization under 18 U.S. Code Sections 6002 and 6003 for an application to be made for the grant of immunity from criminal prosecution in the United States to the named witnesses and for an order compelling them to give evidence.

On the next day (12th July) the U.S. Attorney General himself wrote a highly significant letter to the U.S. Attorney for the Eastern District of Virginia. Let me read from part of this important letter:

> These immunity requests are for the purpose of permitting testimony to be compelled in a civil litigation to which the United States is not a party. As you know, the Department of Justice has a firm policy against seeking such orders in private litigation except in the most extraordinary circumstances. In my judgement, the testimony of the individuals for whom orders are to be sought is necessary to the public interest. The extraordinary circumstances which led me to this conclusion include the following: (1) Those persons whose testimony is sought have refused to testify on the basis of the privilege against self-incrimination, and they are outside the *personal jurisdiction of the United States* courts; (2) These persons are not likely to come within the personal jurisdiction of United States Courts so long as the Department of Justice continues a sitting grand jury investigation of the international uranium industry; (3) *These persons are British subjects* and we have determined that *it is highly unlikely that their testimony could be obtained through existing arrangements for law enforcement co-operation between the United States and the United Kingdom;* (4) The Department of Justice has been largely unable to obtain information from these foreign persons about the subject matter of this investigation; (5) The testimony these persons may give may well be indispensable to the work of the grand jury; and (6) The subject matter of this grand jury is of particular importance. It is on this basis that I approve of the requests for orders requiring these individuals to give testimony.

I have emphasized those two passages because they were surely the passages which brought this whole dispute to a head. Let it be said in the words of Lord Wilberforce that this and the other letters by the Department of Justice were "of complete frankness and totally without subterfuge and disingenuousness." Indeed the hallmark of the entire assertion of the extraterritorial application of your laws is one of openness and candour. Yet, in their very honesty these passages were dynamite. They state, in effect, since the United States Government cannot obtain the cooperation of the British Government, then the British courts must be asked to surrender the necessary quantity of British sovereignty. Of course, in the United States, you have maintained the separation of powers between Government, Congress and the Judiciary to a degree which has never been our achievement. Your Attorney General, however, in writing this letter, allowed one essential point to

pass unnoticed. The doctrine of separation of powers is a doctrine of application *within a country* and *not outside it.* The prerogative for the protection of the sovereignty of a nation lies in the nation's government. No court in that country has any right or power to surrender that nation's sovereignty unless it is expressly instructed so to do by its government.

As night follows day, this letter placed an obligation upon our Attorney-General to intervene in these proceedings which had now reached our House of Lords. Again, as night follows day, our House of Lords was bound to acquiesce in the contention that, whatever be the merits of the case, the intervention by the Department of Justice did "constitute an infringement of the proper jurisdiction and sovereignty of the United Kingdom." Hence it was after a nine-day hearing (a long one despite the intervention of the Attorney-General) in October that, in reserved Speeches, on 1st December, 1977, the highest court in our land ruled that the investigation of activities, taking place outside the United States, of British companies and citizens (who are not subject to U.S. jurisdiction, concerning alleged infringements of U.S. antitrust laws) constituted an abuse of the sovereignty of the United Kingdom. In doing so, the House of Lords did uphold the right of the Virginian court, on the application of Westinghouse, to issue both letters rogatory but also upheld the right, under both letters rogatory, for the RTZ companies on the one hand, and the officers of the companies, on the other hand, to claim their respective privileges. The attempt, however, to have the witnesses deprived of their right to privilege, by procedures which brought in issue the sovereignty of the United Kingdom, dominated these dramatic proceedings.

What conclusions can be drawn? First and foremost that it must be in the interests of the whole world that there should be international "fair play" in the conduct of our commercial affairs, and, indeed, in the conduct of all activity which bears upon the interests of sovereign nations. It follows therefore that it is in the interests of the world that there should be a binding international code, in the conduct of all trade, which enforces the concept of fair competition. This is, of course, what your antitrust laws are all about. We cannot, indeed, leave the *Westinghouse* case without commenting that if their allegation is true, if there was an international cartel which deliberately restricted the supply of uranium and forced the price of uranium to go through the skies, then a monstrous offence has been perpetrated on international trade on a scale as great, if not greater, than was perpetrated by OPEC. Rio Tinto Zinc, and other alleged participants in the alleged international cartel, have not given us their account. It may be they felt

chiefly constrained from doing so by the fierceness of your discovery procedures. Yet, the point is still there. It is not in the interests of the world that such an investigation should be wrecked on the rocks of one country's sovereignty.

Second, it should be recognized that every country has the right to protect its own interests and the right to ask other countries to assist in the protection of those legitimate interests. It has long been recognized, by many countries, that criminals (who do not succeed in placing themselves into the category of political refugees) should be extradited (under bilateral treaties) from one country to another when they have committed (or allegedly have committed) crimes within the requesting country. Within this right, I suggest that countries should be entitled to protect their own interests and to seek cooperation from other countries for this purpose. Moreoever, I believe the United States has more cause than any other country in the free world to ask for cooperation from friends and allies. The extent, upon which the rest of the free world (if not all the world) relies upon the United States for its political and economic well-being is enormous. Your investments abroad, which stood at $347,000 million in 1976, are colossal. The number of peoples in the world who are directly, or indirectly, supported out of the U.S. economy is also of high proportions. I do not want to embarrass you by equating your position in world power with the British Empire of my young days, but, on no view are you any less powerful. I did try to find out from your Department of Commerce what was the number of people, throughout the world, who are employed by American companies, their subsidiaries and affiliates. Possibly my secretary turned off the taps of information by alluding to the British Empire. Be this as it may, no figures were available. Yet one can make some calculations. American companies in Britain are responsible for 9 percent of our total employment. Our total population is at the 56 million mark. Therefore on the premise that the working population (either by direct payments into the family budget or by indirect payments, via taxation, into the Welfare State) supports itself and the nonworking population, it can be calculated that in Britain alone American companies "support" about 5 million people. Turning worldwide, it is possible roughly to calculuate (or at least estimate) the total of persons employed by American companies, their subsidiaries and affiliates. In 1973, Anthony Sampson in his book "The Sovereign State of ITT" calculuated that the ITT companies employed worldwide 400,000 people. ITT is one of several giant U.S. companies operating abroad. Well over half of the first 200 corporations listed in "The 1977 Fortune 500 Directory" have substantial operations overseas. There are also many

smaller U.S. corporations with subsidiaries abroad. It would not, therefore, be unreasonable to multiply that figure by fifty. This would bring a worldwide total of 20,000,000 people employed by American-owned companies. If you then treat every such employee as supporting four persons, American industry abroad is directly supporting 80,000,000 people of the world. If I were asked to move from that figure, I would go higher rather than lower!

It seems to me, in these circumstances, that you are entitled to say to your allies: "You benefit from our economy . . . you benefit from the protection of our military forces at home and abroad . . . we expect your cooperation when our interests, our peoples and our economy are being damaged by those who seek to do us wrong." In short, your country does not lack justification in seeking extraterritorial application for its laws. Modified, where necessary, and implemented with the consent of other nations, these laws could and should be welcomed by the international community. Regrettably, your Congress and Government agencies have chosen to take unilateral and not universal action and unilateral action, as I have tried to show, is wrong for us, wrong for you, and wrong for the world at large. It offends America's allies and usually deprives her of her objectives. By killing the cooperation from those who should be assisting her, your Government is ending up by swatting the wrong flies. In using this simile, I cannot resist reminding you of an article which appeared in the Los Angeles Times about two-and-a-half years ago. It was printed under the title "Wrong Bugs Zapped":

> Los Angeles County emergency program to eradicate the Mediterranean fruit fly succeeded in wiping out 4 million flies over the week-end. There was one problem: they were the wrong flies. Instead of the wild flies now gorging themselves on the county's fruit and vegetables, a joint task force managed to kill 80% of a shipment of sterile flies from Hawaii. The sterile bugs were supposed to mate with their wild cousins in a man-induced birth control program. 'It's a setback, no doubt about that,' said Paul Engler, the county's agricultural commissioner.

Westinghouse can also ruefully join with Paul Engler and state in reference to the House of Lords proceedings, "It's a setback, no doubt about that."

For myself, I would join you in viewing international conventions, while useful for public debates, as a clumsy means of enabling nations of the world to join together for coercive and effective action. For my part, despite the recent bumps that the current Double Taxation Treaty has had here, I think much better progress can be made by separate treaties between nations. I suggest, therefore, that if our respective governments are not yet engaged in negotiating a treaty on the law of international competition, we should urge them to get down to it.

You have listened to me with great tolerance. I am most grateful for the kindness of your attention. Not for a moment do I hold out the citizens of Los Angeles, let alone the lawyers who practice in this county, to be the perpetrators of those activities which have been the subject of my complaint in this address. Indeed, it cannot be said that the international market has been singled out by your Government for special adverse treatment. I have been in this land long enough to know that the American citizen is as much the victim of regulatory agencies as anyone in the free world. Yet, all is not lost among those of us who despair over the creeping hand of bureaucracy. There was a report recently in England in a local newspaper which read as follows:

> A check is to be made by the Thorne Rural Council to discover how many people have died since having their names entered on the housing list.