RIO TINTO—ZINC CORPORATION v. WESTINGHOUSE ELECTRIC CORPORATION:[1] EXTRATERRITORIAL JURISDICTION IN ANTITRUST MATTERS

The recent House of Lords decision in the *Rio Tinto—Zinc* case raises once again the controversy in that area of law relating to the extra-territorial application of American antitrust regulation. There are essentially two contrasting views. On the one hand, the world's largest trading blocs, the United States and the European Economic Community, have demonstrated that they are intent on applying antitrust regulation on an objective territorial principle. If any restraint affects competition within the jurisdiction, and although the cause of the restraint originates beyond the jurisdiction, the antitrust laws will be applied.[2] Upon the alternative view, assertion of extraterritorial jurisdiction in antitrust matters is prejudicial to the sovereignty of the other state affected, unless the latter grants consent.

In asserting jurisdiction extraterritorially, the former group is seeking to maintain competition within its own borders.[3] Arrangements might be made beyond territorial boundaries which have the effect of restraining domestic competition within the jurisdiction. If these arrangements were permitted because they had been made beyond the territory, the antitrust laws would be rendered useless for it would be simple to evade the applicable sanctions. However, it has been when the former group (and the U.S. in particular) has attempted to enforce its own philosophy of economic regulation through extraterritorial application of antitrust laws that controversy and reaction have occurred.

The Reaction of Foreign States to the Purported Exercise of Extraterritorial Jurisdiction Prior to the House of Lords' Decision in Rio Tinto—Zinc

(i) IN THE FORM OF EXECUTIVE AND JUDICIAL COMMENT. There have been many instances when the reaction of foreign states to the extra-territorial application of antitrust laws has not been favourable to the state seeking to exert jurisdiction.[4] In the course of the investigation into the

[1] [1978] 1 All E.R. 434, [1978] 2 W.L.R. 81.

[2] For a comprehensive survey of the U.S. antitrust laws see Kintner (ed.), *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1978). The major EEC regulations are Articles 85 and 86 of the Treaty of Rome. See J. W. Howell, "Extraterritorial Application of Antitrust Legislation in the Common Market" (1973) 12 *Columbia Journal of Transnational Law* 169, 174-5.

[3] E.g. *U.S.* v. *Aluminium Co. of America (The Alcoa Case),* 148 F. 2d 416 (1945); *U.S.* v. *Watchmakers of Switzerland Information Centre Inc.,* 133 F. Supp. 40 (1955); 134 F. Supp. 710 (1955); I. R. Feltham, "The Canadian Radio Patents Case and the Peat Moss Case", (1960) 1 *University of British Columbia Law Review* 340; *Imperial Chemical Industries* v. *Commission of the European Communities (The Dyestuffs Case),* [1972] C.M.L.R. 557; *Rio Tinto-Zinc Corporation* v. *Westinghouse Electric Corporation, supra* note 1.

[4] *British Nylon Spinners Ltd* v. *Imperial Chemical Industries Ltd,* [1952] 2 All E.R. 780, 782 per Lord Evershed M.R.; *Seyfang* v. *G.D. Searle and Co.,* [1973] 1 All E.R. 290. In an investigation conducted by the U.S. into the existence of an alleged oil cartel of twenty one companies, subpoenas *duces tecum* were served requiring the production of documents located beyond the U.S. One recipient was the Anglo-Iranian Oil Company. The United Kingdom ordered A.I.O.C. to refuse compliance on the ground that the subpoena went to the very root of the "economic, strategic and political interest of Her Majesty's Government". (1953) 2 *International and Comparative Law Quarterly* 645, 646.

alleged uranium cartel in the *Rio Tinto—Zinc* case, the Attorney-General of the United Kingdom stressed in his submission to the Law Lords that U.S. antitrust inquiries posed a threat to British sovereignty. Mr Silkin said that attempts to press investigations outside a state's boundaries were an extension of economic policy and that the representations made to Her Majesty's Government by other states reflected the aggravation caused by U.S. attempts to stretch the jurisdiction of American antitrust laws.[5]

(ii) IN THE FORM OF LEGISLATION. Many states have enacted legislation in reaction to U.S. antitrust investigations,[6] among them Australia[7] and the United Kingdom.[8] In Canada, statutory provisions have been enacted at state level.[9]

The Facts in Rio Tinto—Zinc

Westinghouse had contracted between 1966-1974 with utilities companies engaged in the production of electricity in the U.S., undertaking to supply 79 million pounds of uranium in the period up to and including 1994. The contracts were of a fixed price nature, subject only to escalation with rises in the cost of living. In 1973, the market price of uranium was U.S.$6 per pound, but it had risen by 1976 to U.S.$41 per pound. The fixed price character of the contracts did not protect Westinghouse from this occurrence and in September 1975, the Corporation notified the other parties that it was unable to fulfill the obligation of supply. 16 utilities companies commenced actions for breach of contract, claiming damages in the region of U.S.$2,000 million. At Westinghouse's request, 13 of these actions were consolidated for the purpose of pre-trial procedures in the U.S. District Court at Richmond, Virginia.

Westinghouse claimed the defence of commercial impracticability,[10] on the ground that an international uranium cartel had been formed among Governments and producers, which had operated to inflate artificially the market price of the mineral. However, at this stage Westinghouse was unable to prove these allegations as it had to do if the commercial impracticability defence was to succeed. Then, in September 1976, Westinghouse received from "The Friends of the Earth" photostat copies of documents supporting their allegations. These documents revealed the

[5] *The Australian*, October 27, 1977, p. 11, col. 1. Note also the recent attempts by the Australian government to block U.S. prosecutions of Australian uranium companies allegedly involved in an international conspiracy. See *Australian Financial Review*, September 15, 1978, p. 4.

[6] International Law Association, Report of the 55th Conference at New York, 1972, p. 143.

[7] *Foreign Proceedings (Prohibition of Certain Evidence) Act*, 1976. See Note, (1977) 50 *Australian Law Journal* 607 and K. W. Ryan, "The International Application of U.S. Anti-Trust Legislation", paper presented to 1978 A.U.L.S.A. conference (August) Perth.

[8] *Shipping Contracts and Commercial Documents Act* 1964.

[9] Ontario, *Business Records Protection Act*, 1960. In addition, the Federal Government sought to establish a Competitive Practices Tribunal, a "watch-dog" body charged with ensuring that foreign laws, decrees or government directions would not take effect in Canada contrary to Canadian competition policy: I.L.A. Report, *supra* note 6, p. 144.

[10] *Uniform Commercial Code*, § 2-615.

involvement of two British companies, Rio Tinto—Zinc Corporation and R.T.Z. Services Ltd (hereinafter referred to as the R.T.Z. companies).

On 15th October 1976, Westinghouse instigated civil proceedings in Illinois against members of the alleged cartel for breach of U.S. antitrust laws, claiming treble damages in the region of U.S.$6,000 million.[11] Applications were lodged in the course of pre-trial proceedings at Richmond on the same day, seeking oral evidence and production of documents from various corporations, among them the R.T.Z. companies. These applications were heard by Merhige J. and on 21st October 1976, the letters rogatory were granted in the form requested by Westinghouse addressed to the English High Court.

On 28th October 1976, Master Creightmore on the *ex parte* application of Westinghouse made orders under section 2 of the *Evidence (Proceedings in Other Jurisdictions) Act* 1975 giving effect to the letters rogatory. The R.T.Z. companies and seven named witnesses (employees of the companies) of whom the letters rogatory sought oral depositions, applied to have the orders set aside on the ground that the letters rogatory were merely seeking discovery as opposed to evidence and therefore should be rejected pursuant to sub-section 2(4) of the 1975 Act. This application was refused by the Senior Master, then again on further appeal by both MacKenna J. in the High Court and the Court of Appeal. Although the Court of Appeal dismissed the appeals and ordered execution of the letters rogatory on the grounds that both the documentary and oral evidence requested were required for the Richmond proceedings, and that the letters did not constitute an attempt to obtain prohibited pre-trial discovery, the Court modified the specification of the documents requested, so as to narrow the range of the documents required to be produced.[12]

The Court of Appeal also made two crucial declarations at the request of the parties.[13] The first was to the effect that the R.T.Z. companies might be able to claim privilege from production of the documents under sub-section 14(1) of the *Civil Evidence Act* 1968 by virtue of sub-section 3(1)(a) of the 1975 Act, on the ground that production would tend to expose the companies to a penalty within sub-section 14(1) in the form of fines imposable by the European Commission for breach of Article 85 of the Treaty of Rome. The second declaration was to the effect that the individual witnesses—appellants would similarly be entitled to a claim of privilege before the examiner under the Fifth Amendment of the U.S. Constitution, by virtue of sub-section 3(1)(b) of the 1975 Act.

On 8th June 1977, one of the witnesses, Kenneth Bayliss, appeared before a consular official nominated as examiner at the U.S. Embassy in London, in compliance with the High Court order of 28th October 1976, which

11 Westinghouse nominated as members of the alleged cartel a number of companies, among them C.R.A.; M.K.U. (in which the Australian Government is a shareholder); Queensland Mines; Novanda and Pan Continental. *Australian Financial Review*, March 19, 1977, p. 36, col. 1.

12 *In Re Westinghouse Electric Corporation Uranium Contract Litigation M.O.L. Docket No. 235* [1977] 3 All E.R. 703, [1977] 3 W.L.R. 430.

13 *In Re Westinghouse Electric Corporation Uranium Contract Litigation M.O.L. Docket No. 235 (No. 2)* [1977] 3 All E.R. 717, [1977] 3 W.L.R. 492.

the Court of Appeal had upheld in its decision of 26th May 1977. Bayliss refused to answer questions and claimed the privilege against self-incrimination of the Fifth Amendment. All seven witnesses—appellants subsequently followed this example. Judge Merhige arrived in London and ruled on 14th June 1977, that privilege was well taken. The R.T.Z. companies in turn claimed privilege under sub-section 14(1) of the 1968 Act when they appeared before the examiner on 10th June 1977, although they did release six documents requested in the letters rogatory.

On 15th June 1977, Judge Merhige received a letter[14] from the Deputy Assistant Attorney-General, Antitrust Division, U.S. Department of Justice. This stated that the evidence of the witnesses named in the letters rogatory was required for a grand jury investigation.[15] This message was emphasized further when a representative of the Department appeared before the Judge the next day.[16] Merhige J. ruled nevertheless that the witnesses should not be required to answer questions which they considered self-incriminatory. Subsequently, with the consent of the U.S. Attorney-General,[17] the Department of Justice applied to Judge Merhige for an order under U.S.C. sections 6002-3 compelling testimony in respect of each named witness-appellant, which the Judge was obliged to grant.[18] Mr Bayliss attended the examiner once again on 25th July 1977 at the U.S. Embassy, where he refused to answer questions, stating that he sought the assistance of the English Court on the question whether the individual witness was entitled to privilege under the Fifth Amendment.

The R.T.Z. companies and the individual witnesses appealed to the House of Lords against the Court of Appeal decision that the order of 28th October 1976, giving effect to the letters rogatory, should be upheld. Westinghouse cross-appealed against the Court of Appeal decision upholding the R.T.Z. companies' claim to privilege under sub-section 14(1) of the *Civil Evidence Act* 1968. While Westinghouse conceded that the sanctions imposable under the E.E.C. antitrust provisions were penalties within the meaning of the sub-section, the corporation contended that since the European Commission had knowledge of the cartel but had not taken action against the R.T.Z. companies, the likelihood of proceedings being instigated and a fine subsequently imposed would not be increased by production of the requested documents.

In respect of the appeals by the R.T.Z. companies and the individual witnesses, the English Attorney-General intervened. Mr Silkin informed the House of Lords that requests by the U.S. Government for evidence to be given by companies or persons who were outside the jurisdiction of the U.S., for the purpose of investigations conducted within the U.S. into alleged violations of U.S. antitrust laws, were considered by Her Majesty's

[14] Reproduced [1978] 1 All E.R. 434, 457-8, [1978] 2 W.L.R. 81, 105.
[15] A grand jury had been empanelled in June, 1976, to investigate possible violations of the U.S. antitrust laws by members of an alleged uranium cartel and to instigate criminal proceedings if violations were established.
[16] [1978] 1 All E.R. 434, 458, [1978] 2 W.L.R. 81, 104-5.
[17] Expressed in a letter of 12th July, 1977, and reproduced [1978] 1 All E.R. 434, 459, [1978] 1 W.L.R. 81, 106-7.
[18] Under *U.S.C.* sub-s. 6003(a).

Government to constitute infringement of the sovereignty of the United Kingdom.[19]

The Issues in Rio Tinto—Zinc and the Decision of the House of Lords

(i) Should the order of 28th October 1976 enforcing the letters rogatory be upheld? In view of the rulings of the House of Lords relating to the claims of privilege by the R.T.Z. companies under sub-section 14(1) of the *Civil Evidence Act* 1968, and by the individual witnesses-appellants under the Fifth Amendment, the decision of the majority to uphold the order of 28th October 1976 was not of great importance to the eventual outcome of the litigation. However, this issue merits consideration because the decision is of crucial importance to any lawyer drafting an application for letters rogatory outside the United Kingdom, seeking information, either in the form of documents or oral depositions, from companies or persons within the jurisdiction of the English High Court. Determination of this question depended upon whether the substance of the letters rogatory fell within the terms of the *Evidence (Proceedings in Other Jurisdictions) Act* of 1975, and more specifically whether the information required was "direct" evidence for use at the Richmond proceedings as opposed to information which may lead to the discovery of evidence.

The House considered the terms of the letters rogatory, first in relation to the production of documents, and secondly with regard to the individual witnesses. It was decided by the majority that the three conditions precedent of section 1 of the 1975 Act were satisfied.[20] The judgments of the Law Lords illustrate that they were conscious of the vital distinction enunciated by Devlin J. in *Radio Corpn. of America* v. *Rauland Corpn.*[21] and maintained by sub-sections 2(3) and 2(4) of the 1975 Act, between "direct" and "indirect" material.[22] The power of the High Court to give effect to letters rogatory is limited by these sub-sections to prevent what had been described as "fishing" expeditions.[23]

19 [1978] 1 All E.R. 434, 448, [1978] 1 W.L.R. 81, 93-4.

20 Section 1
"Where an application is made to the High Court . . . for an order for evidence to be obtained in . . . (England and Wales) . . ., and the court is satisfied—(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ('the requesting court') exercising jurisdiction . . . in a country or territory outside the United Kingdom; and (b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated, the High Court . . . shall have the powers conferred on it by the following provisions of this Act."

21 [1956] 1 All E.R. 549, 551, [1956] 1 Q.B. 618, 643-4.

22 Sub-section 2(3) states that an order of the High Court giving effect to the request "shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order. . . ."
Sub-section (4) states that an order under section 2 shall not require a person—"(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (b) to produce any documents other than particular documents specified in the order as being documents appearing to the Court making the order to be, or to be likely to be, in his possession, custody or power."

23 *Radio Corpn. of America* v. *Rauland Corpn.* [1956] 1 All E.R. 549, 554, [1956] 1 Q.B. 618, 649 per Lord Goddard C.J.

Wilberforce, Diplock and Keith L.JJ. upheld the order of 28th October 1976 in so far as the application referred to particular individual documents, ruling that that part of the application relating to particular classes or categories of documents could not be tolerated under sub-section 2(4). Their Lordships approved the "blue pencil" approach adopted by the Court of Appeal in amending the application so that it fell within the limitations of the 1975 Act, although it is clear that had the matter required further consideration they would have been less liberal.[24] Lord Wilberforce was tempted to reject the letters rogatory out of hand; thus adopting the position of Viscount Dilhorne and Lord Fraser, which would have had the effect of the House handing down the opposite ruling. However, since the schedule attached to the letters rogatory did list a number of specified documents, some of which might be in the possession of the R.T.Z. companies (or in the possession of a subsidiary over which they exercised power and control); because these appeared to be relevant to the existence of a uranium cartel which might be relevant to the Westinghouse defence of commercial impracticability in the Richmond proceedings, Lord Wilberforce was prepared to follow the spirit of judicial assistance to foreign courts displayed by the 1975 Act and give effect to the letters rogatory as far as possible.[25]

The Law Lords held (Viscount Dilhorne dissenting) that that part of the order relating to the individual witnesses should be upheld. In so far as the application related to those individuals who were employed by the R.T.Z. companies, the House considered that since these persons appeared to have attended or have knowledge of meetings at which matters relevant to the existence of a cartel may have been discussed, it was a reasonable assertion that the testimony of those nominated was required at the trial. Once again the "blue pencil" approach was to be applied to strike out that part of the letters rogatory relating to unidentified witnesses with whom a connection could not be established. Thus the generality of the application as received by the English court was not held to invalidate the entire request.[26]

Viscount Dilhorne ruled that the request for the examination of named persons was connected to that for the production of documents on the ground that the witnesses would be examined on the matters to which the sought-after documents related. Since His Lordship had refused to uphold that part of the order relating to the production of documents, the application relating to the examination of witnesses should be rejected also.[27] Viscount Dilhorne concluded that the substance of the letters demonstrated that the discovery and examination of witnesses was of a "fishing"

[24] [1978] 1 All E.R. 434, 443, [1978] 2 W.L.R. 81, 88 per Lord Wilberforce; [1978] 1 All E.R. 434, 463, [1978] 2 W.L.R. 81, 111-2 per Lord Diplock; [1978] 1 All E.R. 434, 477, [1978] 2 W.L.R. 81, 127-8 per Lord Keith; *contra* Viscount Dilhorne, [1978] 1 All E.R. 434, 454, [1978] 2 W.L.R. 81, 101; Lord Fraser [1978] 1 All E.R. 434, 470-1, [1978] 2 W.L.R. 81, 120.

[25] [1978] 1 All E.R. 434, 444, [1978] 2 W.L.R. 81, 89.

[26] [1978] 1 All E.R. 434, 444, [1978] 2 W.L.R. 81, 89 per Lord Wilberforce; [1978] 1 All E.R. 434, 463, [1978] 2 W.L.R. 81, 111 per Lord Diplock; [1978] 1 All E.R. 434, 471, [1978] 2 W.L.R. 81, 120 per Lord Fraser; [1978] 1 All E.R. 434, 478, [1978] 2 W.L.R. 81, 129 per Lord Keith.

[27] [1978] 1 All E.R. 434, 454, [1978] 2 W.L.R. 81, 100-1.

character. It might obtain some "direct" evidence; it might obtain information which would lead to the securing of "direct" evidence. Therefore section 1 of the 1975 Act had not been satisfied, for it was impossible to determine whether the letters sought evidence only or mainly. In any event, Viscount Dilhorne ruled that even if section 1 had been fulfilled, since he believed that the application constituted a "fishing" operation, the order of 28th October 1976, could not be upheld.[28]

(ii) The question whether the R.T.Z. companies could claim privilege against production of the documents requested by virtue of section 14 of the *Civil Evidence Act* of 1968.[29] This issue under section 3(1)(a) of the *Evidence (Proceedings in Other Jurisdictions) Act* 1975 was a matter of English law.[30] The House of Lords unanimously upheld the decision of the Court of Appeal that a fine imposable by the European Commission under Articles 85 and 86 of the Treaty of Rome and Article 15 of E.E.C. Council Regulation 17/62 did constitute a "penalty" for the purpose of section 14, and that it is enforceable by proceedings for recovery of a penalty under the *European Communities (Enforcement of Community Judgments) Order* 1972.

Westinghouse had contended that production would not tend to expose the R.T.Z. companies to prosecution and penalty on the ground that the Commission had knowledge of the cartel arrangement but nevertheless had not instigated proceedings. This argument was rejected. The Law Lords applied the test laid down in *Triplex Safety Glass Co.* v. *Lancegay Safety Glass (1934) Ltd*[31] to the effect that if there is a reasonable ground to apprehend danger then a real risk exists and privilege should be granted. That the Commission had not acted to enforce the E.E.C. antitrust laws was held not to be a factor in this calculation.[32] Viscount Dilhorne added

[28] [1978] 1 All E.R. 434, 454-5, [1978] 2 W.L.R. 81, 101-2.

[29] "(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; . . ."

[30] Section 3(1)
"A person shall not be compelled by virtue of an order under section 2 to give any evidence which he could not be compelled to give—(a) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or (b) subject to sub-section (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.
(2) Sub-section (1)(b) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either—(a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or (b) conceded by the applicant for the order; . . ."

[31] [1939] 2 K.B. 395.

[32] [1978] 1 All E.R. 434, 444-5, [1978] 2 W.L.R. 81, 89-90 per Lord Wilberforce; [1978] 1 All E.R. 434, 456-7, [1978] 2 W.L.R. 81, 103-4 per Viscount Dilhorne; [1978] 1 All E.R. 434, 464-5, [1978] 2 W.L.R. 81, 112-3 per Lord Diplock; [1978] 1 All E.R. 434, 471-3, [1978] 2 W.L.R. 81, 121-2 per Lord Fraser; Lord Keith stated that he had nothing useful to add ([1978] 1 All E.R. 434, 478, [1978] 2 W.L.R. 81, 129) and agreed with Lord Diplock ([1978] 1 All E.R. 434, 476, [1978] 2 W.L.R. 81, 127).

that once the real risk is established "great latitude is to be allowed to the witness and to a person required to produce documents".[33]

(iii) The claim to privilege made by the individual witnesses against giving oral evidence on the ground that to do so would be self-incriminatory. It was the unanimous decision of the House of Lords that the individual witnesses were entitled to the protection afforded by the Fifth Amendment by virtue of section 3(1)(b) of the 1975 Act.[34]

(iv) The attempt by the U.S. Department of Justice to misuse the procedure provided by the 1975 Act. The House of Lords was prepared to accept that the evidence demanded by the letters rogatory was required by Westinghouse for the Richmond proceedings. Consequently, the House had reached (with the exception of Viscount Dilhorne and, in part, Lord Fraser) the decision that the letters should be amended by the English Court and given effect by order within the 1975 Act. However, evidence which came to light after the order of 28th October 1976, in the form of the letter of the U.S. Attorney-General and the subsequently successful application for orders under §§ 6002-3, revealed beyond doubt that the evidence required by the letters rogatory was in truth to be used for the purposes of the grand jury investigation. This new evidence demonstrated that the letters no longer complied with section 1(b) of the 1975 Act, and since criminal proceedings had yet to be instigated did not fulfill section 5(1)(b) of that same statute.[35] The House regarded the procedure of §§ 6002-3 as an attempt to obtain evidence in spite of these failures. The 1975 Act had never been intended to extend the powers of a grand jury investigation extraterritorially. The House accepted the policy declarations of the Attorney-General of the United Kingdom that the court should exercise its discretion and not give effect to letters rogatory at the expense of the sovereignty of Her Majesty's Government.[36] Therefore, the House ruled (a) that the appeals of the R.T.Z. companies and individual witnesses should be allowed; (b) that the order of 28th October 1976, should be discharged; (c) that the Westinghouse appeal should be dismissed. It was ordered that Westinghouse should pay costs of the appeals and cross-appeals before the House.

An International Antitrust Convention

The decision in *Rio Tinto—Zinc* affirms once again the rejection of any application of antitrust regulation on the basis of an objective territorial

[33] [1978] 1 All E.R. 434, 457, [1978] 2 W.L.R. 81, 104.
[34] *Supra* note 30.
[35] Section 5(1)
"The provisions of sections 1 to 3 above shall have effect in relation to the obtaining of evidence for the purposes of criminal proceedings as they have effect in relation to the obtaining of evidence for the purposes of civil proceedings except that . . . (b) paragraph (b) of . . . (section 1) . . . shall apply only to proceedings which have been instituted; . . ."
[36] [1978] 1 All E.R. 434, 445-8, [1978] 2 W.L.R. 81, 90-4 per Lord Wilberforce; [1978] 1 All E.R. 434, 457-60, [1978] 2 W.L.R. 104-8 per Viscount Dilhorne; [1978] 1 All E.R. 434, 465-7, [1978] 2 W.L.R. 81, 113-6 per Lord Diplock; [1978] 1 All E.R. 434, 473-6, [1978] 2 W.L.R. 81, 123-7 per Lord Fraser.

principle. Lord Wilberforce said: "It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack".[37] Although the matter was not considered in depth by the House in this instance, there is much authority, even in American jurisprudence,[38] which demands that the laws relating to antitrust be applied only upon the basis of territoriality.[39]

The application of national antitrust regulation on an objective territorial principle can cause only confusion and threaten the harmony which exists between the leading Western trading partners. Transnational corporations face a bewildering array of national laws relating to antitrust. The need for a practical solution is emphasized by the persistence of the U.S. in enforcing its own economic standards upon the remainder of the world.[40]

There have been two attempts to harmonize the antitrust laws of different nations. The first attempt was the successful amalgamation of the antitrust laws of the nine member states of the E.E.C. The second attempt was initiated by the United Nations. In 1953, the U.N. *Ad Hoc Committee on Restrictive Business Practices* reported to the Economic and Social Council submitting a draft for the prevention and control of restrictive business practices in international trade.[41] The Committee had analysed the antitrust provisions, constitutions and laws of some sixty states. The great contrasts in national policies and expectations was the major reason for failure. It proved unrealistic to assimilate so many conflicting attitudes; impractical to pursue the aim of one uniform legislative standard.[42]

The lack of international consensus as to the definition of a "restrictive trade practice" constitutes the principal barrier to the formulation of

[37] [1978] 1 All E.R. 434, 448, [1978] 2 W.L.R. 81, 94.

[38] *American Banana Co.* v. *Utd. Fruit Co.*, 213 U.S. 347, 357 per Holmes J. (1909); *U.S.* v. *Sisal Sales Corpn.*, 274 U.S. 268 (1927); *U.S.* v. *National Lead Co.*, 63 F. Supp. 513 (1945); *U.S.* v. *General Electric Co.*, 82 F. Supp. 753 (1949); *U.S.* v. *Minnesota Mining and Manufacturing Co.*, 92 F. Supp. 947 (1950); *U.S.* v. *Holophane Co.*, 119 F. Supp. 114 (1954).

[39] The I.L.A. has studied the problems inherent in the extra-territorial application of antitrust regulation in detail. The matter appears prominently in Conference Reports between 1964-72. See especially the Fifth Report of the Committee on the Extra-territorial Application of Restrictive Trade Legislation delivered at the New York Conference, *supra* note 6, p. 174.
See R. Y. Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws" (1957) 33 *British Yearbook of International Law* 146, 147; G. W. Haight, "International Law and Extraterritorial Application of Antitrust Laws" (1954) 63 *Yale Law Journal* 639, 640.

[40] Ten such cases have been brought since 1973. This is in contrast to the period 1961-73 when only three cases were brought. In June 1977, the Chief of Antitrust in the U.S. Department of Justice warned that "the U.S. antitrust laws . . . are not limited to transactions which take place within our borders. When foreign transactions have a substantial and forseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place." *Australian Financial Review*, July 1, 1977, p. 2, col. 5.

[41] *Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council*, Annex 2, 16 U.N. ECOSOC, Supp. 11 (1953).

[42] S. Timberg, "An International Antitrust Convention: A Proposal to Harmonize Conflicting National Policies Towards the Multinational Corporation" (1973) 8 *Journal of International Law and Economics* 157.

successful inter-government consultation procedures. While a small group of states may experience little difficulty in reaching agreement, as illustrated by the success of the E.E.C. provisions, efforts to attain consensus between developed and developing countries have proved disappointing.[43]

In October 1976, the *Third Ad Hoc Group of Experts on Restrictive Business Practices* convened pursuant to the Resolution adopted at the U.N.C.T.A.D. ministerial meeting earlier in the year. The stated purpose of the Group was the

> "formulating (of) a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of those countries."[44]

Sigmund Timberg was Secretary to the U.N. *Ad Hoc Committee*. He has proposed the establishment of a series of supranational institutions on the lines of the E.E.C. model.[45] This type of scheme has three requirements. A procedure must be set up whereby the facts of a particular dispute may be investigated so that it may be determined whether the standards of a Convention have been violated. The second requirement is for an agency to conduct this investigation and determine whether in fact a violation has occurred. In this event the agency would recommend remedial measures. The final requirement is for a body to enforce the recommendations of the agency.

The success of the E.E.C. model may be explained by two contributing factors: the relatively small membership of that organization and the homogeneity of the members. To apply that same model to a far greater body of nations by means of a multilateral convention is a very different proposition. However, the alternative, that is the present unilateral exercise of extraterritorial jurisdiction in antitrust matters in the nature of that thwarted in *Rio Tinto—Zinc*, is poisonous to our international economic and political harmony. This alternative will destroy the relationship between free-enterprise states. A Convention is the only solution.

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[43] Report of UNCTAD Second *Ad Hoc* Group of Experts on Restrictive Business Practices, UNCTAD/TD/B/C.2/AC.5/6 (1976).
[44] Provisional Agenda for Meeting of *Ad Hoc* Group of Experts on Restrictive Business Practices, TD/B/C.2/AC.
[45] Timberg, *supra* note 42 at 179.

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