Had an International Court decision been rendered unfavorable to Egypt's position, and that government had refused to abide by it, sanctions could have been applied, even with force in the background if necessary, with the support of other law-abiding nations and of their public opinion. Had the decision been in support of the position of Egypt, there would still have remained with the claimant states any political pressures or economic sanctions to which the Egyptian Government might be amenable.

The unhappy fate of Sir Anthony Eden should be a lesson to other statesmen tempted to follow a similar course. His example in defeat may serve a more constructive purpose in promoting the rule of law in international relations than would have his success in resorting to armed force.

GEORGE A. FINCH
Honorary Editor-in-Chief

EXTRATERRITORIAL APPLICATION OF UNITED STATES LEGISLATION AGAINST RESTRICTIVE OR UNFAIR TRADE PRACTICES

For several years now legal literature in the United States has carried articles *pro* and *con* on the question whether the application of the American antitrust laws to transactions taking place wholly or partially abroad and being directed primarily toward distributive activity outside the American market, violates "international law."[1]

On the same page of a recent advance sheet[2] the Supreme Court has dealt in sibylline fashion with certain issues involved in the debate, refusing to rehear its denial of certiorari in *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*,[3] and affirming by memorandum decision the District Court decision in *Holophane Company, Inc.* v. *United States.*[4] Both cases involve the issue of the international validity of so-called "extraterritorial" application of United States legislation for the regulation of economic conduct, *i.e.*, in both cases the contention was made that "international law"[5] would forbid the extension by the United States of its legislative authority to the conduct in issue.

Vanity Fair Mills was extensively reported in the last issue of the

[1] Haight, "International Law and Extraterritorial Application of the Anti-Trust Laws," 63 Yale L. J. 606 (1954); Whitney, "Sources of Conflict between International Law and the Anti-Trust Laws," *ibid.* 640; Report of the Attorney General's National Committee to Study the Anti-Trust Laws, Ch. II, pp. 65–115 (Unnumbered Govt. Doc., March 31, 1955); Stocking, "The Attorney General's Committee's Report: The Business Man's Guide Through Anti-Trust," 44 Georgetown L. J. 1, 27–30 (1955); Proceedings, Section of International and Comparative Law, American Bar Association, 1953, pp. 75–100; Timberg, Emmerglick and Whitney, "Anti-Trust Problems in Foreign Commerce," 11 Record of the Ass'n. of the Bar of the City of New York 3–41 (1956); Note, "Extraterritorial Application of the Anti-Trust Laws," 69 Harv. L. Rev. 1452 (1956).

[2] 77 S. Ct. 144; 352 U. S. 903, 913 (1956).

[3] Certiorari denied, 77 S. Ct. 96, 352 U. S. 871 (1956); opinions below, 234 F. 2d 633 (2d Cir., 1956), affirming (with modification) 133 F. Supp. 522 (D.C.N.Y., 1955).

[4] Opinion below, 119 F. Supp. 114 (D. C. Ohio, 1954).

[5] Whether public or private or both is not always clear; *cf.* Timberg, *loc. cit.* (note 1 above) 13–14.

JOURNAL[6] and will not be briefed again here. Suffice it to say that both the District and the Circuit courts held that neither substantive Federal law against trademark infringement nor American Federal courts as *fora* applying Canadian law would be available to an American plaintiff seeking redress against a Canadian corporate defendant (properly found before the American tribunal) for infringing registration under Canadian law of plaintiff's trademark. For our purposes the most important aspect of the case is its interpretation of the Lanham Act in the context of the conflicts-of-jurisdiction situation before the Court. The Act protects registered trademark owners against confusing similarity, palming off, and infringement "in commerce." "Commerce" is defined by the Act as "all commerce which may lawfully be regulated by Congress." Distinguishing *Steele* v. *Bulova Watch Co.*,[7] the District and Circuit courts held that Congress had not intended to reach the situation of an alien defendant whose allegedly infringing mark continued on registry under the laws of the country of his nationality, even though the effect of infringement was to affect United States commerce. Policy considerations were plainly influential. For example, the District Court spoke as follows:

> [Plaintiff] urged, however, that since the Court had personal jurisdiction over the defendant, it could order the defendant to file a cancellation of its Canadian trademark and thus accomplish the same result [*i.e.*, change registration of the mark in Canada]. This attempt to do by indirection that which a Court has no power to do directly may lead only to confusion and an unseemly conflict between the Courts of two jurisdictions. [At this point the Court's note 1 cites the instance of *United States* v. *Imperial Chemical Industries* in conflict with the British decision in *British Nylon Spinners* v. *Imperial Chemical Industries.*]
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> We in this Country undoubtedly would be outraged if American companies having branches in foreign lands were faced with the possibility that the Courts of all these lands would assume jurisdiction to determine the rights of the American company in its home land to trademarks, copyrights, or patents granted or registered under the laws of the United States. To attempt to assert that because a Canadian company has a branch in New York, the Courts of this Country can determine its rights in Canada in Canadian trademarks registered in Canada is equally far-fetched. Such an attempted assertion of jurisdiction might provoke justified resentment. [At this point the Court's note 2 refers to the 1947 incident which resulted in the enactment in Ontario of a statute forbidding sending records out of the Province in response to external subpoenas, following an effort to conduct a grand jury investigation in the United States of possible restrictive practices in the Canadian pulp and paper industries.][8]

The Circuit Court referred to the same range of considerations in upholding the discretion of the District Court in refusing to take jurisdiction on diversity grounds under the doctrine of inconvenient forum.[9]

[6] 51 A.J.I.L. 103 (1957).

[7] 344 U. S. 280 (1952); digested in 47 A.J.I.L. 318 (1953).

[8] 133 F. Supp. 522, 528–529, and Court's notes.

[9] 234 F. 2d 633, 647.

In *Holophane* a Delaware corporation was charged by the United States under Section 1 of the Sherman Anti-Trust Act with entering division-of-territories agreements with Holophane, Limited, a British corporation, and La Société Anonyme Française Holophane, a French corporation. The corporate ancestor of the American company was a subsidiary of the British company, which owned the basic patents and trademarks; but some years before the litigation the American group had (it was found)[10] become independent. The District Court ruled that it had jurisdiction over the defendant and the subject-matter and that the United States should have a decree. The decree ordered the market-allocation agreements canceled, prohibited Holophane-U.S.A. from engaging any longer in the restrictive practices in which it had undertaken by contract to engage, and ordered the American company to take affirmative steps abroad to compete in the territories allocated by the intercompany agreements to the British and French Holophane companies.[11]

The Supreme Court's unanimous memorandum affirmance, except for paragraph XI of the decree (not carried in the lower court report and not quoted by the memorandum decision),[12] which was affirmed by an equally divided Court, is obviously little guidance in a situation where some had expected guidance.[13] It is necessary, in appraising the significance of the case to consider the colloquy on oral argument. It is clear from the unofficial but professional reporting[14] of the oral argument in the Supreme Court that the main burden of Holophane's contention was that "international law" was violated by those portions of the District Court's decree requiring affirmative competitive conduct abroad. Counsel argued:

> . . . . [P]ersonal jurisdiction solely over American participation in the agreement did not give the district court power to order affirmative business acts abroad in violation of the territorial agreement. There are two things wrong with this direction of affirmative action abroad. First of all it violates "the principles of the law of nations recognized by this Court" in such cases as *Ware* v. *Hylton,* 3 U. S. 199, and *The Apollon,* 221 U. S. 159; and second, it gives the antitrust laws extra-territorial effect in countries where the agreement in question is perfectly legal.

In questioning counsel for Holophane and for the United States, members of the Court showed awareness of the problem which would exist if the affirmative action required of the defendant should give rise to liability

[10] Findings of Fact Nos. 10 and 11, 119 F. Supp. 114, 116.

[11] New York Times, Nov. 14, 1956, Financial Section.

[12] 1954 Trade Cases ¶ 67,679 should be referred to for the terms of the decree. Par. XI is the portion of the decree, paraphrased in the text above, requiring affirmative competitive action by the defendant. The affirmance by even division is tantalizing.

[13] Two members of the California Bar with experience and professional interest in the future of antitrust decrees directing conduct abroad expressed such expectations during their participation in the Second Summer Workshop in International Legal Studies at the University of California School of Law (Berkeley), 1956.

[14] 25 Law Week 3141 (1956).

under the law of the place of acting. Some of the hints as to possible lines of solution or thinking are interesting:

> (1) Defendant in the American proceeding might be ordered to get a declaratory judgment in the foreign court that the restrictive agreement cannot be performed for illegality under American law (Mr. Justice Frankfurter). In reply counsel for Holophane took the position that the American court would not have this power, because it would "collide" with foreign law, *i.e.*, British law under which the agreement would be legal. In response, the Justice mooted whether British law were so plain, mentioning the Monopoly Law; but counsel persisted in his view.
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> (2) Counsel for the United States emphasized that there had been no showing that the affirmative acts required by the decree would violate any foreign law or the valid judgment of any foreign court. In ensuing discussion on proof of foreign law the Government contended that Holophane would have to prove clear illegality under foreign law and that the Court should not take judicial notice of the foreign law in this particular.
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> (3) There can be detected in the colloquy intimations that in the eventuality that the defendant find itself directed to violate foreign law, hardship might be mitigated by subsequent interpretation of the prior American decree. Thus, counsel for the Government suggested that the decree in the *Holophane* case might not necessarily require the defendant to go abroad and act so as to subject itself to the jurisdiction of a foreign court, but counsel was not willing to concede that the decree could be satisfied (without any showing of clear breach of foreign law) simply by Holophane's holding itself out in this country as willing to sell within the territories allocated by the agreement to the British and French companies. With respect to the suggestion that the American decree might be modified in the event of trouble for the defendant under foreign law, it was suggested from the bench: ". . . it does not look well for this country to wait until a foreign suit and then . . . say that the decree should be changed."

Holophane, it might thus be said, raises more questions than it answers with respect to how the situation of the actor caught between the conflicting demands of two legal systems is to be treated; but in net effect the affirmance makes extremely short shrift of the argument that "international law" forbids the United States to attach legal consequences to economic conduct having either its location or its effects partially or principally outside American territory, assuming the actor to be sufficiently present in the United States for judicial jurisdiction to attach to it and the conduct *per se* a violation of the antitrust laws.

The contrasts between the two cases may be generalized as follows:

(1) *Holophane* confirms that basic American antitrust legislation such as the Sherman Act is not to have the spatial sweep of its language restricted by judicial interpretation narrowly based on the territorial principle of jurisdiction, despite assertions that "international law" requires this result.[15] But in *Vanity Fair Mills* we see the American Federal courts,

[15] *Cf.* Haight and Whitney, *loc. cit.* (note 1 above). It is assumed throughout this editorial that the type of "jurisdiction" under discussion is that relating to capacity

from trial to highest, refusing to give a similarly wide territorial scope to equally sweeping language in a statute (Lanham Act) designed to protect industrial property against infringement and unfair competition. Both decisions came down after certain unhappy experiences in which the American courts and the Department of Justice felt the resistance of other national states to the efforts of this country to inquire into or regulate restrictive practices involving the nationals or the national interests of other states and taking place wholly or partially outside the United States.[16] In *Holophane* the conflicts-of-jurisdiction problem was considered during oral argument but was not decisive. In *Vanity Fair Mills* both the District and the Circuit Courts developed their interpretative arguments regarding the reach of the Lanham Act and their policy viewpoints with respect to *forum non conveniens* with the diplomatic intervention in the *Anglo-Iranian Oil Case,* the *Imperial Chemicals-Nylon Spinners* contretemps, and the Canadian paper pulp incident plainly in mind, as the courts' footnotes show.

(2) To the extent that the rest of the world, or a goodly portion of it, may be a bit out of step with United States policies regarding enforced competition (particularly where the combination, contract or conspiracy amounts to a *per se* violation of the American antitrust laws), *Holophane* tends to perpetuate and increase conflicts of national state jurisdiction. *Vanity Fair Mills,* on the other hand, goes to extremes to avoid possible conflicts of jurisdiction, legislative or judicial, between foreign trademark registration and an American statute which falls mainly into the unfair competition (as distinguished from restrictive and monopolistic practices) category.

Pending the day of the solution of problems of conflicts of jurisdiction in the restrictive and unfair trade practices areas by international legislation [17]—a day which does not appear imminent—more systematized and more continuous national attention than courts alone can give to the resolution of pressing problems of conflicts seems highly desirable in the interests of good foreign relations, justice, and policy effectiveness. In other areas of importance where the commands of sovereign states conflict, international practice or international agreements have worked out solutions to remove

to attach legal consequences to conduct, not power to apply state power in direct enforcement of commands. Obviously the territorial principle is exclusive in the latter situation, unless the territorial state has waived in some way its otherwise sovereign power to execute laws within its borders.

[16] As in the well-known incidents involving (i) the efforts to subpoena foreign-held records of the Canadian pulp and paper consortium and those of the Anglo-Iranian Oil Company; (ii) the impasse with respect to the nylon patents in Great Britain. In Re Grand Jury Subpoena Duces Tecum, 72 F. Supp. 1013 (S.D.N.Y., 1947); In Re Investigation of World Arrangements, 107 F. Supp. 628 (D.C.D.C., 1952); U. S. *v.* Imperial Chemical Industries, 105 F. Supp. 215 (D.C.S.D.N.Y., 1952); British Nylon Spinners *v.* Imperial Chemical Industries, [1953] 1 Ch. 19.

[17] See Timberg, "International Combines and National Sovereigns," 95 U. Pa. L. Rev. 575 (1947); and *cf.* Stocking, *loc. cit.* (note 1 above); Schwartz, "Committees, Politics, Scholarship and Law Reform: Antitrust Studies in Perspective," 104 U. Pa. L. Rev. 153 (1955).

or minimize the conflicts. Similar developments are needed here, especially with respect to justice for the person or private entity caught between the competing sovereign wills. But before this needed work can be done it will be necessary for us to clear away some underbrush and to point up our thinking on issues such as these:

(a) Precisely what "international law," public or private or both, are we talking about when we argue that the application of the antitrust laws to conduct abroad is forbidden by international law? [18]

(b) If we are talking about international public law, are we talking about the necessity of the United States having an internationally recognized basis of legislative jurisdiction, as under the territoriality principle, the protective principle, the nationality principle, etc.? Or are we urging that all national law is required by international law to be confined to territory or nationality?

(c) Is there possibly a problem of denial of justice or violation of the minimum standard for the treatment of aliens should the United States under its laws compel the alien present before its courts to act or to refrain from acting outside the United States in circumstances where obedience to the American command will subject him to civil or penal liability under the laws of the country of his nationality or of another country having a basis of jurisdiction which international law recognizes?

It is these issues, primarily, which have been avoided in much of the literature and in many of the judicial decisions, such as those cases which have directed attention to presence, *vel non*, of the defendant, to the exclusion of the basis or bases of legislative jurisdiction over him.

The listed issues ought to be faced, not only by courts from case to case, but by international lawyers, legislators and administrators.

COVEY T. OLIVER

PASHUKANIS IS NO TRAITOR

Eugene B. Pashukanis is no longer an "enemy of the people." For the Soviet legal scholar this announcement is as exciting as it would be for the American if the National Archives were to state that new evidence had disclosed that Benedict Arnold was not a traitor. For nearly twenty years the very name Pashukanis had been so besmirched as to blacken also the reputation of any Soviet lawyer who had been closely associated with him or who had expressed ideas identifiable as similar to his.

Pashukanis' case had been something of a mystery since that morning of January 20, 1937, when an article in *Pravda* announced that the man who only two months before had been named to supervise the revision of the whole pattern of Soviet codes of law had been found to be an "enemy of the people." [1] No overt act of treachery was disclosed. He was criticized primarily for having preached a philosophy of law which, had it been followed to its conclusions, would have undermined the foundations of the

[18] *Cf.* Jessup, Transnational Law (1956), reviewed below, p. 444.

[1] For a record of the denunciation and the texts of the principal works of Pashukanis and his denouncers, see V. I. Lenin *et al.*, Soviet Legal Philosophy (20th Century Legal Philosophy Series, 1951).