

THE PROPER REACH OF TERRITORIAL JURISDICTION: A CASE STUDY OF DIVERGENT ATTITUDES

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I am assuming that my task in the course of the 15 or 20 minutes allowed—and the most that one could be expected to do—is to make some more or less provocative observations, to point some problems, and certainly not in the course of that time to provide any answers.

Of course, this question of extraterritorial jurisdiction covers a very large area. It covers crime generally and such particular questions as labor laws, laws about securities, currency law, shipping contracts, production of documents to courts, and a host of others. Antitrust, however, has been the main focus of discussions on this question; at any rate in the Anglo-American field, and that is what we are immediately concerned with. Therefore, in the short time available, I propose to concentrate mainly on that as the illustration of the problem, but as no more than an illustration of the problem, and I want finally to wind up by looking at the question in the general context of international law and organization.

Perhaps I should begin briefly by attempting to put the matter in the context of this question of Anglo-American attitudes. I should say straightaway that on this question at least, I am quite sure that even if there is an English attitude, there is no American attitude; that opinion is very divided, and certainly on the kind of lines that I shall follow I would expect to find the chief support from American lawyers if only because on the whole they have thought far more about these problems than we have. I shall try to relate it a little to the questions of law and policy because that is the theme of the meeting.

I do not myself believe that there can be either in this country or anywhere else any sentient international lawyer who has not perceived that international law has to do with policy. Whether one regards it as a theme for large discussion or something that can be taken as read because it is obvious, it may be a question on which opinions will differ. But I do not see how anybody could be under any illusions in a subject which, after all, began with a party opinion written by Grotius for the Dutch East India Company.

All the same, I think it is very important not to forget that the very

purpose of law is to provide limits to discretions and to powers of decisions; and it is important not to forget that policy includes legal policy, *i.e.*, the need to see that the system works, that as far as possible it is clear, that it is as far as possible predictable, and so on. It does seem to me that the need of international society at present is not so much to concentrate on whether lawyers are aware of the policy implications of what they do (I should have thought that the simple answer to that question is "Yes, they are," even if they do not always say so), but a much more important need is to concentrate on seeing that policy-makers, whether lawyers or others, are aware of the legal framework within which their decisions ought to be made. Just as I believe—and it is much the same thought—that in an all too permissive society, concentration on duties would be salutary rather than so much talk about people's rights. Both attitudes are right. It is a question of what is the right thing to concentrate on at present. It seems to me that the right thing to concentrate on at present in our violent and disorganized international society is the rule of law and not the rule of policy.

The heading for this afternoon's discussion is "The Proper Reach of Extraterritorial Jurisdiction: A Case Study of Divergent Attitudes." The first interesting point that occurs to one is that if one looks for this case study, one finds that with almost negligible exceptions, the only cases, on the Anglo-American scene at least, are American. There simply is no English jurisprudence upon the proper extraterritorial reach of antitrust laws. I am not saying it is confined to the United States. The EEC Commission is fast learning, of course, from the U.S. precedents, and I will come to that later.

What is the reason then for this one-sidedness in the jurisprudence relating to extraterritorial reach of antitrust? It is to be found in the realms of policy. I think one must recognize that this is a subject that relates to national interest very closely. It is an old-fashioned branch of the law in the sense that it is concerned not so much with *international* policy as with the conflict between the interests of particular sovereign states; and the export of antitrust laws is a weapon of economic policy. Laws originally intended, and still intended indeed, to promote competition at home can be used by extraterritorial application to hobble competition from abroad. This aspect of antitrust law cannot escape the attention of anyone who has looked at the orders made by Judge Cashin in the *Swiss Watch* case.¹

¹United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. ¶ 70600 (S.D.N.Y. 1963), *modified*, 1965 Trade Cas. ¶ 71352 (S.D.N.Y. 1965).

Naturally, one's view of what is happening in this kind of situation varies according to whether one is looking at it from the point of view of this side of the Atlantic or from the other side. From the point of view of the United States any state has a right to defend its own economy from invasion by foreign businesses that do not conform to the standards and practices required by United States law. One can see that point very clearly. But of course the best defense is attack, and from the point of view of foreign firms who find their organization at home affected or their markets in third states affected by the extraterritorial exercise of jurisdiction by United States courts, this has a different look—it looks more like attack than defense.

So that we are here in the presence of a subject which is the focus of national interests, which may be opposed to national interests. The question is whether international law sets any limits, any sort of Queensbury Rules, to this essentially economic or business struggle.

Not surprisingly, it is to the United States one must go for the view that the answer to this question is that there is little or no international law on the matter: that there may be, indeed, a question of comity, that there ought no doubt to be consultation, exchanges of information, and so on, but no hard legal obligation. This is a characteristic posture of the "big chap" dealing with the "little chap." The little chap, on the other hand, looks for rules and expects and asserts that there must be some to be found in international law.

The point I wish to make first is this: It is because there is an *opposition* of interests, or a possible opposition of interests, between states that this doubt about legal controls arises at all. In other areas of jurisdiction (for example, common crimes) the doubts do not arise. Nobody is troubled if courts do exercise wide extraterritorial jurisdiction in common crime; and this difference I will come back to later.

Another interesting point, I think, about the question whether there are rules governing extraterritorial jurisdiction and what they may be, is that it is only in the economic field that there has been grave doubt. In other possible applications of extraterritorial jurisdiction it seems to be fairly generally accepted that there are principles of international law that are applicable.

At the last meeting of the International Law Association, Professor Seidl-Hohenveldern described a case from the Continent of great interest, involving two neighboring countries, one with an airport near the frontier of the other. The law of the country in whose territory the

airport was situated had laws providing that buildings above a certain height might not be constructed within a certain distance of the airport, for obvious safety reasons. Somebody in the other country proceeded to build above that prescribed height within the territory of that country, but also within the perimeter of the safety regulations of the airport across the frontier. According to the analogy of some antitrust cases, if the constructor of the building had a "presence" within the jurisdiction of the country where the airport is situated, it would be possible for the authorities of that country to bring proceedings for contravention of their law, since the building clearly had "effects" in territory of that country of the airfield. Unfortunately, it was characteristic of the procedure followed at this meeting of the International Law Association that just as Professor Seidl-Hohenveldern was about to tell us what in fact the answer was that the court had given, the Chairman said that his time was up! So now we must wait for the publication of the Annual Report. But I think none of us will have any doubt that in that kind of case the court would not have jurisdiction to make orders in respect of buildings in another country.

The English attitude towards the question of antitrust has of course very recently been stated officially in the case² brought against a number of Dyestuffs companies before the European Commission, including I.C.I. The Commission found that there was a breach of the Rome Treaty³ by the defendants (including I.C.I., a British company incorporated in this country) and imposed fines; that decision is now under appeal.

The British Government took the somewhat unusual step of issuing to the EEC an *Aide-memoire* in which they said they were not attempting to prejudge the actual case before the Commission, but they merely wished to state certain principles which they felt applied to this question of antitrust jurisdiction. Those principles were what one might call the orthodox principles from the English point of view: that, for example, the separate legal personality of corporations must be respected; that I.C.I. for example would not have a presence in the Community countries merely through a wholly owned subsidiary unless that subsidiary was an agent able to make contracts binding the parent company; that jurisdiction should not be exercised on the ground of mere effects (the

²Commission Decision of July 24, 1969, Ruling on Dyestuff Manufacturers, 12 E.E.C.J.O. No. L 195 (Aug. 1, 1969), [1965-1969 Transfer Binder] CCH COMM. MKT. REP. ¶ 9314 (1969).

³Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11.

Alcoa case⁴ doctrine), and so on. (I shall not go through the *Aide-memoire* which most of you will have seen.) Now, there is a statement, whether it is right or wrong, which suggests that there are international law principles and rules of a fairly clear kind which govern this question of extraterritorial jurisdiction.

If it is accepted that there are *some* rules, and I think one may say that the mainstream of lawyers on both sides of the Atlantic would accept this—because the *American Restatement*⁵ also accepts this position, although in a slightly different form—then the question comes of their application. Here we return to the policy question. At this point I would like to differ from some of the things that were said this morning, using the antitrust question as an illustration of what I mean.

First, I do think it is wrong to suppose that in the application of law there is always a choice and therefore a policy decision to be made. This is a typical fallacy of the lawyer, or at any rate of the practicing lawyer, because of course this is the only kind of case he sees. The client does not come along with a kind of case where the application of the law is clear. He comes along with a difficult case where there is indeed a choice, and that is where he wants advice. But though this is the kind of case we see all the time, we should not assume that this is typical of the working of a proper legal system. On the contrary, if the law is working reasonably well, there will be many, many cases where the law is clear and its application is not really open to question. Therefore no question of policy or a policy decision can arise.

Further, if there are principles and rules to be applied, then I believe that purely legal argument and even conceptualism will have its proper place. This is an essential part of the technique for the development and elaboration of law and its refinement to meet different factual situations.

Thus, for example, if—as in the British *Aide-memoire*—one accepts that the basic principle in this extraterritorial question might be the principle of territoriality, then it might make a very great difference in law, in legal logic, whether a contract for the export of goods is *c.i.f.* or *f.o.b.* I am not sure whether that distinction would be felt in business reality to be quite so important as it is in legal logic. But I do not think it is any the less valid. Lines must be drawn somewhere. It is the lawyer's business to draw lines for the sake of clarity, and that is one of the professional techniques for doing so.

⁴United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

⁵RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965).

On the other hand, questions of jurisdiction may also be found to depend upon purely business interpretations of factual situations. Let me cite again the recent series of *Dyestuffs* cases⁶ in the Community. Essentially the problem was this: Given a very tight, very highly competitive market working to hairbreadth margins, given that any manager who survives in such a market is likely to have his eyes open and to know what two and two make, then it follows really as the night follows the day, that any price move by one supplier will be met with an immediate, perhaps even anticipated response from the others, so that the whole shift in the market, as near as may be, will be simultaneous.

Given that factual situation, the question then arises in terms of the Treaty of Rome:⁷ Does it amount to a concerted practice? The German *Bundesgerichtshof* has recently decided that in such a situation there had been no meeting of the minds of the kind required, I believe, by German antitrust law. But what is a meeting of the minds? This is a question almost of pure philosophy.

I do not propose to try and resolve that question! But I want merely to add again another point: that it seems to me that the meaning and interpretation of words and the place of language in the law, even "conceptualism" if you like, is not to be despised. This has had a very considerable place in the development of law; and the more refined and elaborate the law is, the more important the place of the verbal argument will be.

Again, it is an area where there are indeed large policy considerations; but it is policy that has been refined by professional discipline to something that is quite different from a sort of open-ended consideration of "What shall we do here?"

There is one more problem arising from this extraterritorial application question. Let us be clear that in most antitrust cases the court does indeed on any view of the law have substantive jurisdiction. In the *Swiss Watch* case,⁸ for example, there can really be no doubt that the Court (a) had jurisdiction and (b) that there had been territorial conduct contrary to the local law. But the question then arises: What are the limits to which the remedies ordered by the Court can be taken? In the first judgment, the orders amounted to a dismantling of the Swiss watch

⁶Commission Decision of July 24, 1969, Ruling on Dyestuff Manufacturers, 12 E.E.C.J.O. No. L195 (Aug. 1, 1969), [1965-1969 Transfer Binder] CCH COMM. MKT. REP. ¶ 9314 (1969).

⁷Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11.

⁸*United States v. Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. ¶ 70600 (S.D.N.Y. 1963), *modified*, 1965 Trade Cas. ¶ 71352 (S.D.N.Y. 1965).

industry in its existing form in Switzerland. You remember that there was a revised agreed Final Judgment which laid down the principle that nothing in the Final Judgment "shall be deemed to limit or circumscribe the sovereign right and power of the Government or the Swiss Confederation, or any agency thereof, or specifically the sovereign right and power of the Government of the Swiss Confederation or any agency thereof, control or regulate its domestic or foreign commerce or to make and apply regulations with respect to the watchmaking industry or any part thereof."⁹ In other words, it is the "effects" doctrine reversed: How far may you exercise jurisdiction with effect abroad because of conduct at home?

Finally, I want to bring this out of the national parochial plane on to the international plane. We said that we agreed that this question of rules and principles and limits to extraterritorial municipal jurisdiction is only a practical question where there are divergent national interests; it is only then that rules are needed, and there is a call for some limitation. The difficulty does not arise where there is a common interest in the exercise of jurisdiction. Such a common interest, at any rate within limits, may be created by international treaty.

Take, for example, the interesting proposal which is being made at the forthcoming session of the Maritime Safety Committee of I.M.C.O., in relation to the Oil Pollution Prevention Treaty of 1954.¹⁰ The proposal is that requirements concerning the construction of tankers—which, it is hoped, may minimize the possibility of oil spills—should be written into the Treaty as an amendment (there is a power of amendment by majority vote); but more than that, that a party to the Treaty which does not accept the amendment should after a time cease to be a party to the Treaty and, furthermore, that states that accept the amendment and remain parties to the Treaty may apply a sanction to the Treaty by refusing to allow into their ports tankers of any flag which do not conform with the regulations. This may or may not be wise; it may or may not prove to be acceptable. But it does suggest an interesting technique: coupling international treaty with the exercise of municipal jurisdiction with extraterritorial effect in such a way as to provide quite remarkable possibilities of international quasi-legislation, and sanction for that legislation.

I am conscious, Mr. Chairman, that I have not really talked as I

⁹1965 Trade Cas. ¶ 71352, at 80491 (S.D.N.Y. 1965).

¹⁰International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 327 U.N.T.S. 3.

should have done about extraterritorial jurisdiction, except in relation to a very large canvas, but I wanted to relate it rather to the kind of thing we were saying this morning, and to express rather different views from some we heard.