

THE INTERNATIONALITY OF ECONOMIC INTERESTS *

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Every private enterprise country recognizes that private business may be operated in ways that are contrary to the public interest and therefore tries to curb such operations by use of governmental power. Every such country recognizes that business enterprises may engage in disputes among themselves or with other economic entities, and that these disputes may require public intervention and settlement. Every such country depends for its revenues partly upon the taxation of business activities, intangible as well as tangible business assets, or business income or profits. The controls and taxation which are imposed upon business do not raise problems of national jurisdiction as long as the assets, activities, revenues, and effects of business enterprise lie entirely within a single country. An economic society consisting of quasi-subsistence agriculture, local handicraft, and local trade to transfer the products of handicraft and agriculture between towns and countryside would seldom produce problems of control or taxation cutting across national boundaries; a simple territorial basis for government jurisdiction would be sufficient for any economic problem.

In its origins, Western society sufficiently resembled this model to have given a strong territorial bias to our concepts of jurisdiction over economic affairs.

Nevertheless, the rise of trade soon made it evident that the economic interests of a nation did not stop at the territorial boundaries. Every trading country became interested in the well-being and business opportunity of its traders abroad, in revenue from its exports, and in access to foreign supplies of goods. Countries with sufficient power took steps to safeguard these interests. Access to foreign resources and opportunity to sell in foreign markets became major stakes of diplomacy and, when diplomacy failed, major reasons for war. Old-style imperialism sought to secure preferential trade positions by imposing governments on weak peoples or by converting indigenous govern-

* This paper is taken from an address at the Conference on the Extraterritorial Effects of Trade Regulation, held under the auspices of the Institute for International and Foreign Trade Law of Georgetown University Law Center, in Washington, D.C., on April 5, 1962.

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ments into puppets. History dramatically illustrates that nations' vital concerns reach beyond their frontiers and that nations will reach beyond their borders to protect these interests.

Pursuit of such extraterritorial policies frequently brought governments into conflict. Major differences were settled by war; where interests were too small to justify war, restriction was met by retaliatory restriction, and many significant national interests were impaired.

I. LIBERALIZATION OF INTERNATIONAL TRADE

Nobody found this situation satisfactory. At least partly in the hope that trading interests might be better protected and national conflicts might be better avoided, the liberal theory of international trade—that every country should allow free export and import of goods and capital and free movement of people across national boundaries—evolved. To the extent that this pattern could be realized, it was thought to eliminate the economic importance of the national frontier. It seemed to restore consistency between national territorial jurisdiction and national concern over foreign trade, and to offer the prospect that peace would not be impaired by efforts to extend national authority in support of the national interest.

Belief that a liberal trade policy was a nostrum for international economic problems was plausible, however, only on certain assumptions. One was that governmental restrictions were the sole source of action from abroad that could significantly damage a nation's economic interests. As international trade became more tightly organized by large corporations and cartels, this assumption became implausible. As in the cases of quinine, potash, and watches, a national cartel in a country supplying most of an export commodity could sometimes impose its will on foreign users of the product, while the government of the exporting country either gave assistance or stood benevolently aside. An international cartel comprised of producers in all major exporting countries could exercise a controlling power exceeding that of the government of any one of the participating countries. Private trade restriction could have results similar to those of public trade restriction.

Thus liberalization of government trade policy came to require, as a corollary, curbs upon cartels that affected international trade. The necessity of this dual policy was recognized in the draft charter of the defunct International Trade Organization,¹ and is currently taken for

¹ Compare U.N. Conference on Trade and Employment, Havana Charter for an International Trade Organization, arts. 17-20 (E/Conf. 2/78) (U.N. Pub. Sales No. 1948.II.D.4) (1948), with *id.*, arts. 46-54.

granted in the European Economic Community.² We are well on the way to formal acceptance of the point that each country has a legitimate interest in private restrictions imposed upon its trade or its markets from abroad.

Broad claims of jurisdiction are inherent in any effort to cope with international cartels by unilateral governmental action. The cartel contract is international. Producing countries are unlikely to try to control or destroy it; and if any of them attempts to do so, it cannot succeed unless companies under its control furnish a significant part of the total supply. Consuming countries cannot protect their citizens from the cartel unless they can apply a control based on the effect of the restrictions upon their domestic market rather than on the physical location of plants, the place of execution of the agreement, or the residence of the contracting parties.³ Often a consuming country cannot reach such a cartel because it cannot find property or persons over which to exercise its authority; but where the available instruments of control will reach they are likely to be used. Governments which have stood ready to protect their trade interests by measures such as war and seizure of territory can scarcely be expected to refrain from asserting the authority to do so by the peaceful use of their administrative and judicial systems. In the absence of efforts by producing countries or by intergovernmental organizations to afford them protection, they are not likely to be deterred by the assertions of producing countries that such self-protection is improper.

II. INTERNATIONAL USE OF THE CORPORATE STRUCTURE

Belief in the sufficiency of a liberal trade policy rested also upon concepts of nationality appropriate to a world of personal enterprise. A major modern source of difficulty as to conflict of jurisdiction has been the internationalization of enterprises, made possible by the anonymity, ambiguity, and fluidity of corporate structure. Under the corporate system it is possible to conceal the identity of the persons who own or effectively control a corporation and the de facto national allegiance of those persons. A single interest may be expressed in a series of corporate entities, each having not only a separate legal personality but also a separate corporate nationality. Two or more interests may be affiliated through interlaced stock ownership without public disclosure of the alliance. It is possible for an enterprise to change the number of its corporate personalities, their nationalities, the

² See Treaty of Rome, March 25, 1957, pt. 1, arts. 2-3, pt. 3, tit. 1, ch. 1, § 1, arts. 85-86, 298 U.N.T.S. 15-16, 47-48.

³ See RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 32, comment *b* (Tent. Draft No. 2, 1958); *cf.* 29 AM. J. INT'L L. 439, 543-61 (Supp. 1935).

nature of their affiliation with one another, and the locus of nominal control without any changes in the underlying physical operations or actual control. There is no longer any predictable concomitance between the corporation as a legal entity and as identifiable commercial operation, with identifiable ownership and management. Nor is there any longer a predictable concomitance between corporate nationality and the nationality appropriate to the locus of commercial operations, the locus of actual control over those operations, the nationality of the individuals who exercise that control, or the nationality of the beneficial owners. The ability of businessmen to manipulate legal fictions has made obsolete the presumptions that are still expressed in much of our thinking—presumptions that a business enterprise has boundaries identical with those of a corporation, that the enterprise has a single national identity, and that this identity can be reliably inferred from the country in which it is incorporated.

People, like corporations, can change their nationality. But when a man does so, he loses his previous nationality and acquires the new one only on evidence that he has identified his interest with the new country by residence, service in its armed forces, or in some similar way. A business, however, can acquire a new nationality much as a woman acquires a new dress—by the acquisition of a new corporate identity in addition to its old one.

The arbitrary nature of corporate nationality and its irrelevance to the underlying economic facts is evident in numerous cases, of which one illustration will suffice. Petroleum operations in Iraq were carried on between the two World Wars by a British corporation which was the legal expression of an international agreement among Dutch, French, American, and British corporate interests. To escape British income tax, the joint subsidiary operated under a non-profit working agreement, and the necessary papers were executed in Belgium. One of the beneficial owners of the subsidiary was a naturalized British subject resident in London. He had never been in Canada, but he set up a Canadian corporation to own his shares and receive his part of the profits.

So anonymous is corporate control that when efforts are made to pierce the corporate veil in time of war, the facts are often matters of dispute. Whether control of General Aniline, an American corporation, was properly to be regarded as German or Swiss, became a matter for enduring controversy in American courts.⁴ So far is a corporation

⁴ See *Societe Internationale v. McGranery*, 111 F. Supp. 435 (D.D.C. 1953), *modified sub nom. Societe Internationale v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *rev'd sub nom. Societe Internationale v. Rogers*, 357 U.S. 197 (1958) for a description of the corporate complexity of General Aniline.

from necessarily expressing any national economic interest that anti-trust investigations have not infrequently uncovered instances in which the function assigned to a national subsidiary of a foreign corporation by the parent was to retard the development of production within the country of its incorporation and thus assure the more profitable exploitation of foreign productive facilities.

These characteristics of international corporate enterprises have tended to deprive all governments of effective control of their activities. A corporation chartered by one country may be managed by citizens of another while controlled by a company in a third country; it may sell products in a fourth country which were produced in a fifth, and may compete with enterprises engaged in production in yet another country. No nation has exclusive jurisdiction over such an enterprise. The segments of authority actually exercised probably do not correspond to the extent of the national interest in the corporation's activities. Rather, they are likely to reflect inherited traditions of jurisdiction that were not developed to cope with the phenomena of corporate structure.

Even the formal corporate structure often consists of a chain of subsidiaries chartered in several countries. Since the corporate combine can usually accomplish its purposes by action through more than one of the entities of which it is composed, any single country trying to control such a multinational corporation is likely to find that control cannot be effective unless it reaches upstream to a parent company or downstream to one or more of the subsidiaries. Otherwise a company forbidden to make a particular agreement may, in fact, enjoy the benefits of an agreement of the same substance made abroad on its behalf by a foreign parent or subsidiary; incriminating documents may be removed from the home office and lodged abroad in the offices of another member of the combine; and when required to remove the effects of an unlawful restriction of export trade by licensing its patented technology to a competitor, a company may nullify the effect of the license by inducing a foreign affiliate to sue the exporter under counterpart patents held overseas. In undertaking control upstream or downstream, the country doing so often finds it necessary to control action that is also subject to the authority of other governments. The choice is likely to lie between a broad claim of jurisdiction and impotence.

Private rights as well as public authority are difficult to vindicate when these possibilities of corporate blind-man's buff exist. Several years ago one American company sued another, charging that the second company was unlawfully trying to exclude it from the Canadian market. The plaintiff sought to examine certain documents possessed

by the defendant which would prove the truth or falsity of the claim. To escape this examination, the defendant sent these documents abroad, first to a subsidiary in London, and later, when their location was discovered, to Switzerland. Had the American court viewed its jurisdiction as being limited by the national boundaries, the maneuver would have been successful. But since corporate control over the documents was exercised from the United States, judicial control was similarly exercised. The court ordered the defendant to bring the documents back to London and make them available there for inspection.⁵ After this the defendant company settled the suit and removed the obstacles which it had set up to sale in Canada.

Broad claims of jurisdiction are inevitable in efforts to control international enterprise. A government that can reach only part of the corporate structure is easily thwarted unless it can obtain information about other parts of the structure and can prevent them from taking action to defeat its policies. If power to do this cannot be exercised, there will be cases in which none of the affected governments can apply effective control.

The obstacles that deflect control of international enterprises vary from country to country because of variations in the degree to which governments seek to defend their corporations against jurisdictional claims of other governments and in the leeway that national laws give corporations as to secrecy about their ownership, holdings, and operations. A kind of Gresham's law of government control operates internationally, by which corporations cluster under the shelter of those governments that are most lenient or will defend them most aggressively. Escape from taxes by manipulating corporate nationality and the locus of legal action has become so apparent that students of taxation refer to certain countries as tax havens. Efforts to escape from antitrust laws are similarly evident in antitrust practice in the United States. Doubtless similar efforts will become apparent elsewhere as other countries apply effective legislation to control restrictive practices. Even today, one could accurately refer to one or two countries as control havens.

⁵ The ruling referred to arose in the course of litigation involving Radio Corporation of America, Rauland Corporation, and Zenith Radio Corporation, which dragged on in the federal courts in Chicago, Illinois and Wilmington, Delaware for several years. Many rulings on issues of discovery, including the one mentioned, are unreported. For further information on the international discovery aspects of this case, see *RCA v. Rauland Corp.*, 21 F.R.D. 113 (N.D. Ill. 1957) (motion to suppress taking depositions in Norway denied); *RCA v. Rauland Corp.*, 18 F.R.D. 440 (N.D. Ill. 1955); *RCA v. Rauland Corp.*, 16 F.R.D. 160 (N.D. Ill. 1954); *Zenith Radio Corp. v. RCA*, 101 F. Supp. 561 (D. Del. 1952).

III. PRINCIPLES OF NATIONAL JURISDICTION OVER INTERNATIONAL TRADE

Theories as to a nation's jurisdiction over trade seem to a layman like myself to involve three conflicting principles.⁶ According to the first principle, jurisdiction is territorial—persons and acts within a country can be controlled by the government; persons and acts beyond the boundary are exempt. According to the second principle, jurisdiction is personal—citizens are subject to control wherever they may be, and persons domiciled within the country may be treated like citizens; but the foreigner overseas is exempt. According to the third principle, jurisdiction depends upon the location of the effect of the conduct which is sought to be controlled. What affects domestic trade is subject to control, including acts abroad by foreigners.

Both the second and the third principle are inconsistent with the first. To reach into another country to control one's own citizens is no less an invasion of territorial jurisdiction than to reach into it to control an impairment of trade in one's own market.

In practice, most governments invoke different theories of jurisdiction in different settings. Joint use of the first and second principles is common; use of the third principle is more common than is sometimes asserted. I question whether any government consistently limits itself to a single one of these theories in all matters, civil and criminal, under both public and private law.⁷

Substantial diversity of principle is apparent in the scope of national laws concerned with restrictive trade arrangements. These laws assert jurisdiction, not only in their provisions for the termination or correction of objectionable practices, but also in their provisions requiring that restrictive arrangements and dominant firms be reported to the government. Critics of the American antitrust laws have sometimes asserted that the United States follows a principle of extra-territoriality, whereas other countries consistently eschew such a course.⁸ But the texts of foreign laws do not seem to support this assertion.

Reporting requirements exist or have existed in the laws of nine countries. In three of these, only enterprises that do business in the

⁶ International law recognizes at least five bases of jurisdiction. See 29 AM. J. INT'L L. 439, 445 (Supp. 1935). The universality and passive personality principles do not, however, affect trade problems as do the three principles mentioned in the text.

⁷ *Ibid.*

⁸ See RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 32, comment b (Tent. Draft No. 2, 1958); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954).

country are required to report;⁹ in six, agreements that have a domestic restrictive effect must be reported.¹⁰ Dutch law, an example of the first group, requires reporting of "regulations of competition" by owners of enterprises established in the Netherlands, but instructs the responsible minister to grant exemption to regulations of competition outside the Netherlands.¹¹ Danish law, an example of the second group, requires registration of agreements and enterprises that exert a substantial influence on trade in Denmark.¹² The jurisdictional implications of these two reporting standards are different, not only as to agreements governing exports and imports, but also as to agreements made abroad that restrict the domestic market, agreements made at home or participated in by domestic enterprises that apply only to operation outside the country, and agreements governing international transportation. In some countries the jurisdiction has not been legislatively spelled out and no cases have yet arisen to test what is implied. In some instances, however, the statute seeks information about domestic effects by requiring information about activities abroad by foreign firms.

Austrian law explicitly applies to cartel agreements made abroad to the extent that they are implemented in Austria.¹³ The effect is to require that these agreements be submitted for registration, which may be denied, and to deny legal validity to nonregistered agreements. Anyone who tries to implement an agreement before it has been registered, after registration has been denied, or in a manner other than has been registered, is subject to penalties.¹⁴

Norwegian law, which requires that agreements and associations be registered if they regulate production or distribution within the realm, provides that if participants are domiciled abroad, their representatives in Norway must report. It also requires that any subsidiary or person subject to the controlling influence of a foreign firm or group of firms must be registered if that firm or group has substantial

⁹ See, e.g., Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, §6(1), 2 EUROPEAN PRODUCTIVITY AGENCY OF THE ORGANISATION FOR EUROPEAN ECONOMIC CO-OPERATION, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES UK1.2, at 4 (1960) [hereinafter cited as OEEC GUIDE].

¹⁰ See, e.g., Cartel Law of 1959, art. 2, 3 OEEC GUIDE A1.0, at 1 (Aust.); Act Against Restraints of Competition of July 27, 1957, §98(2), 1 OEEC GUIDE D1.0, at 41 (Ger. Fed. Rep.).

¹¹ Economic Competition Act of June 28, 1956, as amended by Act of July 16, 1958, §§ 2, 4, 2 OEEC GUIDE NL1.0, at 1-2 (Neth.).

¹² Monopolies and Restrictive Practices Control Act of March 31, 1955, pt. 3, 1 OEEC GUIDE DK1.0, at 2 (Den.).

¹³ Cartel Law of 1959, art. 2, 3 OEEC GUIDE A1.0, at 2 (Aust.).

¹⁴ Cartel Law of 1959, arts. 3, 5, 38, 39, 3 OEEC GUIDE A1.0, at 2-3, 18-19 (Aust.).

influence over prices in any foreign country.¹⁵ Similarly, Denmark requires that agreements and trade association decisions by which foreign firms influence the Danish market be reported by the Danish representatives of the participants.¹⁶

New Zealand, until registration was ended by amendment of the law, required that agreements relating to sale or supply in New Zealand be registered if one participant carried on business there.¹⁷ The Restrictive Trade Practices Act of the United Kingdom requires the registration of restrictive agreements if two or more parties have thereby accepted restriction and if two or more of the parties do business in the United Kingdom;¹⁸ but since those who accept the restriction need not be those who are domestically domiciled, the effect is to require that agreements be registered when the only restrictions relevant to the British market apply to the activities of firms not doing business therein.

In a few instances there is a limited statutory provision for corrective action in cases such as these. New Zealand provides that when any party to an agreement does not carry on business within the country, an order may be made with respect to that part of the agreement being carried on in New Zealand.¹⁹ This seems to mean that an enterprise in New Zealand may be ordered not to execute its part of an agreement made abroad with a foreign enterprise, even though, in the absence of the agreement, the same acts would be lawful.

Norway forbids Norwegian firms from participating in horizontal price-fixing arrangements made by foreign firms for sales in Norway.²⁰ It also prohibits representatives of foreign firms from trying to influence the prices, profits, or discounts of Norwegian firms, and from trying to induce them to restrict their competition in bidding.²¹ Moreover, since the King has the power to forbid restrictions by enterprises and groups that are required to report,²² he appears to have general corrective authority over any registered foreign agreements affecting the Norwegian market and over any enterprises registered because they are under foreign control.

¹⁵ Act on Control of Prices, Dividends, and Restrictive Business Arrangements of June 26, 1953, as amended by Acts of June 25, 1954 and March 28, 1958, §§ 33-34, 2 OEEC GUIDE N1.0, at 24-26 (Nor.).

¹⁶ Ministerial Order No. 193 of June 18, 1955, 1 OEEC GUIDE D1.0.0, at 1 (Den.).

¹⁷ Trade Practices Act, Act No. 110 of 1958, § 11(2) (N.Z.).

¹⁸ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 6, 2 OEEC GUIDE UK1.2, at 4.

¹⁹ Trade Practices Act, Act No. 110 of 1958, § 19(5) (N.Z.).

²⁰ Royal Decree of July 1, 1960 § 1, 2 OEEC GUIDE N3., at 14 (Nor.).

²¹ Royal Decree of July 1, 1960 § 4, 2 OEEC GUIDE N3., at 15 (Nor.).

²² Act on Control of Prices, Dividends, and Restrictive Business Arrangements of June 26, 1953, as amended by Acts of June 25, 1954, March 28, 1958, and June 17, 1960, § 42, 2 OEEC GUIDE N1.0, at 43 (Nor.).

Efforts to exercise control in foreign markets are also evident in a few laws. Under the British Monopolies and Restrictive Practices (Inquiry and Control) Act, statutory orders may govern conduct in other countries, but only if the persons to whom they apply are British subjects, British corporations, or persons who carry on business in the United Kingdom.²³ Under Norwegian law, restrictions applied in other countries by Norwegian associations and enterprises are supervised, "with a view to counteracting conditions which may have a detrimental effect on Norwegian interests" ²⁴ New Zealand's registration requirement covered restrictive agreements, regardless of the locus of the trade affected, if two or more of the parties carried on business in New Zealand.²⁵ Thus it appears to have been applicable to agreements among New Zealand enterprises about operations abroad.

Within the Common Market national authority has been scrambled in a new way. As I understand the Treaty of Rome²⁶ in the light of the recently issued regulations, the provisions related to business restrictions are municipal law in every member state. If agreements and activities by dominant firms offend the substantive standards of the treaty, and the international commission has not acted, each member country is obligated to curb these agreements or activities, whether the prohibited effects appear in its domestic market or only in the markets of other member countries. The impending enlargement of the Common Market makes it probable that this kind of obligation will become the norm among most of the trading nations of Western Europe.

IV. CONCLUSION

In a world characterized by supranational corporations, international cartels, and dependence of many countries upon other countries for supplies or markets, a strictly territorial basis for national jurisdiction is unrealistic. Whatever its place in tradition, it does not accord with the facts of a world of increasingly interdependent states. A restriction applied in Country *A* that reaches across a national boundary to impair the trade of Country *B* is no less an interference with another country's affairs than is an effort by Country *B* to reach across the border into Country *A* to find out what is being done and,

²³ Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, c. 66, § 10(4), 2 OEEC GUIDE UK1.0, at 11.

²⁴ Act on Control of Prices, Dividends, and Restrictive Business Arrangements of June 26, 1953, as amended by Acts of June 25, 1954 and March 28, 1958, § 43, 2 OEEC GUIDE NI.0, at 31 (Nor.).

²⁵ Trade Practices Act, Act No. 110 of 1958, § 11(1) (N.Z.).

²⁶ Treaty of Rome, March 25, 1957, pt. 3, tit. 1, ch. 1, § 1, art. 88, 298 U.N.T.S. 49.

if possible, to stop it. International trade is the proper concern of all who participate; hence overlapping claims of jurisdiction are appropriate expressions of the underlying facts.

Insofar as individual countries tolerate schemes that restrict foreign trade, the overlap becomes more important; for such restrictions typically hurt interests in other countries. Only by repressing such restrictions can one nation avoid the extraterritorial injury that evokes extraterritorial claims of jurisdiction.

To assert this duality of interests is, of course, to say that control of international trade ought to be entrusted to international agencies or, if carried on nationally, ought to be coordinated. It is to recognize the awkwardness and insufficiency of any national claim to exclusive jurisdiction. It implies a great need to seek ways of minimizing conflicts among governmental policies. But these ways cannot be found if one begins by denying the legitimacy of some of the affected interests or by insisting that jurisdiction belongs as a matter of right to governments that represent only one side of the market bargain.

When the issues that arise involve direct and simple conflicts of interest, conflicting claims of jurisdiction are inevitable. But as participation in international trade by each country comes to be broader and more diverse, the national interest no longer can be defined as a simple expression of the interest of consumers or producers nor as a simple expression of a desire to control foreign corporate interests or to protect domestic corporate interests. Each country finds itself on both sides of the market and on both sides of the problem of controlling corporate power, and therefore is increasingly likely to recognize the validity of the interests of both sides.

Acceptance of the view that the buyer's interest is valid and should be protected is inherent in the Common Market's action in pooling the authority of members to cope with cartels in international trade. The example of the Common Market increases the incentive and the opportunity for the Atlantic Community, or perhaps a more inclusive group, to do likewise. But even before such a degree of cooperation is realized, international conferences may evolve more viable interim concepts by which the claim of consumers to reasonable protection and the claim of governments not to have their reasonable interests disregarded by resort to control havens are better reconciled with the claim of business not to be subjected to conflicting orders and the claim of each government to retain authority within its own territory and over its own citizens.