

UNITED STATES ANTITRUST LAWS IN RELATION TO AMERICAN BUSINESSES OPERATING IN THE COMMON MARKET

ALLISON L. SCAFURI*

In recent years as American business activity abroad has burgeoned, there has been rising concern over the impact, on business activity and on foreign relations, of extraterritorial enforcement of United States antitrust laws. The problem has been most acute for American businessmen in regard to the multi-national company, *i.e.*, the American parent company and alien subsidiary; and, for foreign relations, in regard to two or more corporations, one American and the other foreign. Adding now to the complexity of risks facing the American company that seeks, broadly, to do business in Europe, is the inherent threat of the strong antitrust provisions of the Treaty of Rome, the Convention which underlies the European Economic Community. Seemingly the American company now faces assault from three intermingled fronts: American antitrust laws; antitrust laws of individual European States; and, antitrust laws of the European Economic Community. The scope of the instant article is, primarily, to explore the impact of the United States antitrust laws on the beleaguered American businessman who, for motives of profit or national purpose, seeks to press his economic frontiers to the Continent.

RELEVANT DEFINITION OF EXTRATERRITORIALITY

It would be judicious, at the outset, to define extraterritoriality as it is generally understood in international law. Brierly has given it quite a limited definition, *i.e.*, that it relates merely to the lack of or limiting of jurisdiction over persons physically present in State A.¹ Most other authorities, such as Stumberg, dichotomize the term, stating that extraterritoriality relates either (a) to whether or not the laws of State A have operative effect in State B so as to be enforceable by courts in State B; or (b) to the extent to which laws in State

* A.B. and LL.B. degrees from the University of Michigan (1951 and 1954 respectively); graduate studies in international affairs at the Fletcher School of Law & Diplomacy and Harvard Law School, 1954-55. Member of Michigan, American and Detroit Bar Associations, American Society of International Law, American Institute of Aeronautics and Astronautics, Michigan Aeronautics and Space Association; member of International and Comparative Law Section of ABA, and International and Comparative Law Committees of the State Bar of Michigan and Detroit Bar Association; Chairman, Special Committee on Space Law, State Bar of Michigan; presently in private practice in Detroit.

¹ Brierly, *The Law of Nations* 222 (6th ed. 1963).

A operate with respect to events occurring in State B so as to be enforceable by courts in State A.²

Extraterritoriality, as defined by Brierly, relates merely to the generally understood exclusions of nationals of State B, in State A, from the jurisdiction of State A. Examples of this cover situations such as the right of innocent passage of State B ships through the waters of State A and the immunity of State B diplomats from State A laws. Clearly this is not the area of instant concern.

Stumberg's section (a) definition can be similarly dismissed. It relates to such ordinary conflict of laws questions as whether State A's laws can control a contract made between State A and B parties where a party seeks to enforce the contract in the courts of State B.

It is Stumberg's section (b) definition of extraterritoriality that concerns us here. The ultimate question then becomes: does State A's right to enforce its laws stop at the water's edge?

THE SCOPE OF EXTRATERRITORIALITY UNDER INTERNATIONAL LAW

Even the most ardent defenders of the right of the United States to enforce its antitrust laws extraterritorially, most notably Wilbur L. Fugate, admit the general international law rule to be that States are limited in their jurisdiction to activities occurring within their physical borders.³ Yet, the most ardent critics of those who zealously insinuate United States antitrust laws into transactions taking place at the ends of the earth (and will presumably attempt to enforce these good laws in outer space) must admit that the general rule has always allowed for exceptions where acts take place in more than one State.⁴ Otherwise many multi-state transactions could be deemed incapable of regulation by any State.

Pursuing this rationale, Fugate quotes a statement from the *Alcoa*⁵ decision that is extremely relevant: (a) because it seems to state the generally understood rule of international law; and, (b) more important, because it states the unswerving United States policy, *i.e.*, "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."⁶

For those vitally interested for present business purposes in what

² Stumberg, *Principles of Conflict of Laws* 52 n.5 (3d ed. 1963).

³ Fugate, *Enforcement of the United States Antitrust Laws in Foreign Trade*, A.B.A. Bull., Section of Int'l & Comp. L., Dec. 1960, p. 20, at 23. (Cited hereinafter as "Fugate"); cf. Preliminary Report, Association of the Bar of New York, National Security and Foreign Policy in the Application of the American Antitrust Laws to Commerce with Foreign Nations 8, 9 (1957).

⁴ Fugate, *supra* note 3, at 23.

⁵ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁶ *Id.* at 443. Cited by Fugate, *supra* note 3, at 23.

the policy is, rather than in speculation as to what it ought to be, Fugate casts the spotlight upon an unequivocal excerpt from the 1958 draft of the Restatement of Foreign Relations Law of the United States:

A state has jurisdiction to prescribe rules attaching legal consequences to conduct, including rules relating to property, status or other interests with respect to conduct occurring:

- (a) In its territory;
- (b) Partly within and partly outside its territory;
- (c) Entirely outside its territory if the conduct has, or is intended to have, effects within its territory which have a reasonably close relationship to the conduct.⁷

Directing our attention to (b) and (c), it would be pertinent to know what type of off-shore conduct might reasonably be concluded to have a detrimental effect within the United States, in terms of United States antitrust laws.

OFFSHORE IMPACT ON DOMESTIC COMMERCE

Ever since the era of Senator Sherman and President Theodore Roosevelt, free competition has been a public policy corollary to free enterprise in the United States. Combinations in restraint of trade have been deemed evils of the market place aimed at the strangulation of the incipient competitor, and the small competitor not desirous, or incapable, of vying for impregnable bigness. Fugate ably traces the thread of this policy into the international business realm:⁸ (1) the Sherman Act, he reminds us, specifically states that monopolization of commerce between the United States and foreign nations is prohibited; (2) sponsors of the Webb-Pomerene Export Trade Act in 1918 purposely made clear that its intended exceptions to the Sherman Act were narrow and in no way indicative of lukewarm support of United States antitrust laws relative to foreign commerce; and, (3) a standard Mutual Security Act provision states that Congress is cognizant of "the vital role of free enterprise in achieving rising levels of production essential to the economic progress and defensive strength of the free world," but that our policy is "to foster private initiative and competition" and "to discourage monopolistic practices" in international trade.⁹

⁷ ALI Restatement, Foreign Relations Law of the United States § 8 (Tent. Draft No. 2, May 1958).

⁸ Fugate, *supra* note 3, at 20-27.

⁹ *Id.* at 21.

Many landmark decisions lay down the general guidelines of off-shore private economic conduct construed to have a substantial impact upon domestic American commerce not consonant with the antitrust policy of the United States. In the *American Tobacco*¹⁰ case, for example, the Supreme Court held illegal a London contract between the American Tobacco Company and the Imperial Tobacco Company of Great Britain whereby the parties agreed to divide the world tobacco market; and, in the *Imperial Chemical Industries*¹¹ case, the district court required that either I.C.I. or DuPont divest itself of interest in jointly-owned foreign subsidiaries, claiming that the patent and processes agreements which formed the basis for these ventures were in furtherance of conspiracies to effect territorial division of markets. There are many examples, but only one point, *i.e.*, that the impact upon American trade will be the primary test; and that one will not be permitted to do indirectly what he is prohibited from doing directly.

CRITICISM OF EXTRATERRITORIAL ENFORCEMENT

There are many critics of the United States attempts at extra-territorial enforcement of its antitrust laws. Among the most articulate is Sigmund Timberg. He catalogues many complaints which point to the conclusions that the United States policy is: (1) undermining its relationships with friendly States; and, (2) interfering with sound international economic relations.¹² He notes that the Netherlands has been so displeased at involvement of its nationals in the *General Electric Lamp*¹³ and *Canadian Electronic Patents*¹⁴ cases that a provision was included in its Economic Competition Law of 1956 whereby compliance with antitrust regulations of another State without prior consent of Netherlands authorities is prohibited.¹⁵ There is an indignant Ontario statute making it a crime to send corporate records out of Canada at the request of a foreign governmental authority.¹⁶ Many other foreign complaints and criticisms are extant but the most cogent would seem to be contained in the Canadian government's complaint arising out of the *Canadian Electronic Patents* case:

¹⁰ *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

¹¹ *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

¹² See generally Timberg, *Conflict and Growth in the International and Comparative Law of Antitrust*, A.B.A. Bull., Section of Int'l & Comp. L., July 1960, p. 20. (Cited hereinafter as "Timberg.")

¹³ *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949).

¹⁴ *United States v. General Elec. Co.*, civ. 140-57, S.D.N.Y., complaint filed Nov. 24, 1958.

¹⁵ Timberg, *supra* note 12, at 21.

¹⁶ *Id.* at 22.

... I do not put the issue upon the restricted and somewhat inconstant basis of international law. Even were it to turn out that ... the antitrust cases could be supported upon some theory or view of public international law, that nevertheless would not be a practical solution to a practical problem. ... These cases involve on the part of the United States more interference, and apparent assertion of a right to interfere, in commercial projects in Canada than is fitting or acceptable between two friendly but independent countries.¹⁷

The ultimate question, then, should be whether it is reasonable for the United States to embroil others in its *Carrie Nation*-type offshore antitrust enforcements.

According to Fugate, the Department of Justice has been increasingly sensitive to foreign relations problems inherent in antitrust cases.¹⁸ He states the direct-substantial-impact-upon-United States-foreign-commerce test to be generally controlling, but makes a policy statement that should foreclose liberal interpretation of the test by anyone seeking to advise an international business client: "We in the Department of Justice believe that our foreign trade cases have not impinged on the sovereignty of other nations and have been entirely consistent with the rules of international law and comity."¹⁹

THE COMMON MARKET CONFLICT

Although the impact of Common Market antitrust regulations on American business activities within the "EEC" is beyond the scope of this article, it is important to weigh, briefly, certain inherent conflicts problems. Timberg, for example, points out that any national legislation weakness of the member countries is likely to be of little significance if the strong antitrust articles of the Rome Treaty are strictly construed.²⁰ No student of United States constitutional law would assume, certainly, that these provisions will be held to merely cover trade between Member States, in spite of their language.

Leo M. Drachsler, who has ably addressed himself to the immediate problem of existence of the American parent and alien subsidiary within the Common Market, has delimited these problem areas:²¹

¹⁷ Ibid. Statement by E. D. Fulton, Minister of Justice and Attorney General of Canada explaining his government's objection to the filing of a complaint by the United States.

¹⁸ Fugate, *supra* note 3, at 25.

¹⁹ Id. at 27.

²⁰ Timberg, *supra* note 12, at 24.

²¹ Drachsler, *American Parent and Alien Subsidiary: International Antitrust Problems of the Multi-National Corporation*, A.B.A. Bull., Section of Int'l & Comp. L., July 1964, p. 29, at 39-41.

1. *The effect of the Common Market "enterprise concept" upon the American parent.* The basic problem will involve the decision of such organizations whether or not to register their intra-corporate business agreements with the Common Market. This depends, of course, on whether or not they are one enterprise. Thereupon, the spectre of intra-enterprise conspiracy could arise and, since turnabout must be fair play, the result could be assumption by the Common Market of antitrust jurisdiction over the American parent.

2. *The question of whether or not the American parent would have the right to receive a hearing before the Common Market Commission.* Presumably, the general international law principle relating to "minimum standards of justice" would protect the American parent at some administrative or judicial level, but would not necessarily forestall harassment.

3. *The overriding question of potential liability of the American parent to suit by the Commission.* If the Commission concludes that the parent and subsidiary are one enterprise they could presumably assume in personam jurisdiction over the parent through good notice to the subsidiary; and, pursuant to its investigatory powers, the Commission could compel the American parent to produce its documents and records.

The conflict of laws problems, complicated by the extraterritorial antitrust precedents of the courts of the United States, bode evil for the American businessman in his European business activities.

PROPOSED RELIEF

Drachsler suggests that one answer to the seemingly insurmountable conflict of laws problems, as between the United States and the Common Market, might be replacement of the conventional parent-subsidiary form of international operation with a mutually acceptable denationalized modification.²² The proposal is vague; and the method of implementing some form of the proposal from the United States side would not seem to be an easy task.

Timberg views the conflicts morass with mild hope, putting forward three possible solutions:²³

1. That the United States courts relax the rigid canons of American antitrust laws to take into account differing foreign policies. If this could be done, there would be no problems; however, it does not seem presently feasible.

2. That treaties and bi-governmental consultations be concluded prior to institution of proceedings. Presumably, in view of dreary precedents, this is not a meaningful answer. Treaties, *e.g.*, the

²² *Id.* at 41-51.

²³ Timberg, *supra* note 12, at 26-27.

Treaty of Friendship, Commerce and Navigation with Japan, did not forestall the Justice Department when it wished to call a transaction into question.

3. That multi-national conventions be concluded, as in the case of the Berne Union which modified certain patent forfeiture sanctions under national patent laws against foreigners. The difficulty here is implied in the very term "convention," which is an agreement between several States.

CONCLUSION

United States and foreign businessmen must, in view of the antitrust conflicts tangle they face, conduct themselves *inter se* in a manner more conservative than is normally conducive to ordinary and reasonable enterprise success. Otherwise, they face the possibility of purely national, as well as Common Market, judicial and administrative handling of their alleged antitrust transgressions on an *ad hoc* basis.

American foreign policy in the mid-twentieth century is ostensibly keyed to the preservation of an economically healthy community of States with like ideological bases; American domestic policy, likewise, must of necessity be concerned with the balance of payments and gold drain problem. Therefore, it is not beyond the realm of reason to expect that United States policy with respect to extraterritorial enforcement of its antitrust laws will be tempered to forward these other, overriding, policies. Law, in the United States, must follow morality, but should not be permitted to carry us to tragic error.