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The Limits Imposed by International Law on the Application of Cartel Law†

That the application of cartel law, and in particular of penal provisions enacted thereunder, is subject to certain limits in international law beyond which the cartel legislation of individual States may not go, is widely acknowledged.[1] Not so the precise location of the extreme limits permissible for the sphere of validity defined by these provisions themselves (jurisdiction to prescribe);[2] just how controversial this is can be illustrated by the fact that the paper presented by Ian Hunter at the meeting of the International Law Association in The Hague in August 1970 offered a choice between no fewer than three alternatives,[3] namely:

> (1) International law, as evidenced by the general practice of states to date, does not permit a state to assume or exercise prescriptive jurisdiction over the conduct of an alien which occurs within the territory of another state or states solely on the basis that such conduct produces "effects" or repercussions within its territory.
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> (2) A state has jurisdiction to prescribe rules of law governing conduct that occurs outside its territory and causes an effect within its territory if:
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> (a) the conduct and its effect are constituent elements of activity to which the rule applies;[4]
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> (b) the effect within the territory is substantial; and
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> (c) it occurs as a direct and primarily intended result of the conduct outside the territory.
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> (3) A state has jurisdiction to prescribe rules of law governing conduct occurring wholly outside its territory if such conduct produces effects within the territory which the state reprehends.

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[1]Oehler, Theorie des Strafanwendungsrechts, in Aktuelle Probleme des Internationalen Strafrechts (Heinrich Grützner–Festschrift 1970), p. 110. Seidl-Hohenveldern, Völkerrecht, (1969) pp. 214–215.

[2]As opposed to the actual sphere of operation in which these measures are also enforceable (jurisdiction to enforce). On the delimitation of jurisdiction to enforce from jurisdiction to prescribe, see American Law Institute, RESTATEMENT OF THE LAW (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) s.7, pp. 21–22.

[3]*Id.*, pp. 59–60.

[4]On the interpretation of this polysemantic expression, *see* Hermanns, Völkerrechtliche Grenzen für die Anwendung kartellrechtlicher Verbotsnormen (1969), pp. 60–61.

Alternative 3 corresponds in effect to the Alcoa judgment.[5] This judgment sought in principle to penalize only such acts originating abroad as were performed with the intention of producing an effect in the state of the forum. But from the fact that there *was* an effect in the state of the forum, the judgment concluded that there must have been an intention on the part of the offender to produce that effect.[6] Section 98(2) of the German Law against Restraint of Competition and—following its example[7]—Art. 85 of the E.E.C. Treaty, base the claim to penal jurisdiction simply on the fact of an effect being produced in the state of the forum. Even in their formulation, therefore, they conform to the model of Alternative 3.

The Alcoa decision had also served as a model for sec. 8 of Tentative Draft No. 2 (1958) of the *Restatement of the Law (Second), Foreign Relations Law of the United States,* published by the American Law Institute. Criticisms were levelled against this formulation, particularly by a European Advisory Committee under Lord McNair to which the author had the honour to belong. The views of this Advisory Committee are reproduced by Hunter in his Alternative 1. Criticism of this alternative—as expressed also in The Hague—overlooks the importance of the restriction residing in the word 'solely.' In the classic example of the shot over the frontier, for instance, the State in which the victim was would still be able to claim penal jurisdiction under Alternative 1, since more than mere effects or repercussions would be involved.

Alternative 2 leans heavily on sec. 18 of the final version of the Restatement. The wording chosen in that section was an attempt by the American Law Institute to come some way toward meeting the objections of the European Advisory Committee.[8] In his Alternative 2, Hunter has defined the underlying restriction of the Alcoa rule more closely.

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[5]United States v. Aluminum Co. of America et al., 148 F.2d 416 (2nd Cir. 1954), Whiteman, Digest of International Law 6, p. 140.

[6]Hermanns, op. cit., pp. 28-29.

[7]Graupner, The Law Relating to Restrictive Trade Practices in West Germany and in the Treaty Establishing the European Economic Community, in Comparative Aspects of Restrictive Trade Practices, International and Comparative Law quarterly, Supplementary Publication No. 2 (1961), p. 53. On the territorial sphere of operation of Article 85 E.E.C., *see also* Cerexhe in Ganshof van der Meersch (editor), DROIT DES COMMUNAUTÉS EUROPÉENNES (1969), p. 817, No. 2021. Ellis, *Source Material for Article 85(1) of the E.E.C. Treaty,* FORDHAM L. REV. 1963, pp. 247-277, and Van Damme, *La Mise en Oeuvre des Articles 85 et 86 du Traite de Rome,* CAHIERS DE DROIT EUROPEEN, 1966, pp. 304-305. S.98(2) of the German Law against Restraint of Competition was in turn influenced by the Alcoa decision. Rehbinder, Extraterritoriale Wirkungen des deutschen Kartellrechts, p. 49 (1965).

[8]These criticisms were also directed against sec. 8 of Tentative Draft No. 2 (1958) of the Restatement referred to in note 2; this Draft followed the Alcoa decision. The change in attitude of the American Law Institute is attributable to the criticisms of the European Advisory Committee under Lord McNair (Hermanns, op. cit., p. 70). Against this "watering-down" of Tentative Draft No. 2, see Metzger, The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction, 41 New York University Law

There is no way of avoiding a decision, at least[9] between Alternatives 2 and 3. It cannot be maintained that cartel law, as a form of administrative penal law, is subject to looser rules of delimitation than penal law *sensu stricto*.[10] Nor can every claim to the extraterritorial validity of cartel law be dismissed simply on the ground that it constitutes public law, which cannot in principle be enforced outside the frontiers of the state concerned.[11]

It would be incorrect, however, to deduce that Alternative 3 represents the position in international law merely from the fact that both sec. 98(2) of the German Law against Restraint of Competition and Art. 85 of the E.E.C. Treaty—and as the latest, rather unexpected link in this chain sec. 7(2)(b) of the Swiss Cartel Law of 20th December, 1962, at least according to an obiter dictum of the Swiss Federal Court—are geared to the mere effect in the national territory.[12]

In the Mariposa case it was rightly decided that the mere promulgation of an enactment which is potentially at variance with international law does not in itself constitute an infringement of international law. An injustice in international law does not occur until rights protected by international law are impaired by the concrete application of such an enactment.[13] But as

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Review (1966), pp. 15-17. The American Law Institute rightly declined, however, to consider further limitations not recommended by this Advisory Committee. It had been proposed that a criminal prosecution should only be admissible if the offense was punishable in both countries. Krumbein, Die extraterritoriale Wirkung des Antitrustrechts (diss. Cologne 1967), cites in this connection Association of the Bar of the City of New York, Special Committee on Antitrust Laws and Foreign Trade (1957), p. 9. This proposal would lead to the coming into being of cartel support countries, similar to the tax havens.

[9]Alternative 2 could under certain circumstances be interpreted as an elucidation of the term "solely" in Alternative 1.

[10]Schlochauer, Die extraterritoriale Wirkung von Hoheitsakten (1962), p. 54 ff., Rehbinder, op. cit., p. 87; contra, Seidl-Hohenveldern, review of Schlochauer's book in JZ 1963, 39; simile, Van Hecke, Le Droit Anti-Trust, Aspects Comparatifs et Internktionaux, Recueil des Cours 106 (1962, II), p. 303, and Schwartz, Deutsches Internationales Kartellrecht (1962), p. 268.

[11]Seidl-Hohenveldern, AWD 1960, p. 277 bottom left; Hug, Die Anwendbarkeit der kartellrechtlichen Bestimmungen über die EWG auf in Nichtmitgliedstaaten veranlasste Beschränkungen im Gemeinsamen Markt, in: Kartelle und Monopole im modernen Recht (1961), p. 635; contra, Bär, Kartellrecht und Internationales Privatrecht (1965), p. 297, and my elucidation in my review of Bär in American Journal of Comparative Law (1969), 16, p. 276; against the principle referred to, see in particular P.A. Lalive, Droit Public Etranger et Ordre Public Suisse, Eranion in honorem G.S. Maridakis (1964) Vol. III, p. 191 ff.

[12]In its decision in Librairie Hachette S.A. et Consorts v. Société Coopérative d'Achat et de Distribution des Négociants en Tabacs et Journaux et Consorts, BGE 93 II 192, 196, WuW 1970, pp. 355-356, the Swiss Federal Court also interpreted sec. 7(2)(b) of the Swiss Cartel Law of 20th December, 1962—admittedly in an obiter dictum—as meaning that that Law must be applied to all cartels producing in Switzerland effects which are prohibited in that country. This is contested by Frank Vischer, Bundesgerichtspraxis zum Internationalen Obligationenrecht 1966-1967, Schweizerisches Jahrbuch für Internationales Recht XXV (1968), pp. 326-327.

[13]U.S.-Panama Claims Commission, Mariposa Claim, Ann. Dig. 1933-34, No. 99. Sim-

Hermanns pointed out in The Hague, sec. 98(2) of the aforementioned German Law has never yet been applied to a case in which the facts fitted Alternative 3. The question is therefore still open.

On Art. 85 of the E.E.C. Treaty, Thiesing[14] likewise pointed out in The Hague that in both the Dyestuffs[15] and the Quinine[16] cases, part of the activity complained of had taken place within the territory of the E.E.C. Nevertheless, the Commission of the European Communities has stressed that its claim to penal jurisdiction extends to acts performed by foreign firms outside the Common Market which have effects within the Common Market.[17]

The vacillation of these statements shows how difficult it is in practice to draw the line here. What is "mere effect"; what, indeed, is "part of an activity" or "constituent elements"? Precisely in cartel cases, the presence and extent of an effect from outside is certainly more difficult to establish than in the case of the shot fired over the frontier.[18] Nevertheless, I consider it to be unduly pessimistic to doubt the possibility of effecting such demarcations at all(—and then to derive from that an argument in support of Alternative 3).

It should not be beyond the wit of lawyers to draw distinctions here. One such attempt is the Aide-Mémoire of October 1969, in which the British Government protested against the Dyestuffs decision of the Commission of the European Communities.[19] Nevertheless, it was pointed out during the debate in the Hague that some of the formulations in this Aide-Mémoire, too, are capable of more than one interpretation. Hunter's initiative in the Hague was all the more welcome, therefore; by means of a

ilarly Hermanns, op. cit., p. 8. Reservedly, PCIJ Series A No. 7 (Chorzów case), p. 46; cf. Seidl-Hohenveldern, Völkerrecht (1969), p. 273, Rz. 1214.

[14]J.J.A. Ellis, Extra-territorial Application of Anti-Trust Legislation, XVII Ned. Tijdschr. v. Int. Recht p. 67 (1970) refers to a lecture delivered in October 1969 before the Federation of Netherlands Industry by the member of the Commission primarily responsible for questions of competition.

[15]Official Journal of the European Communities 1969, L 195, p. 11.

[16]Complaint against the decision of the Commission of the European Communities of 16.7.69, Official Journal of the European Communities L 192, p. 5. The decision by the Court of Justice of the European Communities, by which the penalties imposed by the Commission were reduced (Frankfurter Allegmeine Zeitung of July 17, 1970), came too late for comment here.

[17]This pronouncement concerned the Dyestuffs case. Third Comprehensive Report on the Activities of the Communities 1969, para. 34; the Commission thus confirmed the forecast of its future conduct given by Focsaneanu in an opinion quoted by Blair, *The Quinine Convention of 1959-1962: A Case Study of an International Cartel*, in H. ARNDT, RECHT, MACHT UND WIRTSCHAFT (1968), pp. 173-174.

[18]Van Hecke, op. cit., p. 311; Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L. J. (1953/54), p. 648 ff.; Ellis, Comment, 111 U. PENN. L. REV. (1963), p. 1129 ff. Further evidence in Krumbein, op. cit., p. 114, note 2; as in the text, Krumbein, op. cit., p. 118.

[19]British Practice of International Law 1967 quoted by Ellis (*supra* note 14) p. 65-67.

questionnaire, he invited all interested circles to say how they would solve the cases described therein in the light of the principles for which they stood. Two of these test cases will now be discussed briefly.

Hunter's Case No. 3 concerns two companies, A and B, domiciled and having their real centres of management in Britain. They conclude an agreement in London to divide up the E.E.C. market between them. Company A is to supply solely in the Federal Republic of Germany, while company B is to confine itself to France. Can criminal proceedings be brought against company A in France on account of "refus de vente"?

Such an agreement would certainly have effects on the E.E.C. market. A radical supporter of Alternative 3 would therefore have to answer the question in the affirmative. Indeed, he would even have to advocate penalizing both firms a second time on the same set of facts for infringing Art. 85 of the E.E.C. Treaty.[20]

To punish a mere omission abroad, which is what the "refus de vente" amounts to, seems however, to be going too far, and is certainly not defensible from the point of view of Alternatives 2 and 1. One is tempted here to vary slightly Madame Dubarry's outburst: "O Freedom (of competition), what constraints are committed in thy name!" At the time of the struggle for the Sherman Act it was common practice in the United States to describe the founders of the large trusts as "robber barons." Opponents of cartels who would regard criminal proceedings as admissible in the present case ought therefore to feel like super-robber barons. The robber barons of the Middle Ages used, it is true, to stretch a chain across a river with the object of mulcting merchants as they came sailing downstream. But they did not first ride across country to compel the merchants to use the river.

It is not easy to think out examples of circumstances under which comparable claims to extraterritorial penal jurisdiction on account of a mere omission would even have been entertained. The classic example of the shot fired across the frontier fails us completely here, since the marksman undoubtedly performs an act. A person standing on the far bank of a frontier river who sees someone fall into the water from the other bank without coming to his aid is admittedly punishable for withholding assistance; but such conduct would constitute an offence on either side of the frontier river. Such a case would not in practice be likely to raise any problems.[21] Under many legal systems, high treason against foreign states does not carry any penalty. For its part, however, the foreign state concerned will in many cases threaten to penalize anyone who fails to give

[20] Vide *infra*, text at nn. 37 and 38.

[21] Vide *supra*, n. 8.

information of a treasonable act which has come to his knowledge. Could therefore a state threaten to penalize a national of another state who, standing on his own side of the frontier river, saw terrorists ferrying explosives over the river and failed to report this to the foreign authorities? One should regard such a claim to penal jurisdiction as inadmissible, although it could be supported by the protective principle.

However, according to the prevailing doctrine, a claim to penal jurisdiction in cartel matters should be based, not on the protective principle, but solely on the extended territoriality principle.[22] The protective principle is therefore of interest in this discussion only inasmuch as its very existence precludes the possibility of regarding every effect from abroad on the national territory as sufficient to localize the act partly within that territory and then proceeding to construct from this a claim to penal jurisdiction based on the extended territoriality principle.[23] Assertions of jurisdiction on account of treasonable acts committee abroad are the classic examples of claims to penal jurisdiction based on the protective principle. But these acts, too, are surely intended to have effects on the national territory. Why then does the prevailing doctrine bring the protective principle into the picture at all in these cases, if the claim to penal jurisdiction could after all be based on Alternative 3 of the extended territoriality principle?

In order to construct an example of a claim based on the extended territoriality principle to penalize an omission committed abroad, one must return to the Quaker States of the 18th century, where adultery was a felony, and failure to report a felony which had come to one's knowledge was at least a misdemeanour. Would such a state really have been entitled to penalize an alien who, from the territory of a neighbouring state which took a liberal view of such matters, saw a young man paying secret visits to the young wife of the old Quaker mayor, if that alien had failed to draw the attention of the authorities of the Quaker State to these suspicious visits? Then as now, the answer can surely only be a plain no; but Alternative 3 would allow penal jurisdiction in a case of "refus de vente", i.e. on account of a mere omission in another country where it does not constitute an offence.

Hunter's example No. 2 concerns two European producers who agree not to charge more than a certain price for their products in South America or to sell them there on particular terms, in order, for instance, to squeeze a

[22]Hermanns, op. cit., p. 37; contra, Rehbinder, op. cit., p. 81. United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968), AM. J. INT'L. L. 62 (1968) p. 975, draws a clear dividing-line between the extended territoriality principle applicable in cartel cases and the protective principle, on which the claim to penal jurisdiction was based in this case of perjury in a visa application to the U.S. Consulate in Montreal.

[23]Krumbein, op. cit., p. 143.

competitor out of that market. In practice, their conduct in that market amounts to dumping. Their agreement does not extend to North America, but as a result of their conduct prices rise in the U.S.A. Does the U.S.A. have jurisdiction to penalize the two producers? Not according to Alternatives 2 and 1, since there was no intention here to affect the U.S. market.

On page 60 of his paper, Hunter mentions a further hypothetical case in which the I.L.A. Anti-Trust Committee was unwilling to allow a claim to penal jurisdiction based on mere effects. A Netherlands law prohibits the erection of tall buildings within a certain radius of an airport. If now an airport were to be built on Netherlands territory so close to the Belgian frontier that the prohibited zone extends into Belgian territory, it would not be possible for the Netherlands courts to punish a Belgian for erecting a building on Belgian soil but within the prohibited zone.

Yet here, too, under Alternative 3 the Netherlands would be able to claim jurisdiction, since the conduct of the Belgian in Belgium undoubtedly runs counter to the protective intent of the Netherlands law and therefore constitutes conduct that the Netherlands reprehends.

If one were really to recognize a claim to penal jurisdiction in such a case, one would have to be consistent and, where the position is reversed, allow aliens abroad the possibility of invoking the protection of a domestic law even in cases in which conduct in the national territory also produces effects abroad, or indeed produces *only* effects abroad. Now the Austrian Administrative Court recently had to deal with a case which was virtually the mirror image of the Belgian-Netherlands airport case thought up by Hunter. An Austrian law allows the municipalities and owners of properties in the neighbourhood of an airfield the right to a hearing when extension of the airfield is contemplated. In connection with the extension of an Austrian airfield at Salzburg which directly adjoined the frontier with Bavaria, Austrian municipalities and residents of Austria were allowed to take part in such a hearing in order to protest against the increased noise, but the Bavarian municipality of Frielassing which adjoined the airfield, or Austrian nationals resident in Freilassing were not. It was held that the relevant provisions of the administrative law were in principle territorial in character. When therefore they accorded rights "to municipalities," this was to be understood as referring exclusively to Austrian municipalities.[24]

With similar narrowmindedness, an American court allowed the export of contaminated foodstuffs to Austria,[25] while the Austrian Administrative

[24]Austrian Administrative Court 3.6.69, Zl. 233/69/3 and 314/69/2. The decision is being published in International Law Reports.

[25]United States v. Catz American Co., 53 F.2d 425, 426 (9th Cir. 1931); Seidl-Hohenveldern, American-Austrian Private International Law (1963), p. 34.

Court refrained from punishing an Austrian who had labelled water from a particular spring as "medicinal water," although under Austrian law it was not entitled to be so described. The accused had in fact been able to show that all the misleadingly labelled water was exported to the Federal Republic of Germany.[26]

This nationalistic illogicality is particularly marked in the field of cartel law. The United States, the Federal Republic of Germany and the E.E.C.—to name but three examples—are on the one hand concerned to penalize mere effects of foreign trade on their internal competition, while on the other hand they exclude export cartels from the ban on cartels in domestic law, since export cartels only have the effect of restraining competition abroad.[27] Dr. E. Günther, the President of the German "Bundeskartellamt," rightly pointed out at the Frankfurt Conference on Cartel Law in 1960[28] that this attitude was illogical; it reminded him of the old countryman's prayer to the patron saint of firefighters: "Dear St. Florian, protect my house and set others alight instead."

The national egoism in cartel matters is reminiscent of certain features of the situation prevailing in the field of exchange control prior to the creation of the International Monetary Fund. There too, States were at pains to protect their own markets by means of stringent currency laws, while at the same time declaring similar foreign enactments, which had the effect of aggravating their own currency situation, to be incompatible with their own ordre public.[29]

The alternatives hitherto discussed for limiting the extraterritorial penal jurisdiction claimed by individual national cartel laws have not so far provided any unambiguous and universally acceptable (let alone universally accepted) solution to the problem which arises when a State claims such jurisdiction over conduct on the territory of another State where such

[26]Austrian Administrative Court 9.5.67, Osterr. Jur. Z. 1968, p. 305.

[27]The Webb-Pomerene Act (U.S.A.) and sec. 6(1) of the German Law against Restraint of Competition; cf. Schwartz, op. cit., p. 47 ff. A cartel agreement to share the Austrian market, concluded in the Federal Republic of Germany between Austrian and West German firms, was legally unobjectionable in the Federal Republic as being a pure export cartel; the Austrian Supreme Court, however, held it to be void as being contrary to mandatory Austrian cartel law (decision of 21.5.68, Österr. Jur. Z. 1968, p. 601, No. 375). Whether a remaining part of this agreement which was not contrary to Austrian cartel law (exchange of licences) could be split off and kept in being was to be judged by German law, according to the Austrian Court.

[28]The report on the debate in Kartelle und Monopole im modernen Recht, Vol. 2 (1961), p. 981, alludes to this contribution to the debate in which Günther concurred with the views expressed by Schwartz, Anwendbarkeit nationalen Kartellrechts auf internationale Wettbewerbsbeschränkungen, ibid. pp. 690–692.

[29]Kammergericht, 3rd November, 1932, IPRep. 1933, No. 3; Seidl-Hohenveldern, Internationales Konfiskations—und Enteignungsrecht (1952), p. 160; Van Hecke, op. cit. p. 322.

conduct is not subject to penalty, or indeed under certain circumstances may even be prescribed by the law in force there. Unlike the exchange control matters just referred to, this question has not so far been regulated by international treaty law. The Havana Charter was, it is true, intended to eliminate these conflicts by providing a world-wide agreement on the mutual recognition of cartel regulations, but it has never come into force.[30] In its bilateral treaties of friendship, commerce and navigation, the United States has since World War II included the following clause, as for instance in Article XVIII (1) of the Treaty with the Federal Republic of Germany: "The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Government agrees upon the request of the other Government to consult with respect to any such practices and to take such measures, not precluded by its legislation, as it deems appropriate with a view to eliminating such harmful effect."[31]

An American court has rightly declined to interpret a similar treaty clause in Art. XVIII of the Treaty with Japan as meaning that it alone, to the exclusion of other antitrust laws of the U.S.A., constituted the cartel law applicable to a cartel arrangement between Japanese and American firms regarding exportation to the American west coast.[32] This was certainly not the intention of the contracting States. On the other hand, neither do these provisions require the treaty partner of the United States to tolerate claims to an extraterritorial validity of American antitrust law. This is already evident from the text of the provisions, which in practice in every case leave it to the discretion of the treaty partner whether or not to support the anti-cartel measures taken by the United States.[33]

When negotiating each of the many treaties of friendship, commerce and navigation concluded by it, the United States insisted on the inclusion of this clause.[34] It presumably wanted to be able later to contend that these clauses constituted further evidence of the existence of a general consensus among the nations on this point of law. It is, however, highly questionable

[30]Nevertheless, the decartelization division of the Military Government for Bavaria referred to the Havana Charter in a decision of 3.2.49, WuW Entscheidungssammlung All. 4, Seidl-Hohenveldern, AWD 1960, p. 228.

[31]Treaty of 29th October, 1954, BGBI 1956 II 487, 273 U.N.T.S. 3 (1957).

[32]United States v. R.P. Oldham Company et al., 152 F.Supp. 818 (N.D. Calif. 1957); Whiteman, op. cit., pp. 148–150.

[33]". . . *may* have harmful effects"; ". . . take such measures, not precluded by its legislation, as *it* deems appropriate."

[34]List in Krumbein, op. cit., p. 64 note 1.

whether this object will be achieved. It is well-known that, even when many treaties contain similar clauses, there are constant disputes as to whether it is permissible to deduce the existence of a general consensus or whether the very inclusion of such a clause does not tend to show that, without that clause, the law affirmed therein would just not exist.[35]

To refute the assumption that a general principle of law requiring mutual tolerance of claims to penal jurisdiction for the infringement of national cartel regulations already exists,[36] it is sufficient to point to the existence of numerous states with a centrally directed economy, whose economy, therefore, as seen from abroad, is nothing but one gigantic cartel, and also to the existence of other States which to a greater or lesser extent put the principle of freedom of contract above the principle of freedom of competition, and in practice are not prepared to make any concessions in that respect to the legal philosophy of the United States.[37]

Now the Americans are fond of stressing the need for more intensive international co-operation in combating cartels, and of pointing in particular to the growing threat to the freedom of competition represented by the international cooperation of the multinational companies. Those who approve this idea should not, however, apply double standards. They should take equally firm action to counter the impediments to competition emanating from the international trade union movement, which in July 1970, for instance, induced the dockers at Antwerp not to unload ships which had been redirected from London to Antwerp on account of the British dock strike.

If it is desired to internationalize the penalty of offences against national cartel laws, it would also be logical to recognize not only the cartel laws of another state but also the penalties imposed under those laws, in the sense that it should not be possible for a further penalty to be imposed under domestic law for the same offence. Nevertheless, in the Quinine case the Court of Justice of the European Communities took no account of the penalties already imposed in the United States in respect of that cartel arrangement,[38] while in the Wilhelm case[39] it allowed the penal provisions of E.E.C. law, as well as those of the German Law against Restraint of Competition, to be applied to one and the same cartel arrangement.

This practice runs counter to the principle *ne bis in idem,* which as a

[35]Seidl-Hohenveldern, Völkerrecht, p. 98. In the Lotus Case, the PCIJ ruled in favour of this second alternative; PCIJ Series A No. 10, p. 27 (1927).

[36]Schwartz, op. cit., p. 51, raises this question.

[37]Hermanns, op. cit., p. 59.

[38]Note to Annex D. of the Report by the Anti-Trust Committee of the I.L.A. for the Hague Conference.

[39]Preliminary ruling of Feb. 13, 1969, Case 14/68.

generally acknowledged principle of law is also valid in international law, and is moreover entrenched in the Constitution of the German Federal Republic. For the contrary attitude of the judges of the Court of Justice of the European Communities there is a subjective, albeit not very convincing excuse. The fact is that all these judges come from States in which, during and after World War II, conflicts between the courts of the occupying powers and the national courts were the order of the day. Such conflicts were usually resolved by those courts ignoring each other. Thus it came about that one and the same offense, say the purchase of a tire from the stocks of the occupying power, was punished separately by each of those courts. The occupation court punished the person who had bought the tire from a pilfering soldier for being in possession of equipment belonging to the occupying power, while the national court punished him additionally for receiving stolen goods and black-market dealing. That was then the prevailing practice of the courts, and one must concede that it was just as unsatisfactory then as is today the practice of the Court of Justice of the European Communities in the cartel cases referred to.

International co-operation in the field of cartel law is therefore, to say the least, very imperfect and in particular does less than justice to the claims of the United States to recognition of its Antitrust Laws.

Nevertheless, Section 40 of the 1965 Restatement seeks to resolve the conflict described between the jurisdiction claimed for a cartel law, and the attitude of the other state which denies that jurisdiction by implicitly assuming that the cartel law represents a higher level of national interest.[40] Bär's proposal is in similar vein; he sees in cartel laws an interest of the state enacting those laws which is worthy of respect and to which the other states should in principle be bound to yield.[41] In a debate with Schiller, Erhard defended the proposition that the German Law against Restraint of Competition, too, was law of a higher order; he was admittedly not comparing it with foreign law, but with the German Stability and Expansion Law.[42] It is only with some misgivings that I would put forward a further objection to the U.S. thesis of the unlimited superiority of cartel law.

It concerns the case of the quinine cartel, before the Court of Justice of the European Communities (See footnote 16) and before American courts. It is not intended to discuss here the moral aspects of the matter, which concerns the increase in price of a medicament vital to the U.S. troops fighting in Vietnam. To do so, one would have to be very knowledgeable

[40]1965 Restatement, s. 39, p. 113.

[41]Bär, op. cit., p. 329. Even more categorically, Lador-Lederer, International Non-Governmental Organizations and Economic Entities (1963), p. 298.

[42]Quoted in Sauter, Zehn Jahre Kartellgesetz, BB 1968, p. 1169. In terms of positive Law, this claim is untenable.

about the qualities and prices of synthetic quinine substitutes. The question also arises whether the guilt of the American Government agencies, which certainly chose the wrong moment to sell the U.S. Government's stocks of quinine in view of the tense situation in South-East Asia even at that time, is not greater than that of the cartel which acted as purchaser. Mr. Blair's statement on the quinine case has been published in the Federal Republic.[43] It therefore seems to be permissible to voice opinion to it.

All that is of interest here in connection with the superiority of cartel law is the complaint that one of the objects of the cartel was to manipulate the purchase prices paid to an Indonesian State enterprise and thus obtain, at the expense of that enterprise, excess profits from which an indemnity was paid to the Dutch partner in that cartel by the other members for the loss of the estates of which it had been deprived by the Indonesian State.[44] It is, to say the least, illogical that it should be representatives of the U.S. Government and of American business who, time and again at innumerable congresses, criticize the seizure of foreign property without compensation as being contrary to international law, and do little but complain that any reaction on the part of the states and owners affected is mostly doomed to failure because outsiders, acting from crude self-interest, breach the solidarity required to make economic sanctions effective, thus making such sanctions appear pointless.[45] But when for once, as in the case now at issue, the competitors of an expropriated party do not exploit his difficult position but show solidarity, this attitude is considered to be reprehensible, or indeed criminal.

Within its own legal order, a state may of course value some laws more highly than others. But in view of the fact that the values safeguarded by a particular law are rated at very different levels by the various members of the community of nations, such a state cannot expect other states to follow its own higher valuation to the extent of subordinating their efforts to protect their own sovereignty to the superiority which that state itself attributes to the law in question. Any claim to the recognition by the third States of the superiority of American or German cartel law could only be based on a recognition of that superiority in the general customary law of nations. Such a claim would be frustrated, not only by the differing attitudes of other states towards cartels,[46] but also by the fact that neither

[43]Blair in H. Arndt, op. cit., pp. 123–184. Cf. the author's review in Österr. Zeitschrift für öffenliches Recht.

[44]Blair, loc. cit., p. 163–164.

[45]Banco Nacional de Cuba v. Farr, Whitlock & Co. and Sabbatino, 376 U.S. 398, 434, note 38 (1964); simile, Oberlandesgericht Bremen 21.8.59, AVR 1961, p. 352; cf. Seidl-Hohenveldern, Völkerrechtswidrige Akte fremder Staaten vor innerstaatlichen Gerichten, in: Recht im Wandel (Heymanns Verlag, Festschrift 1965), p. 615.

[46]Vide *supra*, text at notes 36 and 39.

American nor German cartel law prohibits export cartels, and therefore does not consider cartels to be bad per se. The claim that those systems of cartel law are superior therefore lacks credibility and is not likely to eliminate conflicts between those laws and the legal order of third States.

In practice, the United States has often been at pains to avoid such conflicts, at least in cases in which the conduct required by U.S. antitrust law is illegal in the other country concerned. In such cases the party affected is often exempted from the mandatory provisions of U.S. antitrust law by means of a saving clause.[47] This self-restraint is praiseworthy. The objection raised by Jennings[48] against this practice, namely that the renunciation of a claim which is contrary to international law does not mean that its original assertion was any less contrary to international law, seems to be exaggerated. Jennings' criticism is justified, however, when he points out that this consideration for the legal philosophy of the other state often does not go far enough. Such a state may, under certain circumstances, place just as much value on upholding the rights of freedom guaranteed by it as on the observance of the prohibitions it has enacted. Jennings takes the view that this could apply to safeguarding not only, for example, the right of free speech, but also the right to freedom of contract.[49]

The de facto assertion of a claim to penal jurisdiction based on the extended territoriality principle by the cartel law of a state is not only open to the objections of an international law nature already set out above. The agencies called upon to implement these regulations cannot, in the nature of things, take any steps against a cartel arrangement until they are aware of its existence. The imposition of a penalty for infringement of those regulations must be preceded by proof of guilt. But precisely in the case of international cartel arrangements, particularly when they are made solely between aliens abroad, the relevant documents are likewise located abroad. Especially in such cases, therefore, the prosecuting authorities often find it impossible to furnish proof—although even in domestic cases the chances of obtaining incontrovertible evidence of cartel arrangements are often slender, too.

To overcome this difficulty in furnishing proof, various means have been proposed which are likewise of doubtful validity in international law. In practice, the investigations to establish the existence of an offense against

[47]Seidl-Hohenveldern, AWD 1960, p. 231.

[48]Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 British Yearbook of International Law (1957), pp. 169, 174; contra, Seidl-Hohenveldern, AWD 1960, p. 231.

[49]Jennings, The Limits of State Jurisdiction, 32 Nordisk Tidsskrift for International Ret (1962), p. 209. Hermanns, p. 33, concurs.

cartel law often give rise to conflicts similar to those engendered by the actual assertion of penal jurisdiction in such a case.

One way of avoiding the difficulty of furnishing proof in the case of international cartels is shown by the Alcoa decision, inasmuch as it deduces the criminal intent to have an effect on the territory of the forum, this being a requirement for the enforceability of the claim to jurisdiction, from the fact that the cartel does have such an effect.[50]

As far as German cartel law is concerned, Helmut Arndt is untiring in his advocacy of the proposition that to obviate the difficulty of furnishing proof when prosecuting cartels, the agencies responsible for combating cartels should be supported in their activities by the formulation of ever more comprehensive statutory presumptions of guilt.[51]

This proposition raises a problem of international law: to what extent would such statutory presumptions of guilt be compatible with Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)? This provision reads: "Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law." The question here at issue is whether the words "until proved guilty according to law" admit of such statutory presumptions of guilt.

These words are also to be found in Article 14(2) of the U.N. Covenant on Civil and Political Rights of 16th December, 1966,[52] to which the German Federal Republic is a signatory. They go back to Article 11(1) of the Universal Declaration of Human Rights of 19th December, 1948, by the General Assembly of the United Nations.[53] The documents embodying the history of this provision[43] do not provide any information as to whether the words in question are to be understood solely as meaning that, in establishing guilt, the court must observe the procedural rules of the State of the forum even beyond the minimum laid down in Article 6(1) ECHR, or whether they also allow statutory presumptions of guilt. Unless one rejects this latter view, it would be possible to turn the sense and object of this provision into their exact opposites, if, for instance, presumptions of guilt were actually formulated along the lines of the joke that was going the rounds in Germany during the state of emergency prevailing after World War II, according to which there was a law which stated: "Anyone who has not starved to death by 1st April, 1946, shall be punished for com-

[50]Vide *supra*, text at note 6.

[51]H. Arndt, op. cit., pp. 16, 43. An indication along the same lines is to be found in the report of the Bundeskartellamt on its activities in 1969, Bundestag document VI/950, p. 15.

[52]Khol, Der Menschenrechtskatalog der Völkergemeinschaft (1968), p. 64.

[53]Berber, Völkerrecht-Dokumentensammlung (1967), p. 919.

[54]United Nations, These Rights and Freedoms (1950), pp. 33–36.

plicity in the black market." Bürgenthal[55] was right when, at the Vienna Colloquium on Human Rights in 1965, he said: "There is probably a limit beyond which the law of the adjudicating state cannot go, in that it cannot, for instance, explicitly or implicitly assign to the accused the task of taking evidence."

The European Commission of Human Rights and the European Court of Human Rights have not so far made any pronouncement on this question. In German law, the debate on the compatibility of statutory presumptions of guilt with Article 6(2) ECHR was sparked by Section 245a[56] of the Penal Code, under which the fact of a person previously convicted of larceny being found in possession of housebreaking implements was sufficient to warrant the presumption, rebuttable by the accused, that he intended to use the implements, not for a harmless activity, but for housebreaking purposes.

If, despite judicial decisions to the contrary,[57] one accepts the view put forward above that Article 6(2) ECHR does not allow statutory presumptions of guilt, a reliance on this principle vis-à-vis agencies of the European Communities could probably not be countered by the objection that Article 6(2) ECHR refers only to criminal proceedings. The applicability of this provision cannot, after all, be decided by whether or not a state expressly describes a particular procedure under its own legal order as a criminal proceeding. In the case of an international convention, the only decisive factor must be the substantive content of the regulation. But there can now be no doubt that the cartel proceedings under the German Law against Restraint of Competition are essentially of a penal nature. Here, too, the distinction that Schlochauer[58] seeks to make between criminal proceedings *sensu stricto* and administrative penal proceedings, lacks conviction. Such a formalistic interpretation would, moreover, belie the objective of the Convention, namely to achieve a broader and more certain protection of human rights.

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[55]Comparison of the Jurisdiction of National Courts with that of the organs of the Convention as regards the Rights of the Individual in Court Proceedings. Articles 5, 6 and 13, in Robertson (editor), Human Rights in National and International Law (1967), p. 178. Guradze, Die Europäische Menschenrechtskonvention, Kommentar (1968), p. 106, describes the admissibility of statutory presumptions of guilt as "controversial."

[56]Repealed in 1956. Criminal Law Reform Law of 25.6.69, BFBl I p. 645; cf. Bundestag document V/4094, p. 36, in conjunction with Bundestag document IV/650, p. 400, which described sec. 245a of the Penal Code as being "of doubtful compatibility with the rule of law" ("rechtsstaatlich bedenklich").

[57]In its decision of 3.10.58, NJW 1959 p. 1932, the Heidelberg Landgericht (District Court) held sec. 245a of the Penal Code to be incompatible with the Human Rights Convention; contra, Schröder, NJW 1959 p. 1905; Brunswick Oberlandesgericht (Court of Appeal) of 11.4.63, Neidersächsische Rechtspflege 1963, p. 189; and Bundesgerichtshof (Supreme Court of Appeal) 5.9.67, NJW 1967 p. 2367.

[58]Vide *supra*, note 10.

In the field of E.E.C. cartel law, it has not hitherto been the practice to operate with statutory presumptions of guilt. If, however, the American and German examples were to influence E.E.C. cartel law in this respect, too, this would raise problems of international law in the E.E.C. which would not in all respects be identical with those in the Federal Republic of Germany. For the text of the E.E.C. Treaty nowhere refers to the European Convention on Human Rights. A direct application of the provisions of the Convention to acts of the European Communities via an indirect liability of the Member States for the acts of the Community created by them is admittedly out of the question, since one of the Member States of the E.E.C., namely France, has not yet ratified the European Convention on Human Rights[59] and since moreover the European Commission of Human Rights has expressly rejected such an indirect liability of the Member States of an international body for the acts of that body.[60] This precludes only the application of the Convention as such, however. The agencies created by the Convention would not, therefore, be called upon to examine the compatibility of acts of agencies of the European Communities with the Human Rights Convention. But this cannot and must not mean that any examination of acts of the European Communities for their compatibility with the principles embodied in the European Convention on Human Rights is precluded. For despite the fact that the Convention has not been ratified by France, these principles constitute general principles of law which are common to the legal orders of the E.E.C. Member States and are therefore among the legal norms to be applied by the Court of Justice of the Communities in implementation of the E.E.C. Treaty.[61]

Any invocation of statutory presumptions of guilt will therefore encounter objections based on the ideal of the rule of law embodied in the European Convention on Human Rights and as such constituting international law.

Attempts to overcome the difficulty of furnishing proof by laying hands more or less directly on evidence located abroad constitute a direct en-

[59]Capotorti, Possibility of Conflict in National Legal Systems between the European Convention and other International Agreements, in Robertson (editor), op. cit. p. 92.

[60]Decision of 15.7.65 on Petition No. 2095/63, Yearbook of the European Convention on Human Rights 8 (1965) p. 273 (283), and of 10.6.58, Petition No. 235/56, ibid. Vol. 2 (1958/59) p. 257, on the Oberstes Rückerstattungsgericht (Supreme Restitution Tribunal) in Berlin.

[61]Cf. Winfried Escher, Die Geltung der Europäischen Menschenrechtskonvention gegenüber den drei Europäischen Gemeinschaften (diss. Saarbrücken 1964); and Court of Justice of the European Communities 12.11.69, Case 29/69, request by the Stuttgart Administrative Court for a preliminary ruling in re Stauder v. City of Ulm, EuR 1970, 39, with note by Ehlermann.

croachment on the sovereignty of the state concerned, which is protected by international law.

In investigating cartel arrangements, to an even greater extent than when claiming penal jurisdiction in the narrower sense, the United States in particular has in recent years disregarded the objections existing abroad to such activities on the part of U.S. agencies. Here, too, it cannot plead the alleged superiority of U.S. antitrust law. In a case before the International Court of Justice, the Court did not attach a higher value to the securing of proofs of guilt which would justify the infringement thereby entailed of the sovereignty of the state concerned.[62]

Third states rightly regard it as inadmissible for the United States to have investigations in cartel cases carried out by American investigating officers outside U.S. territory. It is justly pointed out that Switzerland held similar prying activities by persons acting on behalf of the exchange-control agencies of the German Reich to be inadmissible. In *Kämpfer v. the Public Prosecutor of Zürich*,[63] the Swiss Federal Court rightly declined to recognize the allegedly voluntary consent of the firm concerned as a ground justifying such an investigation. There can obviously be no question of voluntary consent when the consent of the firm concerned is obtained by the threat of severe penalties, particularly when this is done on the basis of statutory presumptions of guilt.[64]

Similar strictures apply to the practice of the U.S. antitrust authorities of using a more-or-less firmly based jurisdiction over the subsidiary or a marketing agency of a foreign enterprise[65] to require the enterprise concerned to produce a large volume of business records in the hope that from the material so requisitioned it will somehow be possible to prove the existence of the cartel arrangement suspected by the U.S. antitrust authorities. Such requisitions of documentary material are very aptly known as "fishing expeditions."

Quite apart from the objections engendered by the desire of the foreign State to safeguard its own sovereignty, a further objection to the practice of "fishing" is perhaps to be found among the generally recognized principles

[62]Corfu Channel (Merits) Case, (United Kingdom v. Albania), 9th April, 1949, ICJ Reports 1949, pp. 34-35.

[63]Bundesgericht (Swiss Federal Court) 6.3.39, BGE 65 I 39; cf. also the protests in the Austrian press against the taking of the deposition on Austrian soil, of a German witness whose testimony was of importance to the HS 30 Committee of the German Bundestag, by two members of that Committee. (Tiroler Tugesseitung September 28, 1968. Rightly Heubel, Bankgcheimmis fur Zweignierterlassungen amerikanischer Banken in Deutschlant gegenüber den Behöroten der USA (thesis Frankfurt 1970) p. 104 considers the snooping of American Internal Revenue Service agents in alien countries a violation of international law.

[64]Rehbinder, op. cit., pp. 394-396; Seidl-Hohenveldern, JZ 1963, p. 39, and AWD 1963, p. 75; contra, Schlochauer, op. cit., p. 68; undecided, Schwartz, op. cit., p. 249.

[65]Cases in Hermanns, op. cit., pp. 2-3, and Whiteman, op. cit., pp. 160-179.

of procedural law. A recent decision by an international arbitration tribunal is relevant here. In its Binding Opinion of 6th May, 1969, No. 78, in *Energieversorgung Schwaben A.G. v. the Republic of Austria,* the Arbitration Tribunal set up under the Austro-German Property Treaty refused an application by the plaintiff to produce evidence of an exploratory nature. The decision was based on the following facts: The plaintiff, a German company, held, at the end of the war, about one-third of the shares of the Austrian Ill-Werke A.G. In virtue of the Inter-Allied Reparation Agreements the French Occupying Power in Austria, in whose Zone Ill-Werke A.G. was domiciled, could have confiscated the shares as German property, but refrained from doing so. It was not until the end of the period of occupation that the Austrian Government issued such a confiscation order, claiming that *all* German property had been transfered to Austria by the occupying powers. The plaintiff then contended that the French Occupying Power had not confiscated the shares because it was vital for the Swabian territory forming part of the French Zone of Occupation in Germany to be able to continue to obtain electricity from the Austrian Ill-Werke. The French Occupying Power had therefore deliberately intended to leave the shares in the hands of the plaintiff. The plaintiff asked the Tribunal to address inquiries to the Governments of the Federal Republic of Germany and the French Republic; from the replies to these inquiries it would be evident that the French Occupying Power had at the time indeed refrained from confiscating the shares with this intention in mind. The Tribunal held that the onus of proof for his contentions lay with the plaintiff, and went on to say: "Despite a lack of evidence concerning the fact to be proved, a decision to call for certain evidence . . . should not be taken if the evidence is put forward at random, or for exploratory purposes on the basis of mere presumptions, unless the party calling the evidence has adduced sufficient grounds for his contentions to constitute a prima facie case, so that the hearing of the evidence is intended to provide the basis for new contentions." To call for inadmissible exploratory evidence of this kind was generally prohibited in both Treaty States "as a bulwark against the criminalization of civil procedure."[66] "Facts not adduced in a definite manner cannot form the object of proofs offered by the parties. It is out of the question for the parties to a proceeding to ask for evidence to be heard and to await the results produced by that evidence before being able to put forward the relevant facts. Evidence may only be offered in substantiation of definite contentions already formulated by the parties, and not to elucidate a situation giving rise to points of law, the constituent elements of

[66]Cartel proceedings, of course, come within the ambit of criminal law. Nevertheless, these pronouncements by the Tribunal appear also to be relevant to such cases.

which are not clear to the party itself and have not been put forward by it in definite or concrete form."[67]

To counter these practices, eleven states have already taken legislative measures intended to protect business records located within their jurisdiction against such requisitions.[68] On the whole, these enactments, which threaten penalties for allowing such records to leave the country, have achieved their purpose, since the United States as a rule refrains from enforcing its antitrust legislation if the conduct required by the U.S. laws is liable to be penalized in the foreign State concerned. It would probably not be feasible to frustrate the effect of these enactments by the same means as U.S. courts once applied against a Mexican law of earlier date, which merely provided that business records of Mexican firms had to remain in Mexico. A U.S. court circumvented this law by observing that the party concerned could submit photocopies instead of the original documents.[69]

It should, however, be mentioned that in the matter of the similar problem of access to records which are of importance for tax purposes, the German courts compel a branch operating on German territory of a foreign firm to produce records kept at the firm's head office abroad.[70] When the position was reversed, however, the Reichsfinanzhof (pre-1945 supreme court for tax matters) held[71] that it was unreasonable to require a German parent company to procure from abroad the books of the foreign companies controlled by it and submit them to the German Tax Office. A similar reluctance is to be found in the decision by the Swiss Federal Court in *Vetania Trust Reg. v. Lloyds Bank (Foreign) Ltd.*[72] Here the Swiss court found that it was not competent to require a bank which was allowed to engage in the banking business in Switzerland to effect a sequestration, ordered by a Swiss court, of shares which the bank in question did not have in its custody in Switzerland, but had deposited with its correspondent bank in New York. In the opinion of the court, a sequestration ordered in Switzerland could only extend to objects physically present in Switzerland.

In their investigation of the international quinine cartel, the American

[67]Page 71 of the (as yet unpublished) Binding Opinion.

[68]Krumbein, op. cit., pp. 54–56; Van Hecke, op. cit., pp. 298–299; Rehbinder, op. cit., p. 393; supra note 14, p. 58 Ellis mentions Belgium, Denmark, Finland, France, India, the Netherlands, Norway, Sweden, the United Kingdom and the Canadian Provinces of Ontario and Quebec.

[69]Securities and Exchange Commission v. Minas de Artemisa, S.A., 150 F.2d 215 (9th Cir. 1945), Whiteman, op. cit., p. 163.

[70]Reichsfinanzhof 27.9.33, Amtl. Sammlung Vol. 34, p. 210.

[71]Reichsfinanzhof 25.5.38, Reichssteuerblatt 1938, p. 619, No. 532.

[72]Bundesgericht (Swiss Federal Court) 11.5.64, BGE 90 II 158; the judgment does not contain any detailed considerations of international law. It meets with the approval of Harald Huber, SJZ 1969 p. 150, and is criticized by Kleiner, SJZ 1968 p. 211.

antitrust authorities showed no such reticence. On the contrary, they instructed the First National City Bank in New York to make business documents of a customer of the bank's German branch accessible to the antitrust authorities of the United States, thereby violating German bank secrecy. The American courts dismissed the objection of the First National City Bank, that by acting in this way it would expose itself at least to claims for compensation from its German customer in the Federal Republic. A substantial contributory factor to this judgment, however, was the circumstance that German law does not afford the same protection to bank secrecy as it does to, for instance, the professional secrecy of the doctor or the lawyer, and that the competent German authorities did not raise any objection to the fact that the bank was being compelled by the American antitrust authorities, under threat of heavy penalties, to violate the laws of the German Federal Republic by bringing about a breach of the contract of bailment concluded between its German branch and the German customer.[73] Such an unreasonable demand by the American antitrust authorities seems almost as incompatible with German sovereignty as the carrying-out of investigations on the territory of the German Federal Republic by American authorities on the basis of allegedly voluntary consent.[74]

Here again, the American attitude is illogical. Clauses 302(j) and (k) of the United States Automotive Products Bill of 1965 authorized the President of the United States to pass on to the Canadian Government certain information on the activities of the U.S. automobile industry to which he had been given access on the assurance that this information would be treated as confidential. A storm of protest arose from the interested parties. They cited in particular the decision in *Boyd v. United States,* 116 U.S. 616 (1886), which expressly laid stress on a right to secrecy of business records, at least in the absence of express statutory authorizations to the contrary, and characterized the obligation to produce such records as an act of despotism.[75] The Act itself, as ultimately passed into law, does not contain the criticized provisions.[76]

Summarizing, it is surely self-evident that both the claim to penalize, by

[73]United States v. First National City Bank and Loveland, 396 F.2d 897 (1968), AWD 1968, pp. 306-309; cf. Hermanns, op. cit., pp. 1-2. The Court suggested (on p. 902 of its decision) that the Bank was not likely to suffer any serious disadvantages from this breach of contract, and in particular none of a penal nature. Heubel, op. cit., p. 129, 133 points out that the situation would be different in Switzerland.

[74]Heubel, op. cit. p. 128 considers this claim to be incompatible with German public policy. The latter should also ensure due respect to rules of public international law.

[75]United States-Canada Automotive Products Agreement, Hearings before the Committee on Ways and Means, House of Representatives, 89th Congress, First Session on H.R. 6960 "The Automotive Products Trade Act of 1965," April 27/28/29, 1965, pp. 177-178.

[76]United States Code, 89th Congress, First Session 1965, vol. I, p. 1014.

virtue of a highly extended interpretation of the territoriality principle, even those acts performed by aliens abroad whose sole point of contact with the state of the forum is that they do not fulfill certain expectations of conduct entertained there, and the claim that foreign law should yield to the extra-territorial enforcement of such claims to penal jurisdiction and rights of investigation in cartel matters by reason of an alleged superiority of provisions of cartel law, are fraught with so many illogical premises that, if only for that reason, such claims should not nowadays be considered to be covered in any way by general principles of law, and therefore as being in accordance with international law.