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I. INTRODUCTION

The development of standards for the application of United States antitrust law in an international environment is a matter of increasing importance. One change that gives rise to this problem is the internationalization of United States trade. As a nation, we historically have been self-sufficient in a very large fraction of our needs and have exported relatively little over the years.[1] However, imports and exports have increased markedly in the last ten years,[2] and it appears that this sharp increase will continue for a number of years. We are in the process of becoming much more of a regular trading partner in international commerce than we have been in the past.

A second phenomenon leading to the need for the development of standards is the widespread adoption of antitrust or competition laws by the more advanced nations of the world. The majority of our major trading partners now have such laws. Some of these laws—the West German one, for example—are more stringent than our own.

With increasing frequency, challenges are being made to the behavior of businesses that are incorporated in several countries and that market their products broadly. Given the multinational character of these corporations, many countries could claim that their laws should be applied. We have virtually no doctrinal guidance of any kind to assist our courts in identifying those cases in which our antitrust laws might properly be applied or those in which the United States should simply defer to the application of laws of other countries.

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1. BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, THE NATIONAL INCOME AND PRODUCT ACCOUNTS OF THE UNITED STATES, 1929-74 STATISTICAL TABLES 154-59, 344 (1977).

2. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981, at 421.

II. Possible Solutions

The most frequently suggested "solution" to this set of problems is the doctrine of comity. Comity does not provide an adequate solution, however, because it is more a matter of courtesy than anything that really comes to grips with the fundamental problem. The courts are admonished to take into account the interests of other nations, but no one tells them what operational consequences their consideration of those interests is intended to have. There are few cases in which implementation of anything that can fairly be called comity will lead to satisfactory outcomes.

Occasionally one comes across an extreme case in which comity is clearly appropriate. Recently, for example, a number of Australian environmentalists brought suit against Alcoa in an American court, attempting to persuade the court to apply the United States environmental protection laws to Alcoa's operations in Australia.[3] The notion that United States environmental laws should be applied in Australia was absurd; any environmental impact of the operations was quite obviously of no consequence to the United States. On the other hand, the interests of Australia were directly concerned. The judge—quite rightly, I think—applied Australian law and dismissed the case.[4] Alcoa had argued that the "principles of international comity . . . require[d] that jurisdiction not be exercised" by a United States court.[5] The court declined to reach this issue, however, since it dismissed the case for lack of subject matter jurisdiction and failure to state a claim.[6]

The countries of the European Economic Community, of which we are in a sense a member, have worked out a process of notification and consultation, which, like the doctrine of comity, is based on courtesy rather than law. If, for example, we were going to bring a case against a company from the United Kingdom, we would inform the national authorities there in advance and attempt to work cooperatively with them. However, nothing in that set of understandings suggests that we ought not proceed to apply our laws, or they to apply their laws, to any particular

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3. Conservation Council of W. Austl. Inc. v. Aluminum Co. of Am., 518 F. Supp. 270 (W.D. Pa. 1981).

4. *Id.* at 281-82.

5. *Id.* at 272-73.

6. *Id.* at 273.

case.

In my view, the basic problem in this area is one of allocation of legislative jurisdiction. To the extent our laws differ from those of other countries involved in the matter, the application of one body of law will be inconsistent with the application of the other. As an international community, we must somehow decide whose law applies to what circumstances.

It is because of this view of the problem that I object as strongly as I do to the use of the term "extraterritoriality." As described by our European friends, the nature of the problem is that we insist on applying our law to transactions touching their economies. Indeed we do. They choose to label this "extraterritorial" application of our law, suggesting that if we were not so pig-headed the problem would somehow be solved. Labeling the application of United States law as "extraterritorial" is merely a backhanded way of saying that the other countries would prefer to have their own laws apply to those multinational situations.

The problem to me seems much more closely akin to a problem that we are familiar with in the United States, namely, the choice of law rules under the conflict of laws doctrine. States have often chosen to give preeminence to values different from those of other states. When interstate transactions arise, problems very much like those encountered in international trade are posed. However, we have not been very successful in solving the choice of laws problem, notwithstanding the variety of advantages that we have in our federal system that are not available in the international sphere: We have a federal judiciary, a common legal heritage, and a national constitution with a "full faith and credit" clause.[7] Even so, by manipulating the concepts of "contacts" or "interest," it is possible for a state to apply its own law if it is able to obtain in personam jurisdiction. And, with long arm statutes, that is often not difficult.

However, despite these problems, the concept of "contacts" or "governmental interest" seems to be the best available tool of analysis. Such conflicts approach requires one to ask, "What are the relevant contacts or interests?" One might answer that the relevant contacts are those which tend to identify the national focus of the interests that underlie the enactment and enforcement of competition laws. This is a sensible formulation, but I recognize its narrowness and the assumed preeminence of com-

7. U.S. CONST. art. IV, § 1.

petition policy. For example, assume that country *C* has a competition law to protect its consumers, and a trade law to maximize export earnings. *C*'s trade law, rather than its antitrust law, may be in conflict with country *A*'s antitrust law. (Where is it written that only antitrust needs are to be reconciled? Most countries seek both to protect their consumers from high prices and their exporters from competition and low prices.)

Quite apart from export earnings, the interests underlying antitrust laws are often not easy to identify and associate with a country. There are some easy cases: Companies *B* and *C* from countries *B* and *C* agree to fix prices in country *A* where both market. If all countries have consumer-oriented antitrust laws, then *A*'s law may be applied without frustrating the law of either *B* or *C*. But, even that example is oversimplified. For example, assume that in the United States the price of a product is greater than the marginal cost of producing it. Some consumers will buy the product anyway; others will switch to a substitute product. The focus of an economic analysis is on the "dead weight loss" associated with the behavior of those who switch—not the income loss of those who continue to buy the product at the higher price. As a result, one properly should ask in what country are the people hurt by the dead weight loss. As awkward as it might be, the answer is that the harm occurs in all the countries involved.

I give the following example—real, but altered to protect the guilty. Country *A* has widespread deposits of mineral *M* which is mined by a competitive industry, predominantly for use in countries *B* and *C*. Several *B* and *C* companies construct ore processing facilities along *A*'s coast and buy from *A*'s miners. The processors then collude to suppress the price paid to *A*'s miners. All the evils at which antitrust laws aim occur. In *A*, less *M* is mined and its price is depressed. As a result, *M* is substituted for other inputs in *A*. Consumers of *M* in *A* are made better off. Only miners in *A* are worse off financially. In *B* and *C*, on the other hand, refined *M* becomes more expensive as a result of reduced supply. There consumers of *M* end products shift to other goods and are plainly injured. One must not, however, confuse pecuniary with efficiency losses. In *A*, *B*, and *C* inefficient substitution is occurring, and all three economies are less well off than they might otherwise be. In *A*, *M* is too cheap; in *B* and *C*, it is too dear. The behavior of the cartel has caused trading to stop prematurely—before *M*'s marginal cost had risen to equiva-

lence with its price in *B* and *C*.

The concern of the antitrust laws, at least as I conceive it, is the inefficiency that results from the fact that the quantity of mineral *M* mined and sent to countries *B* and *C* will be less than it otherwise would be, and the price in countries *B* and *C* will be too high in the sense that it will exceed the marginal cost of getting mineral *M* to *B* and *C*. In countries *B* and *C*, inefficient substitution will occur. That is to say, people who would have used mineral *M* if it had been available at its marginal cost will not use it and will instead substitute other goods produced in economies *B* and *C* that are actually more expensive than mineral *M* need be. That represents a loss of economic potential in countries *B* and *C*. Consumers in countries *B* and *C* will thus be less well off; at the same time their own producers will have better income positions. In country *A*, on the other hand, too little mineral *M* is mined and its price in country *A* is reduced. Here, too, inefficient substitution occurs but this time it is substitution that results from a depressed price of mineral *M*, and mineral *M* is substituted for a variety of other products, again giving rise to inefficiency.

I go through all of this in an attempt to focus on the appropriate question. Economists talk rather facilely about the phenomenon of dead weight loss, but in the context of asking questions about international jurisdiction, we must ask what causes the dead weight loss and where it occurs. The answer to that question, I think, is that dead weight loss results from the fact that trading in mineral *M* between country *A* and countries *B* and *C* is halted prematurely by the collaborative behavior of my hypothetical refining companies. But for that "restraint of trade"—the language of Section 1 is particularly apt here[8]—there would have been further trade. More *M* would have been shipped to *B* and *C*, more other goods would have come to country *A*, and the inefficient substitution to which I refer would not occur. Restraints of trade of this kind, which ought to be regarded as antitrust violations, are unfortunate and are the appropriate targets of sensible competition policies here and elsewhere, precisely because they result in this kind of inefficient substitution. But these inefficient substitutions occur among all the trading partners and across both sides of this type of artificial barrier.

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8. The Sherman Act § 1, 15 U.S.C. § 1 (1976).

If I am correct, the implications for successful international agreement of any kind become bleaker still, because if these are the purposes of antitrust, they give rise to very sweeping claims to legislative jurisdiction. There is no possibility of simply cutting these sorts of cases in half and saying, "Well you look after your consumers and we'll look after our consumers." The natural implication of such an approach is that we will surrender our producers' income position to your consumer-oriented antitrust laws and you, your producers' income position to ours. No simple division is possible.

To the extent that all countries recognize that the avoidance of this kind of inefficient substitution is the central objective of competition laws, all will have competition laws that look very much alike and the seriousness of conflict will be mitigated in a different way. Conflict will be mitigated by a relatively close substantive identity between the competition laws of the various countries, in which case it makes a great deal less difference whose competition law is being applied. But, given the relative lack of success that those of us who subscribe to this view of antitrust have had in persuading our own courts and our own legislatures over the last 20 years, one cannot predict with any high level of optimism that substantive uniformity will turn out to be an easy solution to these international problems.

III. Conclusion

I by no means wish to suggest that I have a solution to the problem. I have made up a long list of hypothetical cases—"company *A* in country *A*, etc. does thus and so in country *C*"—all carefully neutral, without any references to the United States, or Germany, or the United Kingdom, or Australia. I have begun to talk to the trade ministers and competition authorities of other countries around the world, hypothetical by hypothetical, simply in terms of, "Do you think your law ought to apply if you are country *A* here," and "What if we are country *A*?" In this way, I hope to focus attention on exactly what each of us thinks his economic and political interests in these matters really are.

Even assuming that all of the trade ministers give the same answers to my hypotheticals (and I strongly suspect they will respond to their individual resource positions and to their unprincipled but very real trading positions), I do not know yet

what principles could be abstracted. I offer it to you as an interesting and, to me, a very complex and perplexing problem.