EXTRATERRITORIAL OPERATION OF LAWS FROM AN AUSTRALIAN PERSPECTIVE

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In these brief remarks I propose to deal first with "effects" doctrine and then with the novel problems arising from the conflict of national laws as a result of extraterritoriality. I should emphasize that I will be stating Australian Government views only where they are expressly referred to as such.

My first point is that the "effects doctrine" should now be accepted as consistent with international law. That is to say, it should be accepted that national legislation may in some circumstances be applied to the extraterritorial conduct of non-nationals by reason of the adverse effect of their conduct upon the legislating state.

The effects doctrine originated in the United States and is still very much associated in one's mind with the antitrust laws of that country. But its application is no longer confined to the United States nor for that matter to antitrust. In that field, however, a Committee of Experts on Restrictive Business Practices, reporting to the OECD concluded that the criterion of effects was to varying degrees accepted in the legislation of all member countries other than the Netherlands, the United Kingdom and Australia. It was embodied in the legislation of Germany, Austria, Denmark, Spain, France, Sweden and Finland and the United States.

It is true that in 1972, in the ICI case, the Court of Justice of the European Communities refused to affirm the effects doctrine. Nevertheless, ever since, the European Commission has applied the competition provisions of the Treaty upon the basis that those provisions embody the effects principle as argued by Advocate-General Maryas in the ICI case.

The United Kingdom has steadfastly rejected the doctrine. Its position was stated very clearly in a submission in the ICI case. Nevertheless, the United Kingdom is now, I think, almost the only country which maintains an in-principle objection, at least with any vehemence.

It is also the case that a large number of countries, including Australia, have enacted blocking legislation. It is sometimes

said that that legislation constitutes a kind of standing objection to the "effects doctrine". I believe this to be a confusion. It is certainly true that blocking legislation represents an objection to the international enforcement of United States antitrust laws. But the objection is directed to the special feature of American law concerning the private antitrust suit for treble damages rather than to the effects principle as such.

Australia certainly objects to the degree of extraterritoriality claimed under the Sherman Act. That objection rests upon a feature of American law which is singular to the United States. That is, that the effects principle is applied to conduct having an adverse effect upon the "foreign commerce" of the United States - its exports or its imports. The effects principle, under American law, is not restricted to conduct having a direct effect upon competition in the domestic market. And as it is not an objection to the effects principle as such. As to this, I refer you to Senator Durack's Second Reading Speech when introducing the Recovery Back Bill in July 1981.

Interestingly (although I do not suggest a direct relationship) the "foreign commerce" jurisdiction in the United States has now been restricted by the Foreign Antitrust Improvements Act 1982 but only in favour of United States exporters. I shall say more on this later.

Let me go from practice and authority to principle. It was very understandable in the 19th century each state's exclusive authority should be thought to relate to persons or conduct within that state's territory or to its nationals. Each state had national criminal laws. Those laws were concerned mostly with the protection of the person or the protection of property. And so they were very naturally restricted to physical acts or physical consequences taking place within national territory. The "corporation" was a 19th century institution but it was then very largely a national affair. Trade was international. But trade was primarily regulated by private contract. National regulatory legislation played little part. Conflicts in that area were resolved by the rules of private international law.

In sum, national laws at that time would not, save in rare circumstances, be concerned about or need to be concerned about the effect of economic conduct undertaken abroad.

All of this has now changed completely. Most states have an array of economic regulatory legislation. Moreover, economic life has been globalized. The post-war period has seen the great expansion of single enterprises operating internationally through different legal entities each with separate corporate nationalities. In these circumstances it is evident that the economic legislation I have mentioned must itself be global or otherwise it could be seriously undermined by conduct taking place overseas.

Those who contend that the effects doctrine is contrary to international law would be on stronger ground if the 19th century rules of territoriality and nationality were categorical. They

are not. They were themselves but emanations of a broader principle - the principle of sovereignty - and were a relevant expression of that principle at that time. That principle does not deny legislative authority to an affected state whose legal system is being undermined from abroad. If, in changed circumstances, the state's authority over its territory would be diminished by the effect of conduct taking place overseas there is no reason in principle against the evolution of specific rules to meet that changed situation. Indeed quite the contrary.

The "effects doctrine" as such is thus compatible with the principle of sovereignty. However, it does not follow from this that legislation seeking to reach any effect of conduct taking place abroad would be consistent with that principle. That is plainly not the case.

The principle of sovereignty was designed to allow states sufficient authority over their territory but it also sought to achieve two other aims. First, to avoid conflicts between states in their national laws - an aim which Brownlie has described, in an excellent phrase, as the "co-existence of sovereignty". Second, to meet the reasonable expectations of corporations or individuals engaging in conduct in foreign countries, as to what law was applicable.

And so whilst international law must recognize the need for a state to protect itself from the adverse effects of overseas conduct this must be qualified by the two competing objectives I have just mentioned. Our major task, I think, is to define these qualifications or limitations upon the effects doctrine rather than continue to argue about the principle.

Let me, against this background, go to some concrete illustrations where extraterritoriality has been held by courts to be justified or - in the final example - has been permitted by Australian legislation:

- An agreement by non-nationals made outside a particular country to smuggle canabis resin into that country and dispose of it there (Director of Public Prosecutions v Doot (1973) 1 AER 940).

- S fraudulently attempts, by simulating drowning, in country B to enable his wife, who was innocent of the fraud, to recover on an insurance policy in country A (DPP v Stonehouse (1977) 2 AER 909).

- Insider trading in country A by companies incorporated in country A lead to the sale of securities in country A at under value. Those securities were, to the companies' knowledge, traded on an exchange in country B and injury was sustained by investors in country B (Schoenbaum v Firstbrook 405 F 2d 200 at 206 (1968)).

- An exporter in country A stipulates a price at which the importer in country B must resell goods in country B (s 5(2) of the Trade Practices Act 1974).

Our examples so far hint at one basis upon which the "effects" jurisdiction may be justified. That is the case where the effect of the conduct is intended. This indeed was one of the ingredients laid down in Alcoa the father of the doctrine. Learned Hand J held that not every repercussion could justify the extraterritorial application of the Sherman Act but only those effects which were "direct and intended". An intended consequence, it will be noted, removes any ground of objection by the actors in being subjected to the overseas law.

You will note that in both Alcoa and the Second Restatement it was laid down that the effect must be "direct". Consequences, unlike conduct, are not clear cut. What we do can combine with what others do and with external factors to produce an obscure set of consequences. The causes cannot be isolated. This is especially true of economic conduct.

There is a third limitation on the application of the effects doctrine which should hold - at least where the effects are unintended. That is, that the conduct proscribed extraterritorially should be of a kind which states generally regulate. The reason for this is that conflicts of national laws and injustice to an individuals is much more likely if the kind of law given extraterritorial application is not the same kind of law as other states have adopted or recognize. An anti-fraud law is less likely to cause conflict than a competition law and a competition law is less likely to do that than say an environmental law. This limitation was recognised in the Second Restatement (s 18(a)) and in my opinion it is clearly right.

It is this limitation which lies behind Australia's objection to the United States extension of the effects doctrine under its antitrust laws to an effect upon foreign commerce.

There is no norm of free competition in the international market. To the contrary, trade measures by Governments - quotas, embargoes, voluntary restraint agreements, injury to domestic competition relief - severely distort competition. Not merely is there no accepted norm but the application of a competition law to effects in that field will inevitably produce collision with a great number of export and import laws of other countries. It will also produce collision with competition laws of those countries, many of which contain an exemption for exports.

A world of judicial charge and counter charge may be exciting but it is hardly, in any meaningful sense, one subject to law.

I mentioned that the United States Foreign Antitrust Improvements Act had in 1982 excluded the application of the effects doctrine to the foreign commerce of the United States in favour of United States exporters. The point to note is that the ground of justification for this legislation was precisely that free competition was not universal in the international market and that United States exporters would thus be prejudiced in the absence of the legislation.

Let me sum up: A state may, consistently with international law, legislate with respect to conduct outside its borders where it

experiences adverse effects if (a) those effects were intended or (b), if unintended, those effects were a direct and foreseeable result of the conduct in question and the conduct is of a kind generally regulated by states.

Let me turn to the other aspect of my remarks. Whilst I believe that those who continue to deny extraterritoriality in general and the "effects doctrine" in particular are burying their heads in the sands of the 19th century, it remains true, that once you have extraterritoriality you will inevitably have some conflict of national laws. Now it is this clash of national laws which is happening today. It will continue to happen and cause the kind of diplomatic friction we have recently experienced until the international legal system resolves the problem.

A conflict may arise out of the "effects doctrine". This is more especially so as it must be remembered that an effect which is adverse to one country may be beneficial to another and in particular to the country in which the conduct takes place. Indeed the Uranium case itself may be seen as a case of conflict between United States antitrust laws and the Australian export control. Shipping is another area. In the case of Australia Part X of our Trade Practices Act regulates outward shipping and permits, under certain circumstances, conference agreements. United States law regulates inwards as well as outwards shipping and thus subjects conference agreements permitted under Australian law to the regulatory control of the Federal Maritime Commission and in certain circumstances to the Sherman Act.

We have seen in the Laker case (Laker Airways Ltd v Sabena 731 F 2d 909 (DC circ 1984)) the potentiality for conflict in the field of aviation. With the cessation of antitrust immunity accorded IATA from 1 January this year there could be conflict arising out of the tariff coordinating functions of that body and United States antitrust laws. There is the field of export control. The United States Export Administration Act was applied in 1982 to prevent persons subject to the United States jurisdiction and exporters of United States originated technology from exporting it to the Soviet Union for use on the Siberian pipeline. Persons subject to United States jurisdiction comprise United States companies but also include controlled foreign affiliates in which there may be as little as 25% American interest. The resulting diplomatic conflict was essentially an argument over which country's laws ought to apply. The attempt to secure information particularly for the purposes of securities law investigations has collided with secrecy laws in some countries and blocking legislation in others.

But - and this is the important point - there are no rules, in the strict sense of obligatory rules, laid down by international law, which regulate the conflict of national laws arising from concurrent jurisdictions.

The development of rules in this area is important. At present, in the United States, the American Law Institute is completing a Third Restatement of the Foreign Relations Law. The American Law Institute has no formal authority. But I think that those familiar with American law in this area would agree that it would

be difficult to over-estimate the importance of its conclusions. The Second Restatement was invariably cited and relied upon by United States courts as accurately defining international law. The Institute is directing its attention to this very question of the conflict of national laws. The rules which it formulates will thus be of immense importance.

Whilst there are no obligatory rules of international law governing conflicts of national laws, the principle of comity is widely recognised by states. "Comity" said Judge Wilkey in the Laker case "summarizes in a brief word a complex and elusive concept - the degree of deference that a domestic forum must pay to the act of a foreign Government not otherwise binding on the forum". The principle is recognised by both common law and civil law countries. It was the original basis for the recognition of foreign judgments. It is the basis for the rule of English law that English courts will not enforce a contract illegal in the state in which it is to be performed even though conflict rules would require the application of English law (Regazzoni v KC Sethia (1958) AC 301). In Australia it has been held that statutes should be construed in accordance with the principle of comity (Polites v The Commonwealth (1945) 70 CLR 68) and the principle is explicitly recognised in the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (S7(4)). Turning to the civil law, an interesting and recent example is provided by the Rothmans - Phillip Morris merger case in which the Berlin Appeals Court held that the unquestioned authority of the Federal Cartel Office under domestic law to issue extraterritorial orders had to be circumscribed by comity.

The question is not of course whether the principle of comity is recognised universally in the abstract but whether it is recognised in the particular circumstances we are considering - that is whether a court would decline to exercise jurisdiction to apply its own law because a colliding national law of an other country was thought more appropriate. A recent and interesting line of English authority would allow an English court to refrain from exercising jurisdiction vested in it or at least grant a stay in favour of a foreign court upon the basis of forum non conveniens. (MacShannon v Rockware Glass Ltd (1978) 1 AER 625; Castanho v Brown & Root (UK) Ltd & Anor (1981) 1 AER 143; The Abidin Daver (1984) 1 AER 470; British Airways v Laker Airways (1984) 3 AER 39).

In the United States there have been some stumbling steps in the application of comity to the problem of conflicting laws - the most notable being the Timberlane test (Timberlane Lumber Co v Bank of America 549 F 2d 597 (1976); Mannington Mills v Congoleum Corporation 565 F 2d 1287 (1979)). In Timberlane it was decided that the court should weigh the interests of the foreign nation with those of the United States. In the light of that balancing process it would decide whether to exercise jurisdiction. The test is based on comity.

There is one fundamental difficulty with the Timberlane test. National laws of the kind of which we are speaking reflect deep national interests. When there is a conflict of national laws arising from extraterritoriality there is often a conflict of the

national interests of both countries which becomes reflected in the proceedings. It is this which has led to more than one diplomatic fracas in recent years. It is, in this respect, quite unlike the conflicts regulated by the rules of private international law. Now the difficulty is that courts of law are not capable of ruling on national interests. The issue is simply not justiciable. (See Greenwell, 8th International Trade Law Seminar especially at pp 163-165 in papers published by the Attorney-General's Department).

To meet this difficulty states have turned increasingly to establishing, either multilaterally or bilaterally, consultative mechanisms. In the field of antitrust, member countries of the OECD have subscribed to the Recommendation concerning cooperation between member countries on restrictive business practices affecting international trade. The Australia-United States Agreement relating to cooperation on antitrust matters of June 1982 and the more recent Memorandum of Understanding between Canada and the United States have set up a consultative framework which is directed to resolving conflicts of laws and policies.

In May of last year OECD Ministerial Council adopted a revision of the Declaration on International Investment and Multilateral Enterprises. That revision is directed to the conflicting requirements imposed by national laws on multinational enterprises. In substance that revision sets up a notification and consultation procedure.

Perhaps, in the context of these consultative arrangements, comity will have the last say - as long as we remember that the principle applies not only to courts but to states.

May it not be said, in the light of the situation of potential conflicts which I have described and the fabric of consultation which has now been built up, that comity requires a state to consult. It will require it to consult when its laws, if applied extraterritorially, would conflict with those of another state with concurrent jurisdiction at least when that state protests. And the courts of the enforcing state should, by virtue of comity, refrain from exercising jurisdiction unless there has been an opportunity to consult between Governments or unless the court itself has, by governmental intervention, been able to resolve the conflict of national interests.