Extraterritorial Effects of Antitrust Laws

Mark R. Joelson

countries with the same thought in mind. It may very well be that a few years from now we may see new procedures for audits of our large multinationals, IBM, General Motors, and the oil companies. We will see tax auditors from the member countries of FECO sitting in with computer print-outs sharing the information as to what each of these companies reported to each of the tax collectors in each of these various countries.

It is appropriate for the United States to enter into these treaties with foreign governments and to agree on the exchanges of information. The recent activities of the IRS, to which I alluded, have involved attempts to obtain tax information through illegal searches, bribery, and theft, involving violations of both U.S. and foreign laws. In a recent case, evidence obtained as a result of such activities was excluded from evidence. The IRS agent involved has been suspended from the IRS and the IRS has promised that this is never going to happen again. I also mentioned the case of a foreign bank official who was required to testify before a U.S. Grand Jury despite claims that this would constitute a violation of foreign criminal law. Less dramatic, but of great economic importance are the fears of U.S.—and foreign-based multinationals. The greater exchange of information would inevitably lead to use such information for non-tax purposes, for example, with respect to possible charges of bribery, exchange control violations and the like. Companies based in countries which do not exchange information may find themselves with a competitive advantage over others. As indicated, the United States provides much more information now than it receives. In part, because it has more tax information with respect to more taxpayers than any other country in the world.

We must be careful, as we move towards greater multinational assistance in the enforcement of our tax laws, that we guard carefully both the civil and the economic rights of our taxpayers.

ROBERT COLE: Thank you, Joe. This is what the tax law in its substantive provisions and in the procedures available for enforcement looks like from an international prospective. We call on Mark Joelson now to tell us whether he is shocked or whether that is about the way the antitrust laws operate internationally.

Remarks by Mark R. Joelson

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Thank you, Bob.

I will comment first that, on the dais, I have tax lawyers to the left and tax lawyers to the right. I also see many people in the audience whom I know are tax lawyers, so now I know what it means to be a stranger in paradise.

My thesis is that, as bad as the extraterritoriality problem is in the tax field, if you can be consoled by the fact that it is worse in the antitrust area, I think indeed it is. Of course, the antitrust laws all to some degree protect U.S. foreign commerce as well as interstate commerce; and extraterritoriality has been an integral part of antitrust enforcement for many years, particularly in the context of the Sherman Act. The extraterritorial scope of U.S. antitrust has advanced step by step. Indeed, the most recent step was only a few months ago when in the Hart-Scott-Rodino amendments to the antitrust laws, the Congress for the first time authorized the service overseas on foreign companies of civil investigative demands. And this new authority to serve foreign parties overseas applies not only to document requests and to written interrogatories but can also embrace oral depositions. In fact, the Antitrust Division started using this new authority only a few weeks ago, first in the platinum industry investigation that it undertook recently, and also in the international oil investigation that was referred to in the *Wall Street Journal* about a week ago. Both of these developments have caused great consternation on the part of foreign governments who get upset as the Antitrust Division is granted more and more powers to act overseas.

The question of extraterritoriality itself goes back to at least 1909, in the famous *American Banana* case. The facts in a sentence are that the American Banana Company sued the United Fruit Company under the Sherman Act for allegedly destroying its banana trade in territory over which Costa Rica claimed sovereignty. The Supreme Court affirmed dismissal of the complaint. And this was one of those opinions in which Justice Holmes wrote a beautiful opinion which pronounced some questionable legal doctrine. He spoke of the "general and almost universal rule" that whether the character of an act is lawful or unlawful must be determined wholly by the law of the country where the act is done. All legislation is prima facie territorial, he declared. This is the so-called limited territorial principle of national jurisdiction. It didn't stand the test of time. At first the cases started distinguishing it, and finally the classic statement of the prevailing view, that is, the objective territorial principle, was enunciated by Judge Learned Hand in the *Alcoa* case. He said that it is "settled law that any (nation) may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the nation reprehends." So he reasoned that the Sherman Act applied to the acts abroad of foreigners as well as American firms if these practices are intended to affect and do affect the foreign commerce of the United States. The *Swiss Watchmakers* decision to some extent limited the scope of that rationale by requiring that the acts complained of should have a substantial and material effect.

Now how do we take this antitrust doctrine and apply it by way of comparison to some of the doctrines from the tax viewpoint that we have just heard? Well, first, as the speakers before me have made clear, the U.S. tax laws assert jurisdiction over the foreign income of U.S. citizens, residents, and corporations. The U.S. antitrust laws, on the other hand, assert jurisdiction over *all* the foreign activities of U.S. citizens, residents, and corporations, including the foreign subsidiaries of U.S. corporations, where these activities restrain the foreign commerce of the United States.

Examples of such restraining activity would be agreements entered into by Americans overseas, either with other Americans or with foreigners, that affect U.S. import prices, or U.S. export prices, or allocate the U.S. market. Many of the great international cartel cases involved this type of activity. Also covered by the sweep of U.S. antitrust law are mergers between American and foreign firms that are significant competitors or potential competitors in the U.S. market. The *Gillette-Braun* case brought a few years ago is an example of this type of situation.

There is an interesting distinction between tax and antitrust doctrine that might be drawn. The reasoning under the tax law seems to be that you tax Americans on their foreign income because they are Americans. The reasoning in the antitrust context, however, is nationality-blind. The U.S. law applies because of the effect on U.S. commerce. And indeed the antitrust division is very insistent in pointing out that the U.S. antitrust laws are nationality-blind and the enforcement authorities do everything they can to apply them in that fashion.

Now turning over to the other side of the coin, as we have also heard, U.S. tax law asserts jurisdiction over the U.S. income of foreigners. This is premised on the source of the income. Well, U.S. antitrust law asserts jurisdiction over both the U.S. activities of foreigners and also the foreign activities of foreigners where the activities restrain or threaten to restrain the commerce of the United States. The U.S. subsidiaries of foreign firms also have to comply with the U.S. antitrust law. For example, in the *Ciba-Geigy* case, two Swiss corporations decided to merge their worldwide operations and did so for presumably legitimate business reasons. Nonetheless, so far as the U.S. subsidiaries were concerned, they were not permitted to merge their competing assets and a special spinoff situation had to be created.

In short, even the activities of foreigners abroad, such as agreements among foreigners, are subject to U.S. antitrust if there is an intended and not a substantial effect on U.S. commerce.

Now, where foreigners and their acts abroad are concerned, and even in some cases where the acts overseas of Americans are concerned, there are some principles that do reduce the impact of U.S. antitrust law.

First is the principle of *comity* which is a general principle of international relations. I would not label it as a principle of international law, but rather of international relations. The concept is that the U.S. Government will try to conduct its affairs so as not to infringe the sovereign interests of another country. The *Swiss Watch* and *Book Publishers* cases both involved modifications of proposed antitrust decrees because of the complaints of foreign governments. Secondly, there is the *sovereign immunity* theory which is to the effect that, where foreign government action is taken in a governmental rather than a commercial capacity, the foreign government entity is immune from suit under the U.S. antitrust laws. This issue has underlaid much of the debate as to whether the OPEC cartel should be sued or indeed could be sued under the U.S. antitrust laws.

Then there is the *Act of State* doctrine declaring in effect that U.S. antitrust law will not be invoked against conduct which is the result of the act of a foreign government and that the courts will not inquire into the validity of the action of a foreign government. And then, finally, the "sovereign compulsion" defense exists to immunize conduct taken by a private party caused by the compulsion of a foreign government. By the way, legislation has recently been introduced which would eliminate this particular defense which has become controversial in the context of the uranium industry.

Turning to the comparison with tax law once again, we have noted that the foreign tax credit is a primary tool to avoid double taxation. There is really no comparable principle in antitrust. In terms of "double jeopardy," however, it is worth noting that activity which violates U.S. antitrust law can also violate foreign antitrust law, and indeed some cartel activities have been the subject of both Common Market and U.S. antitrust enforcement. As in the tax area, there is a great deal of exchange of information among interested governments. If the situation is that the IRS has little interest in the informational filings sent it by foreign government, that certainly is not the case in antitrust. The Antitrust Division has a great deal of interest in the consultations with foreign antitrust officials. There is, for example, a consultation procedure provided through the OECD. There are also bilateral agreements, one that has been around for a number of years involving Canada and the U.S., and a very recent one that has been negotiated with Germany. There are, in addition, many informal contacts such as a close working relationship which has been developed between the EEC and the U.S. antitrust officials.

The boycott problem was mentioned by our tax speakers. Obviously, under the new law, boycotts will carry tax implications. From the outset of the Arab boycott, there was some thought that the antitrust laws could be used against boycotts and indeed the *Bechtel* complaint represented an effort to try to deal with the Arab boycott, or at least one aspect of it, through antitrust enforcement. Interestingly enough, the proposed decree in the *Bechtel* case is now held up by a dispute. A number of U.S. groups have objected to the proposed decree negotiated by the Justice Department, partially on the ground that it leaves Bechtel too free to do what it wishes to do to assist the boycott in Arab countries, as distinct from conduct in the United States. Antitrust appears to be an imperfect tool in the case of overseas boycotts involving foreign governments. As for the possibility of applying U.S. antitrust to overseas bribes there can be doctrinal problems presented also, such as a need to show an impact on U.S. competitors of the payor.

Finally, turning to the issue of enforcement that Joe Guttentag spoke on, there are many tools available to obtain information overseas including the Hart-Scott-Rodino amendments that I mentioned initially. And, of course, where there is *in personam* jurisdiction over a defendant in the U.S. courts, the plaintiff can compel production of documents overseas over which the defendant has control. There can be problems posed by foreign law, including "blocking" statutes. The *Citibank* case that Joe mentioned is relevant also in the antitrust context and, in fact, may be one of the authorities cited when a question of foreign law barring the production of foreign documents comes up. In the antitrust field, the Antitrust Division certainly, and the courts to a large extent, have not been sympathetic with the claims of private parties that foreign governments have laws restricting the production of documents within their territories. Canada has such a law and so does the United Kingdom. Often the courts do tend to put a heavy burden on the resisting party to show that it has, at least, made a good faith effort to have the particular barrier relaxed. I think that there is a suspicion that, in many cases, the foreign government is the willing instrument of a private party.

In general, antitrust enforcement in the United States against private parties, whether foreigners or Americans, is becoming very simple from the jurisdictional viewpoint. The due process contacts needed to obtain jurisdiction over foreign companies have become less and less. In one case, just the sending of telexes into the jurisdiction and the initiation of an arbitration proceeding there were deemed sufficient. In the same case, another party had never set foot in the United States but was alleged to have entered into a conspiracy with a U.S. party. This was deemed to be sufficient contact for due process purposes. So far as venue is concerned, under section 1391(d) of the Judicial Code, an alien may be sued in any district of the United States, so there are no real venue problems. Finally, as many of you know, for service of process purposes, under rule 4 of the *Federal Rules*, and also under state long-arm statutes, private parties can be served overseas by mail, by letters rogatory or as prescribed by foreign law.

I would say that tax law has made great advances in terms of becoming extraterritorial, but that it still has a way to go to take the lead, because antitrust is moving ahead rapidly in this context also.

ROBERT COLE: Thank you, Mark Joelson.

I regard this as one of the finest examples of what the International Law