International Lawyer

Volume 13 | Number 4 Article 5

1979

Extraterritorial Application of Competition Laws: An English View

D. M. Jacobs

D.M. JACOBS*

Extraterritorial Application of Competition Laws: An English View

Introduction

The proliferation of national competition laws[1] in Western Europe and in many other parts of the world outside of North America has largely been a development of the past thirty years. These laws have all evolved very differently from those of the United States, where competition is regarded as an end in itself, and from each other, since they are generally used as a means toward some further end.

Serving as tools of national policy, for instance to combat price inflation, increase productivity, stimulate innovation, encourage more efficient means of supply and distribution and to prevent the growth of excessive economic power in the private sector of industry, the extent to which they are used for any of these purposes and the manner of enforcing them differs considerably from country to country, depending on a wide variety of factors. Thus one government may encourage greater concentrations of industry in order to assist its national companies to meet increasing competition from foreign companies or to enable them to secure sufficient specialized skills or capital so as to cope with the demands of innovation. Another government may conclude that concentration has in general gone far enough and needs to be regulated. Some countries may decide that increased productivity or more efficient means of supply and distribution can best be secured by regulating certain sectors of their economy or by more State ownership, although they may possibly still maintain restraints on the freedom of unregulated companies in the private sector voluntarily to restrict their own relationships.

With regard to restrictive practices there are considerable differences as to how they should be controlled, even though there has developed a large amount of agreement as to what practices may be harmful. Thus price-fixing arrangements between competitors may be prohibited outright, without pos-

*Barrister, United Kingdom.

[1]The term "competition law" is used in this paper to cover monopolies, mergers and restrictive trade practices legislation and what are known in the United States as the antitrust laws.

sibility of justification, as in the United States,[2] or may be permitted if satisfactorily justified by the parties on the grounds specified in the law, as in the United Kingdom. In yet other countries price-fixing may only be prohibited if found to be contrary to the public interest or may only be discouraged by adverse publicity. Infringement of the prohibitions may lead to either civil or criminal proceedings or both, in which the court may merely issue an injunction against repetition of the practice or else it may impose penalties in the way of fines or imprisonment. On the other hand, the law may only provide for the issuance of recommendations by the competent authority to cease the practice in question.

With the continuing expansion of international trade, growth of multinational enterprises and interrelation of many national problems, numerous States have sought to cooperate to deal with matters of mutual concern. Yet in practice such international cooperation in relation to matters in the area of competition law involves many problems.

As a British judge recently said in the House of Lords (the United Kingdom's highest court of appeal) in a case involving the seeking by a United States court from two British companies of documents required for United States antitrust proceedings: "It is axiomatic that in antitrust matters the policy of one State may be to defend what it is the policy of another State to attack."[3] Thus country *A* may permit, indeed actively encourage, export cartels which may further its national trade interests but may harm those of country *B* and which country *A* would never permit if the parties to the export cartels were nationals of country *B* and the cartels affected the interests of country *A*. Webb-Pomerene Export Associations, which are permitted under United States legislation,[4] provide an illustration in point.

The laws of various countries may permit other types of cartels which in particular circumstances are regarded as in the national interest, but are not necessarily in the interest of other countries, for example, "depression cartels" and "rationalization cartels" under the Japanese Antimonopoly Act and structural crises cartels, "emergency cartels" and again various forms of rationalization cartels under the German Act Against Restraints on Competition.

A government may decide that a matter is of such importance to it that its interests must necessarily override any conflicting interests of another State. If the matter relates to acts of nationals of that second State carried out within the territory of that State and not contrary to its laws, the second State may well consider it to be an infringement of its sovereignty for the first State to assert jurisdiction over those acts, on the basis of alleged effects on its domestic or foreign trade or commerce.

---

[2]United States v. Socony Vacuum Oil Co. 310 U.S. 150 (1940).

[3]Rio Tinto Zinc v. Westinghouse Elect. Corp., [1978] 2 W.L.R. 81, 94 (Lord Wilberforce).

[4]Webb-Pomerene Export Trade Act of 1918, 40 Stat. 516 (codified at 15 U.S.C. §§ 61-65 (1976)).

In order to substantiate its case against nationals of foreign countries State *A* may wish to obtain oral and written evidence from these countries. Here again conflicts may arise through differences of view as to what is acceptable for this purpose. State *A* may seek pretrial discovery of whole classes of documents which may not be specifically described. This may be unjustifiable under the laws of State *B*. Differences may also exist between States as to how far certain documents or categories of documents are to be regarded as confidential or subject to legal professional privilege or other categories of privilege. These various differences may therefore lead to resistance on the part of State *B* to the orders of the courts or other authorities of State *A*, with the aim of defending State *B*'s sovereignty, jurisdiction and legal concepts.

These are all factors which States seeking to apply their laws extraterritorially should take into account. Refusal of a State to cooperate in securing the objectives of another State is probably no more than a reflection of differences in economic interests, laws and procedures and concepts of jurisdiction and must not be regarded merely as indicating a wish to frustrate the application of the laws of that other State. It must also be borne in mind that such differences and consequent jurisdiction conflicts involve great uncertainty for the companies concerned as to how they should act.

I. Jurisdiction

A. *In General*

In connection with proceedings brought by the European Commission against the British company, Imperial Chemical Industries, Ltd. (I.C.I. Ltd.), (and others) before the United Kingdom had joined the European Economic Community (EEC), in what became known as the *Dyestuffs* case,[5] the British Government submitted to the Commission an aide memoire to which was attached a statement of principles according to which in the view of the government jurisdiction may be exercised over foreign corporations in antitrust matters.

This states that substantive jurisdiction in antitrust matters should only be taken on the basis of the territorial principle or the nationality principle. It goes on to say that the territorial principle justifies proceedings against foreigners and foreign companies only in respect of some conduct which consists in whole or in part of some activity by them in the territory of the State claiming jurisdiction. As to the nationality principle, the statement says:

> The nationality principle justifies proceedings against nationals of the State claiming jurisdiction in respect of their activities abroad only provided that this does not involve interference with the legitimate affairs of other States or cause such nationals to act in a manner which is contrary to the laws of the State in which the activities in question are conducted.

---

[5] Imperial Chemical Industries, Ltd. v. European Community Comm'n, 11 Comm. Mkt. L.R. 557 (1972).

Many other countries would be in general agreement with this statement of the principles for claiming substantive jurisdiction in antitrust matters, though there may be certain differences in their interpretation of these principles.

More recently, in connection with the preparation of the *Report of the United States National Commission for the Review of Antitrust Laws and Procedures,*[6] the British Government submitted to the United States Government in July 1978 a diplomatic note[7] in which it stated: "HM Government considers that in the present state of international law there is no basis for the extension of one country's antitrust jurisdiction to activities outside of that country of foreign nationals."[8]

Whereas there would be no dispute with a claim to assert jurisdiction by a State in whose territory certain of the acts at issue have taken place, even though some of the acts may have taken place outside, the real area of controversy is where jurisdiction is claimed over conduct outside on the basis solely of effects within the territory.[9]

The controversy over the so-called effects doctrine has for the most part been with the United States, which not only claims jurisdiction on the basis of effects on interstate trade within the United States but also of effects on the foreign trade and commerce of the United States. Although the laws of some other States provide for jurisdiction on the basis of effects within the territory of conduct outside, for the most part either these provisions have never been applied[10] or else jurisdiction has been asserted not solely on the basis of effects, but essentially on acts within the territory.

The Common Market rules of competition apply where conduct causing a restriction or distortion of competition has had a noticeable effect on trade between member States. Conduct outside the Common Market having such effect could therefore be caught, but in practice there have in almost all cases been acts within the jurisdiction. In the *Dyestuffs* case, for instance, the European Court found that I.C.I. Limited and two Swiss companies had done business within the European Economic Community (EEC) through subsidiaries which could be regarded as their branches or agents, since the

---

[6]NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL [hereinafter cited as REPORT], *reprinted in* 897 ANTITRUST & TRADE REG. REP. (BNA) (Spec. Supp. Jan. 22, 1979).

[7]Submission of Charles F. Meissner, Deputy Assistant Secretary for International Finance and Development, Department of State, on behalf of the British Embassy, Washington, D.C., to the Antitrust Commission, (July 28, 1978) (forwarding Diplomatic Note 196, dated July 27, 1978, concerning the extraterritorial application of United States antitrust laws).

[8]REPORT, *supra* note 6, at 84.

[9]Grounds for claiming jurisdiction in other than antitrust matters vary from country to country, except where they have been harmonized as between signatories to a Convention such as the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The extraterritorial application of competition laws, which is the sole concern of this paper, gives rise to special problems between countries requiring general resolution.

[10]By way of exception section 98(2) of the German Act against Restraints of competition has occasionally been applied.

subsidiaries enjoyed no real autonomy of action in the market and therefore in each case formed one economic unit with its parent.[11] Where, however, the parent company does not use its foreign subsidiary as its agent to carry on business on its behalf, it is important that corporate distinctions should be respected. The parent company should not be regarded as subject to the jurisdiction of the foreign State where its subsidiary operates, or vice versa, solely by reason of the parent-subsidiary relationship.

Since even if substantive jurisdiction is claimed with regard to acts outside the territory; there remains the question of securing personal jurisdiction over the parties to those acts, based on sufficient presence within the territory, the recognition of corporate distinctions between parent companies and their foreign subsidiaries is of course very important in this regard.

There is also the question of securing the evidence to substantiate the allegations on which jurisdiction is claimed. Here United States procedures, as extended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[12] enable far-reaching investigations to be made outside the United States, often of a kind known as a fishing expedition and giving rise to conflicts of jurisdiction. This, however, is not merely an issue arising out of the application of United States law, but a general problem. For this reason the collection of information by antitrust authorities in foreign countries is at present the subject of a study by the Organization for Economic Cooperation and Development Committee of Government Experts.

Because of the conflicts of national interests which have developed in the areas of trade and commerce covered by competition law, leading to diplomatic protests or governmental interventions in the foreign court proceedings, certain defenses have been admitted under the laws or court judgments of countries claiming jurisdiction over foreign acts, in particular where those acts have been ordered by foreign governments. Numbers of countries have also introduced statutory measures to protect their sovereignty and jurisdiction. These too will be examined, but first further consideration will be given to the effects doctrine.

B. *The Effects Doctrine*

The United States antitrust laws were first applied to conduct entirely outside the United States and involving solely foreign companies in 1945, in *United States v. Aluminum Company of America,*[13] on the basis that their practices were "intended to affect and did affect"[14] the foreign commerce of

---

[11] Imperial Chemical Industries Ltd. v. European Community Comm'n, 11 Comm. Mkt. L.R. 557 (1972).

[12] 90 Stat. 1383 (codified in scattered sections of 15, 18, 28 U.S.C). This Act enables the government in civil antitrust matters to serve civil investigative demands on potential witnesses with requests for oral testimony and written answers to questions, whereas previously only documentary evidence could be sought from an alleged infringer of the law when a complaint had already been filed or a grand jury convened to make an investigation.

[13] 148 F.2d 416 (2d Cir. 1945).

[14] *Id.* at 419.

the United States. This was later limited by the judgment in the *United States v. Watchmakers of Switzerland Information Center, Inc.*[15] to acts having a "substantial and material effect"[16] and this concept was incorporated into the American Law Institute's 1965 Restatement of the Foreign Relations Law of the United States, Section 18 of which stipulates:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies;
> (ii) the effect within the territory is substantial;
> (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and
> (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[17]

After many years of study of this issue, the International Law Association, in a Resolution adopted in 1972, developed a similar formulation but with the important qualification that the effect within the territory must occur "as a direct and primarily intended result of the conduct outside the territory." In the opinion of numbers of non-United States Governments and companies, the United States has often attempted to assert jurisdiction on the basis of some presumed effects which are far from obvious.

In practice, however, there has not been any decision of United States federal courts since the *Alcoa* case in 1945 in which jurisdiction has been based solely on the conduct of foreign nationals entirely outside the territory of the United States and not implemented by acts performed within that territory.

As was observed by a United States federal court of appeals in *Timberlane Lumber Co. v. Bank of America*[18] citing a former Attorney-General: "Anything which affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States."[19]

The effects test by itself was, therefore, in the court's opinion incomplete in that it failed to consider the other nation's interests. Nor did it take into account the full nature of the relationship between the alleged offender and the United States. It would for instance make a big difference if he were an American citizen.

---

[15] [1963] TRADE CASES (CCH) ¶ 70,600, at 77,415 (S.D.N.Y. 1962).
[16] *Id.* at 77,457.
[17] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).
[18] 549 F.2d 597 (9th Cir. 1976).
[19] *Id.* at 611 (quoting former Attorney General Katzenbach).

The court therefore concluded that one of the factors which should be taken into account in relation to the alleged restraint's effect on United States foreign commerce was whether, as a matter of international comity and fairness, the extraterritorial jurisdiction of the United States should be asserted to cover it. This involves a balancing of national interests and obviously everything will depend on how this is carried out, how objective it really is. Section 40 of the American Law Institute's *Restatement of the Foreign Relations Law of the United States,* to which the judge referred, sets forth the criteria which a court should take into account. These include:

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[20]

Nevertheless, the balancing will seldom be a simple task, and with the court of one nation doing it, there will often be a tendency for the judge to decide that his nation's interests are so vital that they will necessarily override any conflicting foreign interests.[21] This was for instance the approach taken by a United States court in a case where an American bank was required to produce the records held by its German branch, the court holding that the United States' interest in enforcing its antitrust laws outweighed in this case the interests of West Germany and any hardships that might ensue to the defendent in that country.[22]

Similarly, in another case involving a demand for the production of records located in Canada, where production would have contravened specific Canadian legislation[23] and a waiver from such law had been expressly denied, the Santa Fe County District Court in New Mexico observed:

> deference to the sovereignty and national interest of Canada or its provinces cannot be accomplished through sacrifice of the sovereignty of New Mexico and of due process of law and equal application and protection of law afforded by the laws of New Mexico. In this forum, the aforesaid laws of this forum which protect the fundamental public policy of this State must govern over the national interest or policy of a foreign country as legislated and conceived by that foreign country."[24]

---

[20]RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §40 (1965).

[21]The interpretation by Assistant Attorney-General Shenefield of the Department of Justice's Antitrust Division of Judge Choy's judgment in the *Timberlane* case was that the judge was not requiring such a balancing of national interests, but rather than "the interests of the United States in prosecuting the violation be measured both quantitatively and qualitatively against the potential damage to United States's foreign relations that might result." Address by Assistant Attorney-General Shenefield, American Bar Association (Aug. 9, 1978).

[22]United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968).

[23]Uranium Information Security Regulations.

[24]United Nuclear Corp. v. General Atomic Co., Pet. 1 App 3a-4a (1977).

The Supreme Court of the United States has so far declined to review this particular finding, though the Supreme Court of New Mexico did hear the case.[25] This issue has been the subject of diplomatic notes from the Canadian Government, as will be examined later, and in the United States Supreme Court hearing the Canadian Government intervened as amicus curiae.

However, in another case, also involving the production of documents located in Canada, subsequent to the *Timberlane* decision, the decision of another United States court was reversed by a circuit court of appeals because the lower court had failed to consider the legitimate Canadian interest in the disclosure of the documents and had not conducted any balancing of interests, since it also took the view that the law of the forum must prevail.[26] In a still more recent decision of another federal court of appeals[27] the court stated that it found itself in substantial agreement with the balancing approach of the Ninth Circuit Court of Appeals in the *Timberlane* case and listed ten factors similar to those in section 40 of the *American Law Institute's Restatement* which it felt should be included among those to be weighed by the court in deciding whether to exercise jurisdiction.

In some earlier cases, as a result of government interventions with regard to proceedings abroad against their nationals, provisos were made to United States court judgments to give recognition to the sovereign power of other governments as to acts within their territories. Thus, in the judgment (revised after Swiss Government intervention) given by a federal court in 1965 in *Swiss Watchmakers,* the following provision was included:

> . . . nothing contained in this Final Judgment shall be deemed to:
>
> . . .
>
> (L) Limit or circumscribe the sovereign right and power of the Government of the Swiss Confederation or any agency thereof, or specifically the sovereign right and power of the Government of the Swiss Confederation or any agency thereof to control or regulate its domestic or foreign commerce or to make and apply regulations with respect to the watch-making industry or any part thereof.[28]

Similarly, in United States v. General Electric Co.,[29] after the Netherlands Government had protested against a decree enjoining the Dutch company, Philips, from further violation of the United States antitrust laws, a "saving" clause was inserted by the court as follows:

> . . . Philips shall not be in contempt of this judgment for doing anything outside of the United States which is required or for not doing anything outside of the United

[25] 90 N.M. 97 (1976).

[26] *In re* Westinghouse Electric Corp. Uranium Litigation, [1977] 2 TRADE CASES (CCH) ¶61,724, at 72,948 (10th Cir. 1979).

[27] Mannington Mills Inc. v. Congoleum Corp., [1979] 1 TRADE CASES (CCH) ¶62,547 (3d Cir. 1979) (plaintiff alleged that the defendant had sought to monopolize certain United States export commerce by fraudulently procuring foreign patents and enforcing them by threatening and bringing infringement suits in foreign courts against the defendant and other United States exporters seeking access to those markets).

[28] United States v. Watchmakers of Switzerland Information Center Inc., [1965] TRADE CASES (CCH) ¶71,352, at 80,491 (S.D.N.Y. 1965).

[29] 115 F. Supp. 835 (D.N.J. 1953).

States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized or in the territory of which Philips or any such subsidiaries may be doing business.[30]

However, for political, economic, or other reasons a government may not always be willing, or consider it appropriate, to intervene on behalf of its nationals arraigned before a foreign court for their conduct outside the country of that court. The effect of a State's assertion of jurisdiction should not be dependent on whether or not another State decides to protest. In any case, comity requires consideration not merely of the interests of the country where the proceedings are brought or contemplated, but also of those of other countries whose nationals are involved. A balancing of national interests, which may raise complex political and economic issues and even questions of national security, should not be resolved in domestic courts, but rather by consultation and negotiation between governments.

As mentioned earlier there are other national competition laws which enable jurisdiction to be claimed on the basis of effects within the territory of conduct outside, but with the exception of the German Act against Restraints of Competition (of 1957), no instances are known of those provisions being applied, so whether they would ever be applied to conduct of foreign nationals solely outside the territory cannot be judged.

Section 98(2) of the German law provides that "this Act shall apply to all restraints of competition which have effect in the area in which the Act applies, even if they result from acts done outside such areas." Although several foreign mergers have been notified by German companies pursuant to this provision, further action has very seldom been taken on it by the German Cartel Office. In one case it applied section 98(1) to an acquisition of part of the business of a United States company by an indirectly owned subsidiary of a German parent company (Bayer A.G.). Bayer appealed to the Berlin Court and subsequently to the Federal Supreme Court. Both Courts upheld the decision of the Cartel Office.[31] In another case (involving an export cartel

[30] *Id.* at 878. *See also* United States v. Standard Oil Co. (N.J.), [1969] TRADE CASES (CCH) ¶71,742 (S.D.N.Y. 1968) (consent judgment under which the Department of Justice excluded from the injunctions of the decree cartel arrangements—fixing prices, allocating markets or customers, restricting imports or production, and the like—which were either a requirement of the law of the foreign nation where the transactions took place or were entered into pursuant to a request or official pronouncement of policy of that nation. *Id.* at §V(c)(1)-(2)).

[31] "The acquisition by an indirectly owned subsidiary in the United States of Bayer A.G. of the organic pigments division of Allied Chemical Corporation (ACC) was held by the Federal Cartel Office to be a merger for the purposes of section 23 of the German law and Bayer was therefore required to file a formal notification of the merger. In upholding the decision of the Cartel Office, the High Court of Berlin said that although Bayer A.G. had in 1975 and 1976 only 4.4% and 3.5% of the German organic pigments market and ACC had only 0.14% and 0.23% shares during those years, the merger nevertheless had perceptible effects on the domestic market for the purposes of section 98(2). Because of it ACC ceased to be a competitor and Bayer gained access to ACC's know-how and increased its turnover. Although, as Bayer maintained, this was likely to improve its competitive position, this was held not to be a relevant factor for the requirement of notification under section 23. The Court said that it would only be important in relation to the approval or prohibition of the merger under section 24. The Court also said that

covering exports to countries outside the EEC) the decision of the Cartel Office applying section 98(2) was on appeal reversed by the Federal Supreme Court.[32]

Certain decisions of the European Commission have sometimes been cited in support of the extraterritorial application of the EEC rules of competition. These have in all instances involved acts performed within the Common Market by subsidiaries of foreign parent companies acting under the orders or control of those foreign parents. In several cases involving abuse of a dominant market position under article 86, the non-EEC parent has been held, because of the extent of that control over the Common Market subsidiary, to constitute with it a single economic entity, so that the acts within the Common Market were treated as being acts also of the non-EEC parents.[33]

Obviously a company outside the Common Market entering into an agreement with a company within the Community will be caught by article 85 if that agreement is restrictive and noticeably affects trade between member States, as where Japanese producers of ball bearings agreed with French producers to put up their prices of ball bearings to the same level as those of the French companies and to check on any abnormal increase of exports to the French market.[34] This too therefore relates to trading within the Community and does not therefore support the application of the effects doctrine.

Likewise where a number of Canadian importers conspired with Japanese exporters to fix the prices of oranges, fix quotas, limit production and perform other acts unlawful under Canadian law, the defense that the Canadian statute could have no extraterritorial effect was inapplicable since "overt acts within British Columbia were participated in by all ten of the accused."[35]

C. *Collection of Information in Foreign Countries*

1. Discovery Procedures

As indicated in connection with our examination of the effects doctrine, many of the problems which arise in this area result from the seeking of evidence in foreign countries to substantiate the assertion of subject matter jurisdiction.

---

where there are effects on the domestic market there could be no exemption from notification on the grounds that the merger had taken place in another country whose interests might also be affected. The Federal Supreme Court, in its decision of May 29, 1979, confined itself to agreeing with the reasoning of the Berlin Court. The decisions therefore deal with a notification requirement under German law and not with the question of whether the foreign merger should be approved or prohibited.

[32]Olfeldrohre, Bundesgerichtshof, West Ger., WuW/E BGH, 1276 (1973).

[33]*See, e.g.*, Continental Can Co. v. E.C. Comm'n, 12 Comm. Mkt. L.R. 199 (1973); Instituto Chemioterapico Italiano SpA v. E.C. Comm'n, 13 Comm. Mkt. L.R. 309 (1974) (upholding the Commission's decision); United Brands Co. v. E.C. Comm'n; 21 Comm. Mkt. L.R. 429 (1978); Liptons Cash Registers v. Hugin Kassaregister, 21 Comm. Mkt. L.R. D19 (1978).

[34]*In re* Franco-Japanese Ballbearing Agreement, 15 Comm. Mkt. L.R. D8 (1975). *See also* Community v. Associated Lead Mfr. Ltd., 24 Comm. Mkt. L.R. 464 (1979).

[35]Regina v. Burrows, 54 Can. Pat. R. 95, 101 (1966).

Discovery, that is disclosure of facts and documents which are known to or in the possession of another person and which are necessary to the party seeking the discovery as part of his case, is broader in scope in the United States than in other countries. There disclosure may be obtained not only from the other parties to the proceedings but also from witnesses and those who may be witnesses. Enquiries are not confined to relevant and admissible evidence. but may be such as "would lead to a train of inquiry which might itself lead to relevant material."[36]

A distinction needs first to be made between direct discovery, through for instance civil investigative demands in United States government investigations, served on the person from whom information is required, (with sanctions for noncompliance), and the taking of evidence by means of letters rogatory (letters of request from one court to another), a procedure accepted by many countries and used in the United States both for government and private actions. In other words, a distinction between what in the former instance frequently involves the seeking of documents and information with a view to seeing whether enough evidence can be found to justify the starting of proceedings, and what in the latter instance involves the seeking of information and documents relating to proceedings which have already been commenced, to which the foreign company is a party and which relate to acts by the foreign company within the territory of the plaintiff seeking the information.

The latter situation generally raises few problems and is often regulated by bilateral and multilateral conventions. An example of the latter is the 1970 Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters which replaced earlier Conventions of 1905 and 1954 and which was signed by the United States, United Kingdom, France, the Scandinavian countries, Czechoslovakia, and Portugal. It was subsequently implemented by national laws such as the Evidence (Proceedings in Other Jurisdictions) Act 1975 in the United Kingdom.[37]

Section 2(4) of this Act provides that a person shall not be required to state what relevant documents are in his possession, custody or power, nor to produce documents other than those specified in the order of the court as being documents appearing to the court to be or to be likely to be in his possession, custody or power.[38] This provision is aimed against what are generally known as "fishing expeditions," which have long been held by English courts to be inadmissible. This has also been made clear by the British government which for instance intervened in a recent case which reached the

[36]Radio Corp. of America v. Rauland Corp. [1956] 1 Q.B. 618, 644.

[37]Evidence (Proceedings in Other Jurisdictions), Act, 1975, c. 34.

[38]When ratifying the Hague Convention the British Government declared that they would "not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents", which they regarded as including letters of request for information and documents of a type later prohibited from being produced under section 2(4).

highest court of appeal, the House of Lords,[39] when the Attorney-General stated, *inter alia,* "Her Majesty's Government considers that the wide investigatory procedures under the United States anti-trust legislation against persons outside the United States who are not United States citizens constitute an infringement of the proper jurisdiction and sovereignty of the United Kingdom."[40]

In referring to this intervention Lord Wilberforce said that it

> establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive: they have, as I have stated, no difficulty in doing so.[41]

Insofar as other countries may seek from foreign companies information and documents located abroad, they would generally do so only where they clearly have subject matter jurisdiction as recognized by international law and where formal proceedings have been instituted against the company concerned. They would then follow internationally agreed procedures.

2. Where Production Is Contrary to Foreign Law

A court may seek from parties to proceedings before it, who may be either nationals or foreign persons, information and documents located abroad, the seeking of which would infringe the jurisdiction under international law of the other State and the production of which would be contrary to its national interests or might even infringe its criminal or other laws.

Since United States courts have frequently regarded such considerations as irrelevant or overriden by United States national interests, numbers of countries have introduced laws prohibiting or enabling the prohibition of the production of documents or information in such circumstances. Thus, the Netherlands Economic Competition Act of 1956 prohibits compliance with any measures or decisions taken by any other State which relate to any regulations on competition, dominant positions, or practices restricting competition unless the government has granted exemption or, if requested, dispensation, which may be subject to restrictions or directions.

Under the United Kingdom Shipping Contracts and Commercial Documents Act of 1964,[42] where any person in the United Kingdom has been or may be required to produce or furnish to any court or authority of a foreign country any commercial document not within the territorial jurisdiction of that country or commercial information compiled from such document and

---

[39]Rio Tinto Zinc v. Westinghouse Elec. Corp., [1978] 2 W.L.R. 81.
[40]*Id.* at 93.
[41]*Id.* at 94.
[42]Shipping Contracts and Commercial Documents Act, 1964, c. 87.

it appears that the requirement constitutes or would constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom, the Secretary of State may prohibit that person from complying with that requirement. This Act has been invoked by the government on numbers of occasions.

Canada[43] (as well as the provinces of Ontario and Quebec), Australia[44] and South Africa[45] have also introduced legislation to protect business records generally, whilst various other countries have provisions in their laws to protect manufacturing or trade secrets or information relating to particular sectors, such as shipping and aviation.

According, however, to section 39 of the *Restatement of Foreign Relations Law of the United States* (1965), a State is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another State having jurisdiction with respect to that conduct. The party before the United States court who is required to produce the documents or information located aboard is therefore expected to make good faith efforts to comply by seeking from the foreign government a waiver of the nondisclosure law or order. The reviewing court then considers these efforts in the light of the legal obstacles to compliance and the relative interests of both parties and countries involved in deciding whether and how to provide for sanctions for noncompliance.[46] There have been numbers of cases where parties have been found by the court not to have made a sufficient good faith effort.[47]

---

[43]Uranium Information Security Regulations, 1976 (amended 1977). The Regulations were passed pursuant to the Atomic Energy Control Act.

[44]Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Act. No. 121 of 1976. Two orders have been made under this Act.

[45]Protection of Business Act, 1978, Act No. 99 of 1978.

[46]*See In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977); Societe Internationale v. Rogers, 357 U.S. 197 (1958). Both cases involved consideration of the waiver of the very stringent provisions of article 273 of the Swiss Penal Code. This article provides that anyone who discloses a manufacturing or business secret to a foreign government, to a public or private enterprise, or to the agents of any of these is liable to punishment by imprisonment and fine. *See also* Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972). In the recent *Adams* case the Swiss High Court held it to be illegal to produce to the European Commission documents which were located in Switzerland. In *Westinghouse* and *Societe Internationale*, decisions of lower courts finding that sufficient good faith effort had not been made were overruled on appeal. But the United States Supreme Court in *Societe Internationale* stated that the good faith bore no relation to the fact of noncompliance or the propriety of the order to produce and was relevant only to the decision regarding appropriate sanctions.

[47]*See, e.g.*, United States v. First Nat. City Bank, 396 F.2d 897 (2d Cir. 1968). In *In re Ampicillin Antitrust Litigation*, Beecham, a United Kingdom company, had been ordered by the British Government, pursuant to the Shipping Contracts and Commercial Documents Act of 1964, c. 87, not to produce numerous requested documents. The District Court for the District of Columbia found that sufficient good effort had not been made by Beecham to secure waiver of the order. The British government subsequently modified its order, as then did the United States

This requirement to seek a waiver of the foreign law or order is also generally regarded by the foreign government concerned as an infringement or attempted infringement of its sovereignty and interference with its national interests. Thus the Canadian government, in a note submitted to the United States government in November 1978, pointed out that a number of parties to various civil actions before American courts had made urgent and vigorous requests to it for a waiver from the Uranium Information Security Regulations, an amendment to them, or any other action which would enable them to comply with the orders of the American courts. It said that it had refused each of these requests and had continued to prevent production of the documents and the information in question since it considered such disclosure to be inimical to the national interest of Canada.[48] The note goes on to express the Canadian government's

> serious objection to the imposition of any sanction by the judicial branch of the United States Government for failure to produce documents or to disclose information located in Canada where such production or disclosure would require a person or corporation in Canada to perform an act or omission in Canada which is prohibited by the Uranium Information Security Regulations or any other law of Canada. The threat or imposition of any such sanction would have the appearance of an attempt to induce the performance in Canada of acts which are prohibited in Canada and of attaching liability for acts performed in Canada in accordance with Canadian law and the publicly declared policy of the Canadian Government. Such procedure would be inconsistent with generally accepted principles of international law, with the manner in which the Governments of Canada and the United States carry on their mutual relations and with the spirit of those relations.

3. Confidentiality and Privilege

Disclosure of information to foreign authorities may be precluded by considerations of confidentiality or privilege. Interpretation of these concepts differ from country to country or indeed according to the particular circumstances. Government departments may be prohibited from disclosing (even to other government departments) information received in confidence from companies without the consent of those companies. In considering how far a document should be treated as confidential, factors such as the existence in the United States of the Freedom of Information Act[49] will no doubt be

---

Court, J.P.M.D.L. Docket No. 50, Misc. No. 45-70 (D.D.C.) 1974. *See also* United States v. Field, 532 F.2d 404 (5th Cir. 1976), where United States interest in a criminal investigation was held to outweigh the Cayman Islands' interest in preserving secrecy.

[48]Other governments have reacted similarly in such situations. *See, e.g.*, Report of the International Law Association's Committee on the Extraterritorial Application of Restrictive Trade Practices Legislation, pt. V (collection of extracts from published material on official protests, directives, prohibitions and comments). The report was submitted to the Tokyo Conference of the International Law Association in 1964.

[49]5 U.S.C. § 552 (1976).

important. Even where an Antitrust Cooperation Agreement exists, as between the United States and Germany, the safeguard of confidentiality remains an important factor in the Convention.

Privilege in respect of legal adviser-client communications is another area where protection applies and where the position differs, sometimes considerably, from country to country. Thus, in some countries, such as the United States and the United Kingdom, the privilege belongs to the client, whilst in other countries it belongs to the client's counsel.

Written or oral evidence may in various countries be refused on the grounds that disclosure of certain information would be harmful to the public interest.[50] In England a person may refuse to give testimony or produce documents that might expose that person to criminal prosecution or civil liability under English law.[51] Likewise the fifth amendment to the United States Constitution provides privilege against self-incrimination to defendants, parties, and witnesses in relation to oral testimony and documents ordered to be produced.

These factors are therefore important considerations to be borne in mind when one country seeks disclosure of information and documents from another. The fact that the country seeking disclosure may not regard them as confidential or privileged is irrelevant if the other country does.

D. *Personal Jurisdiction*

It is not sufficient to claim jurisdiction over the subject matter. There must be sufficient presence of the alleged violator to bring him within reach of the court. If the foreign company has a branch office or an agent within the jurisdiction, having legal power to enter into contracts on its behalf, there is generally no problem in asserting jurisdiction over the foreign company.

---

[50]In England, Crown privilege would normally be claimed by the government minister concerned but may be raised by the parties and must be asserted by the court when appropriate. The privilege would for instance be applicable where disclosure would be harmful to national defense or to good diplomatic relations. See the decision of the House of Lords in Conway v. Rimmer, [1968] A.C. 910, for a review of the history of the privilege and Burmah Oil Co. v. Bank of England, [1979] 1 W.L.R. 473, for a recent decision of the Court of Appeal concerned entirely with Crown privilege and the production of documents and upheld by the House of Lords in a decision of November 1, 1979 but not reported as of this writing. As to the United States see United States v. Reynolds, 345 U.S. 1 (1953). In certain countries this privilege may be provided for by statute, for example in Australia under the Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Act No. 121 of 1976, and in the United Kingdom, where disclosure of certain kinds of information is prohibited under various statutes, including commercial information obtained by the government under the Fair Trading Act, 1973, c. 41, and the Statistics of Trade Act, 1947, 10 & 11 Geo. 6, c. 39. In France, disclosure of various categories of information are criminal offences. *See* CODE PENAL [C. PEN] arts. 75, 378, 418 (Fr).

[51]Civil Evidence Act, 1968, c. 64, § 14. In Rio Tinto Zinc v. Westinghouse Elect. Corp., [1978] 2 W.L.R. 81, the House of Lords held that the English companies were entitled to claim privilege under that section in respect of the documents required to be produced, since production would tend to expose them to penalties under article 85 of the Common Market Treaty, which has the force of law in England.

Generally it is necessary for the person to carry on business or reside in the country where jurisdiction is sought. The courts of some countries however, notably those of the United States, assert jurisdiction on the basis of what has often amounted to very transitory presence and sporadic business transactions. Section 12 of the Clayton Act provides that "[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought . . . in any [judicial] district wherein it may be found or transacts business."[52] This is interpreted very widely. Thus the finalizing at a single meeting in New York of the principal heads of agreement was sufficient to secure jurisdiction in a case in 1971, for the causes of action could be said to arise from the New York transaction although the signing of the final contract took place later at the domicile of the foreign corporation.[53] State "long arm" statutes have stretched jurisdiction even further, and in their interpretation of these statutes some courts have held it to be sufficient to base jurisdiction upon the fact that an alien had "minimum" contacts with the United States and not necessarily with the State of the forum.[54] The position is not, however, clear in this regard.

Corporate distinctions are sometimes ignored altogether where a foreign parent company or foreign subsidiary is concerned. As the British government stated in the aide memoire which it submitted to the European Commission in connection with the *Dyestuffs* case:

> A foreign company may be considered to "carry on business" within the jurisdiction by an agent only if the agent has legal power to enter into contracts on behalf of the principal.
>
> A foreign parent company may not be considered to "carry on business" within the jurisdiction by a subsidiary company, unless it can be shown that the subsidiary is the agent for the parent in the sense of carrying on the parent's business within the jurisdiction. The separate legal personalities of a parent company and its subsidiary should be respected. Such concepts as "enterprise entity" and "reciprocating partnership" when applied for the purpose of asserting personal jurisdiction over a foreign parent company by reason of the presence within the jurisdiction of a subsidiary (and a foreign subsidiary by reason of the presence of its parent company) are contrary to sound legal principle in that they disregard the distinction of personality between parent and subsidiary.[55]

With regard to the seeking of information, a distinction must be made between seeking it from a parent company on domestic territory and documents in its possession concerning its foreign subsidiaries on the one hand and, on the other hand, seeking documents and information in the possession of the foreign subsidiary or foreign parent company. It must be borne in mind that because a multinational group is involved, this does not alter the fact that it is generally made up of a series of legally autonomous companies, each of

---

[52]15 U.S.C. § 22 (1976).
[53]ECC Corp. v. Slater Electric Inc., 336 F. Supp. 148 (E.D.N.Y 1971).
[54]Centronics Data Computer Corp. v. Mannesmann A.G., 432 F. Supp. 659 (D.N.H 1977).
[55]Imperial Chemical Industries Ltd. v. E.C. Comm'n, 11 Comm. Mkt. L.R. 557, (1972).

which is subject to the law of the country in which it operates, and hence, too, the law governing compliance with foreign measures seeking information from it.

II. Foreign Government Compulsion

Reference has been made in connection with discovery procedures to laws prohibiting the production of evidence to foreign courts or authorities. Similar problems arise in connection with acts required by the government of one country but which are regarded as anticompetitive and contrary to its laws by the government or courts of another country.

In the United States a distinction has been made between on the one hand where private parties have engaged in restraints of competition ordered by a foreign government as a sovereign power, and on the other hand where they have merely been authorized or informally encouraged by the foreign government to engage in the restraints and they voluntarily chose to do so. In the first instance the parties are exempt from the antitrust laws, but they have no immunity in the other two.

It must, however, be recognized that other countries are often less formal in their systems of administration and may consider it sufficient for domestic purposes merely to approve or authorize, perhaps informally, a particular course of action where in similar circumstances the United States might formally order or command that course of action. It is therefore necessary to take into account a country's normal practices in this regard.

Another problem lies in the territoriality of the foreign government compulsion. *The Antitrust Guide for International Operations*[56] published by the United States Department of Justice in January 1977, stated: "Although the United States courts will recognize an antitrust defence for actions taken or compelled by a foreign sovereign within its territory, such recognition will not be afforded with respect to an act within the United States. The situation in third countries is less clear."[57]

One federal district court did allow foreign sovereign compulsion where there was restraint within the United States,[58] but the Department of Justice later sought to enjoin a boycott within the United States commanded by various foreign sovereign States.[59]

This proposed limitation of the Department of Justice on the act of state and foreign Government compulsion defenses has been criticized, in that the main consideration which underlies these defenses is that of fairness to a

---

[56]ANTITRUST DIVISION, U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977) [hereinafter cited as ANTITRUST GUIDE], *reprinted in* 799 ANTITRUST & TRADE REG. REP. (BNA) at E-1.

[57]ANTITRUST GUIDE, *supra* note 56.

[58]Interamerican Ref. Corp. v. Texaco Maracaibo Inc., 307 F. Supp. 1291 (D. Del. 1970).

[59]United States v. Bechtel Corp. The case was eventually settled by consent decree. Competitive Impact Statement of United States, 42 Fed. Reg. 3718 (1977).

company which is caught between conflicting demands from two or more sovereigns. In the event of such a conflict fairness requires rejection of "any mechanical territorial limitation on the Defence and suggests at a minimum the propriety of the balancing of interests approach suggested in Timberlane. . . ."[60] It may further be observed that the United States government is very ready to apply its own laws in other countries, often regardless of the laws or policies of that other country, but is not apparently prepared to consider the reverse situation.

As had been pointed out by a senior Canadian official in relation to the effects of United States antitrust law on compliance by Canadian companies with Canadian legislation and policy:

> If the threat of antitrust liability in the United States is a significant disincentive to compliance with Canadian policy, then the Canadian Government may also have to consider providing the necessary "cover", through legislation or other forms of direct intervention, to confer immunity from antitrust liability. The degree of intervention required for this purpose will be largely a function of the evolution of the U.S. doctrine of foreign compulsion . . . the more restrictively that doctrine is applied, the more foreign governments will feel obliged—whether they like it or not—to subject the private sector to mandatory rather than flexible control.[61]

The need to take further steps to protect national interests has been recognized by the Australian Government, which in 1979 introduced legislation to provide for restricting the recognition and enforcement in Australia of certain foreign judgments obtained in antitrust proceedings.[62] An earlier statute[63] has so far proved sufficient to prevent Australian based evidence from being produced for the purpose of United States court proceedings, where such production was regarded as contrary to Australian national interests or the foreign tribunal was proposing or likely to exercise jurisdiction or powers of a kind or in a manner not consistent with international law or comity. It cannot, however, help where Australian defendants have declined to enter appearance before the United States courts because of jurisdictional objections to the proceedings against them, with the consequence that judgment was made against them in default of appearance. Hence the introduction of the new statute. Unless greater consideration is given to the interests of other countries, more legislation of this type is likely to be introduced in other parts of the world.

III. Summary and Conclusions

A. Partly because of the considerable differences between national competition laws and policies and the unlikelihood of agreement being reached between States on any legally binding supranational regulation of restrictive

---

[60] Address by Professor Barry Hawk, American Bar Association Meeting (Aug. 1978).

[61] Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195, 206 (1978). Mr. Stanford is Director General of the Bureau of Commercial and Commodity Relations, Canadian Dept. of External Affairs.

[62] Foreign Antitrust Judgments (Restriction of Enforcement) Act, 1979.

[63] Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Act No. 121 of 1976.

trade practices and dominant economic power, problems arise because:

1. some States apply or try to apply their national laws to conduct of foreign companies outside their territory on the basis of its effects within the territory and even, in the case of the United States, on the basis of the effects of that conduct on the foreign trade and commerce of the United States;

2. in order to secure the evidence to substantiate the allegations on which jurisdiction is claimed, some States allow discovery of a kind known to other countries as fishing expeditions and which are generally not permitted under their laws; and

3. where substantive jurisdiction is claimed with regard to acts outside the territory, the courts of some States then secure personal jurisdiction over the parties to those acts based on very transitory presence and sporadic business transactions.

B. The two aspects under (A)(1) and (2) above have led to conflicts of national interests and jurisdiction and hence to confrontations between States, which have prompted some governments either to intervene as amicus curiae in the foreign court proceedings, or to introduce protective legislation against foreign claims to jurisdiction or evidence, or else to submit diplomatic notes of protest, and sometimes to two or three of these steps.

C. As regards claims to substantive jurisdiction usually few problems arise where some of the acts complained of are within the territory of the State claiming jurisdiction. States cannot, however, expect to impose their concepts unilaterally, applying criminal or quasi-criminal sanctions either to conduct in another country which is permitted in that country, or for failure to produce substantiating evidence from that other State when the latter's laws prohibit the production of such evidence.

D. There are circumstances where it has been accepted that a State may claim jurisdiction on the basis of effects within its territory of conduct outside, but subject to a number of conditions—as evidenced by the Resolution of the International Law Association referred to earlier. But these recommendations are often not adhered to by the courts claiming such jurisdiction. Indeed, United States courts have sometimes not even accepted that the effect within the territory must be direct and substantial, which are two of the conditions set out not only in the International Law Association Resolution but also in the American Law Institute's *Restatement (Second) of the Foreign Relations of the United States* (1965).

E. A subsidiary company must not be regarded as subject to the jurisdiction of the foreign State in which its parent company is based by reason of being its subsidiary. It is a distinct legal personality and is subject to the laws of the country where it operates. Likewise the parent company must not be regarded as carrying on business within the jurisdiction of the State where its subsidiary operates, solely by reason of having a subsidiary in that country, but only if the subsidiary carries on the parent's business within the jurisdiction.

F. A defendant cannot be condemned for failure to produce documents from another country whose laws either prohibit such disclosure without consent and such consent is not granted or else enable an order to be made prohibiting disclosure and such order has been made. In neither case should the defendant be required to prove a good faith effort to comply by seeking from the government a waiver of the nondisclosure law or order, since this should be a matter, where considered appropriate, for diplomatic approach by the government seeking disclosure to the government prohibiting disclosure.

G. The position under (F) should be no different where the documents located in another country are in the possession of the defendant's locally incorporated subsidiary, for the latter is equally bound as any domestic company there to comply with the laws of the country where it operates.

H. A distinction needs to be made between, on the one hand, discovery involving the seeking of documents and information to establish whether enough evidence can be found to justify the starting of proceedings, and, on the other hand, the seeking of information and documents relating to proceedings which have already been commenced, to which the foreign company is a party and which relate to acts by the foreign company within the territory of the State seeking the information. The former is inadmissible in many countries while the latter situation generally raises few problems and is often regulated by bilateral and multilateral conventions such as the 1970 Hague Convention on Taking of Evidence Abroad in Civil and Commercial Matters. The number of countries ratifying this Convention or entering into bilateral agreements for the same purpose could, of course, be increased.

I. Disclosure of documents or information to foreign authorities may be precluded by considerations of confidentiality or privilege. In such circumstances, the fact that the country seeking disclosure may not regard them as confidential or privileged is irrelevant.

J. Where conflicts of national interests arise, it is not appropriate for courts of one State to ignore the interests of another State either by resolving the issues on narrow factual or procedural grounds or simply by deciding that the interests of the State of the forum must necessarily override any conflicting national interests. There will, therefore, be circumstances where a balancing of those interests is required. Courts are not, however, normally equipped to carry out this balancing or reconciliation of national interests, which may involve complex political and economic issues and even questions of national security and is essentially a diplomatic function.

K. It must be recognized that where some governments will order a particular course of action, other governments may consider it as a matter of practice to be sufficient for domestic purposes to authorize or approve that action. This should be taken into account in considering the defense of foreign sovereign compulsion.

L. Problems will also continue to arise so long as grounds for claiming personal jurisdiction continue to differ so much. Here it should be possible to

reach a greater degree of agreement between States through international conventions.

M. The present OECD study into the collection of information abroad and on fact-finding methods used in antitrust cases and proceedings may help toward further agreement on means of resolving some of the issues raised in this paper. However, as brought out in the OECD Council Recommendation concerning action against restrictive business practices affecting international trade,[64] any rules which are developed to facilitate investigation and discovery by competition authorities of relevant information within the control of an enterprise under investigation, where such information is located outside their national territory, must be consistent with international law, take into account international comity and the provision of the information must not be contrary to the law or established policies or significant national interests of the country where the information is located. Furthermore, account must be taken in the latter country of appropriate safeguards, including those relating to privilege and confidentiality.

[64]Adopted July 20, 1978.