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EARL WEISBAUM

Good Fences Make Good Neighbors: A Discussion of Problems Concerning the Exercise of Jurisdiction

I have the pleasure today of speaking as a lawyer to lawyers. The office I hold is that of Attorney General for England and Wales and Northern Ireland—our Scottish friends have their own law officers; but the United Kingdom is not divided in its view on the matters I am speaking of today. I hope I will be able to convey to you a fair impression of why we in Britain object to certain extraterritorial applications of U.S. law and why we oppose the exercise of U.S. jurisdiction in some cases. But I shall also express to you some of the wider concerns which British Ministers feel on these issues.

For the United Kingdom—and this applies with even greater force after the recent general election—the Anglo-American relationship is central to our well-being, our security and our prosperity. We base ourselves upon the proposition that we stand together on the great issues of the day. We most profoundly believe that when we do differ—for we as sovereign nations are bound to differ from time to time—we can sit down and reason together, applying the tests of common sense and mutual benefit.

I suggest we both like the odd game of poker. But, at the end of the day, we both understand—and our people understand—that we both need, for our mutual contentment to apply the test of fairness in dealing with each other. This is, after all, the basis of the trust that is the heart of our alliance.

The topic I am to speak on today is loosely referred to as “extraterritoriality.” However, despite its great length, the term extraterritoriality only covers part of what I intend to consider now. To a considerable extent what I have to say *does* cover the problems that arise where one country seeks to apply its laws to activities outside its territory. A related problem, which also gives grounds for concern, arises in the context of the application of one state’s laws to activities which by their nature, or because of the transnational character of the legal entities involved, directly affect the interests of two or more states.

I shall try to give examples of what I mean as I go along, but the distinction which I am making, solely for the purpose of describing the extent of my subject, was that indicated by the Attorney General of the United States when he addressed the Union Internationale des Avocats two years ago. He said:

The term “extraterritoriality” itself does more to confuse than to clarify the problem. It suggests that the United States is attempting to apply its laws to conduct that occurred not within the United States but within the boundaries of another nation. That, of course, is rarely, if ever, the situation. The behavior involved in these cases—and the effects of that behavior—have typically occurred partially in the United States, partially in each of several other countries, and partially in international air or sea lanes.

Those words were said in the context of United States antitrust law. And they refer to that difficult class of commercial activities which reach into the territories of two or more states and criss-cross the expanse between them. But just as contentious in recent years have been those cases where there *have* been assertions of jurisdiction aimed at regulating conduct within the territory of foreign states. And a substantial part of my remarks will be addressed to this latter category of cases where an element of extraterritoriality is clearest. Of course, as is the way with problems, they seldom come alone; and some of the instances to which I shall refer combine both features, that is to say both the extraterritorial application of one State’s laws and activities which cross frontiers and thus affect two or more states.

However, to continue for a moment with the quotation which I began to read from the remarks of the distinguished Attorney General, he said, speaking of activities which cross frontiers:

Unless anarchy is to prevail, some nation’s law must be applicable to such behavior. The true character of the problem in these cases is one of conflict over which nation’s law and policy is to apply and prevail. The claim of the United States to control behavior in such contests may not be wholly clear: but neither is that claim clearly inferior to any other nation’s claim.

I of course agree that anarchy must not prevail. I of course agree that in the case of activities which reach into two or more territories and extend

across the high seas the claim of the United States (or of any nation) may be neither wholly clear nor clearly inferior to any other nation's claim. But I find it harder, other than perhaps as a true reflection of what has happened hitherto, to accept that these are necessarily cases of conflict over which nation's law and policy is to apply and prevail. The reason for my reluctance to accept that is because to do so is to cast the problem in terms of one nation's law and policy vanquishing another's.

These are not cases which justify unilateral regulation, particularly when such regulation may be based on a principle which is, to put it as objectively as I can, controversial in the law of nations and contested by many states. They do not justify unilateral regulation for the very reason that the claim of one country to control behavior in these cases may not be clear, yet is neither clearly inferior to that of another country which has a comparably close connection with the subject in issue. Such cases, rather, cry aloud for self-restraint, mutual understanding and joint consideration and accommodation of interests. As Deputy Secretary of State Kenneth Dam said in a recent address to the American Society of International Law: "conflicts of jurisdiction are at the intersection of law and diplomacy."

And indeed, in international transport, in the use of the sea and the air, many of the difficult issues of jurisdiction have had to be confronted and regulated by international agreement.

Let me now try to give an indication of how the outside world views the application of U.S. law to facts or activities which involve other countries as well as the USA. I do this not in the spirit of challenge, confrontation or criticism. We know that in the United States antitrust law is regarded as the Magna Carta of American economic rights and freedoms. It is not for me to question that as an element in American economic policy. Nor is it for me here to question the chosen means of enforcement through penal sanctions administered as if they were part of civil procedure in enforcement of what is essentially public law. But I must try to convey how others view the application of that law to their activities when these are conducted wholly or in substantial part outside the United States. Many feel that the asserted benefits of the antitrust laws, or particular features of the enforcement of those laws, are being extended to them when they neither want them nor is there any warrant for their extension. Even those who strongly support the view that what's good for General Motors is good for America may recognize that global extension of these laws is not welcomed and may prove counter-productive. I give the well-known example of the uranium case.

Imports of uranium for enrichment in the United States were for some years banned in order to protect domestic U.S. uranium producers. Outside producers were therefore excluded from 70% of the world's market for their product. I mention this aspect not in order to complain about this act of protectionism but because the consequence was that in order to survive by selling to the remainder of the market, the outside producers banded

together to defend their interests. They established a minimum floor price. They did that for their commercial survival. The result of this and other developments was that when the USA found it needed uranium from the outside world and the ban was lifted, U.S. suppliers found that the world market price had gone up. As they had undertaken in their contracts to supply utilities at fixed prices based on a plentiful supply at low prices they were in difficulty. They therefore started treble damage actions against the outside producers for collectively having fixed the price. Yet any concerted practice by the foreign producers could not have been directed against the USA while the import ban was in force; their collective measures had been defensive vis-a-vis the United States.

It seems, however, that such a consideration would not weigh against the application of the Sherman and Clayton Acts. And even if it did, the dice in such an action seem to be loaded. The nature of the proof required, the apparently relaxed attitude towards causation, the weight of legal expenses irrevocable even in the event of a successful defense and the excessive and vastly burdensome discovery process compelling disclosure of a company's innermost secrets concerning its world-wide operations—all combine to pressurize even those most inclined to resist to give in and pay up without there being any realistic prospect of the allegations being tested.

Now I am sure that such a short account based on a limited grasp of the complexities of antitrust law may be met by a detailed response. But on an occasion such as this I cannot go into detail on aspects of antitrust law. I must merely try to stress how it looks to outsiders and to companies who may have been brought into litigation because of an unintended effect in the USA or because they had a subsidiary present in the USA, even though the activities alleged were not those of the subsidiary. They might be further trapped because if they appeared to contest the jurisdiction and failed in that challenge, any subsequent judgment might then become enforceable against their world-wide assets under international arrangements for enforcement of judgments. Thus the issues relating to jurisdiction could not even be adequately tested in court without unreasonable risk.

It is not my intention today to review the different bases for jurisdiction which have been so thoroughly analyzed by many writers, though inevitably these concepts underly what I have to say. The uranium case, which I have briefly described, does indicate that there are problems today in this surprisingly unsettled area of international law which are not being resolved by the application of existing notions of jurisdiction of states.

My reaction to that is both traditionalist and cautiously innovative. The territorial basis for circumscribing the exercise of jurisdiction is still for most purposes the best basis for defining the sphere of action of each state. But the world has moved on from being divided into a number of largely isolated nation states. Points of contact have multiplied. Modern activities readily penetrate frontiers.

The telex and aircraft lend immediacy. The old territorial test does not in every case identify a single state which can most justifiably exercise jurisdiction.

Yet unilateral extension of territorial jurisdiction beyond a meaning linked with that of territory as a geographical location of activities is not the answer. It is not enough to claim that any effect within a state, still less any effect on the foreign commerce of a state, is a sufficient connection to bring activities within the rubric of territorial jurisdiction. Each sovereign state is entitled to pursue its own economic policy within its own territory. But I would not be able to regard an effect on the foreign commerce of a state as equating with activities within the territory of that state. It is not the same thing at all. Rather it is similar to the position of the judge in a British tax case who had to apply a rather elderly rule about deduction of travel expenses which included a reference to the cost of a horse, in a case of a businessman's visit to Australia in 1956. The exchange between Bench and Bar went like this:

Judge: I suppose the word "horse" in the rule does not include an aeroplane?

Counsel: No, I think not.

Judge: It ought to, it is much the same thing.

Given, however, that the notion of "territory" and the territorial basis for exercising jurisdiction does not provide a ready solution to all jurisdictional conflicts that arise from international activities, what principle can be propounded to complement the traditional and established bases for asserting jurisdiction, not to enlarge those bases but to guide us to the appropriate exercise of jurisdiction? What we need here may be something on the lines of the genuine and effective link in the principle which the International Court of Justice laid down nearly thirty years ago to distinguish competing rights to assert state claims on the basis of the nationality of an individual who on the plain application of national laws had more than one nationality.

I shall be touching on nationality as a basis for jurisdiction in its proper context later. But the suggestion here is really a two part principle adding an element of restraint to the existing bases for jurisdiction. The suggestion is:

—first, that there should be a substantial and genuine connection between the subject-matter of the issues raised and the state whose jurisdiction may be exercised;

—second, that in the case where more than one state has such a connection, the state which is to exercise jurisdiction should have a reasonable interest in doing so and account should be taken of the effect on the equivalent interests of any other state or states, and if necessary there should be prior and meaningful consultations between the states concerned.

Now it will certainly be said that this is all very well in principle and in theory, but the criteria suggested for deciding whether jurisdiction should be asserted are quite inexplicit. At best they would lead to inconclusive

negotiations between states. At worst they would have little effective role where the private law jurisdiction of a state is invoked. A judge is called on to apply the law rather than weight the niceties of public policy in international relations and to assess the competing interests of states, to only one of which he owes his allegiance and his judicial functions.

Let me say this in answer, or at least in part answer. In many cases the issues involved are ones on which there are shared views and common objectives with differences among states being limited to the weight they attach to particular principles without there being a fundamental divergence. For example, to refer briefly to some aspects of a complicated question, in the case of oil pollution at sea, no state which has a coast wants that coast polluted by oil. States which have merchant fleets do not want their ships to be subject to uncontrolled interference on the high seas. Successive negotiations on this subject have prohibited discharge of oil within a certain distance from the coast but have respected the primary jurisdiction of the flag state to prosecute for offenses on the high seas. However, in order to protect, where possible, coastal states from potential damage to their coasts, the flag state undertakes to prosecute if the coastal state can provide the proper evidence in respect of a particular ship.

On a bilateral basis an example of a good compromise on questions of jurisdiction is to be found in the Exchange of Notes between the United Kingdom and the United States of November 13, 1981 on Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the USA. Obviously our two countries have a common view on suppression of drug traffic; but for the UK to allow the USA to stop and search British commercial vessels on the high seas and then exercise U.S. enforcement jurisdiction, applying U.S. law does involve quite a compromise of important principles. In this case negotiation achieved a result enabling the USA to extend its defenses against drug smuggling as it wished within a defined area beyond its territorial sea but with certain safeguards for the UK against unwarranted interference with shipping on the high seas and against forfeiture of British vessels and prosecution of British nationals without consent.

Similarly, in the great majority of private law cases courts are able to reach sensible and ready conclusions as to the appropriateness of a particular forum for the resolution of disputes containing international elements. It would therefore only be a small number of more intractable cases that would really require the extra test, that is the dual principle of genuine and effective link with the subject-matter and joint consideration of the appropriate jurisdiction to be exercised where laws and policies conflict.

I stress that this suggestion is not intended to replace the territorial basis for asserting jurisdiction, but rather to identify a principle which may be applied in the problem cases. The same principle should apply to problems arising in the context of nationality based jurisdiction.

Nationality is of course a basis long recognized in academic writings for the assertion of jurisdiction, at least to the extent that this does not conflict with territorial jurisdiction. But the extent to which it is justifiable to rely on a formal link of nationality is also now controversial. Is it enough when we are addressing problems concerning international commerce that one of the persons involved has the nationality of the state claiming a right to legislate over the matter or has the nationality corresponding to that of the court whose jurisdiction is being invoked? In cases involving commercial contracts where the parties frequently choose law and forum, I would respectfully suggest that the U.S. Supreme Court has wisely shown an increased readiness to recognize compromises made by the parties despite the inclination established in U.S. jurisprudence to regard choice of forum clauses as attempts to oust the jurisdiction of U.S. courts. I see this refreshing realism realized in *Bremen v. Zapata Off-Shore Co.* where the Supreme Court said:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

I must not, however, misrepresent the Supreme Court by failing to note a corollary to this in that the Supreme Court also stated as a case for rejecting the choice made, that:

Selection of a remote forum to apply differing foreign laws to an essentially American controversy might contravene an important public policy of the forum.

Transposing that into a rather broader context, I would simply note that other countries feel equally strongly that the reciprocal principle applies. It may, for example, be quite inappropriate for one British company, to invoke U.S. jurisdiction against another British company in order to avail itself of U.S. laws whose content or application in particular circumstances may contravene public policy of the United Kingdom, whether it be simply general public policy in the economic or commercial field or policy which is reflected in English law, such as the principle in private law on conspiracy that traders are free to compete as they please provided they do not combine for the predominant purpose of willfully causing damage to a competitor who then suffers that damage at their hands.

The situation I have just described is one in which there is an underlying difference in the laws of two states. The impact of such a difference when one considers jurisdiction claimed on the basis of nationality is this. The assertion that a state is entitled to prescribe rules of conduct for its own nationals wherever they are resident, and to seek to apply them so long as there is no conflict with a directly opposite mandatory command in the law of the territorial state, goes too far. What I mean by this is perhaps best

shown by two illustrations. The first arises from the Foreign Boycott Regulations. The second concerns recent problems over supplying equipment for the Siberian pipeline.

The Foreign Boycott Regulations were made in pursuance of the policy of the United States to oppose restrictions or boycotts aimed at U.S. persons or friendly countries. I would not in any way challenge the right of the USA to seek that objective, even though Britain's dependence on world trade leads us not to pursue such a positive policy. It is the reach of the U.S. measures into Britain and their denial of a place for British policy in certain cases in Britain itself which we cannot accept and which I strongly suspect in a hypothetical reciprocal case no United States administration would accept.

The reason for this strong reaction lies in the purported application of the foreign Boycott Regulations to a wide range of persons outside the USA who are not United States nationals. These extend from foreign subsidiaries, affiliates and so on of U.S. companies to any permanent foreign establishment which is, in the terms of the Regulations, "controlled in fact" by a U.S. domestic concern. The test of such control, put in general terms, is 25% beneficial ownership where no one else controls a larger share. The Foreign Boycott Regulations are in this regard an example of what is found in other U.S. regulatory measures.

We find this objectionable for a reason of principle, which I shall amplify in a moment—that the nationality of a company is that of its place of incorporation. We also find such extensive regulation objectionable as a matter of policy because the practical consequence is to restrict activities in the United Kingdom and by United Kingdom companies in cases where such restriction is not British policy. Imagine what the reaction would have been had the British government prohibited any subsidiary in the USA of a British company—subsidiary defined in the terms I have described—from carrying out any contract with Argentina during the Falklands hostilities. I have no doubt that the U.S. administration would have complained of this as a most high-handed and unacceptable attempt to extend the United Kingdom's jurisdiction into that of the USA, even though the USA with its characteristic integrity came to take the side of Britain as a matter of general policy in that unhappy episode.

Indeed, the U.S. courts themselves in the somewhat reciprocal situation in 1980, when Iran was illegally holding U.S. hostages, refused to continue an *ex parte* injunction restraining an Iranian bank from pursuing a claim for a debt against the London branch of a U.S. bank. For in that case the U.S. district court did recognize that it would be exorbitant for a U.S. court to restrain a non-U.S. bank pursuing a contractual claim in London in respect of deposits made there. It is therefore all the more difficult to understand renewed assertions of jurisdiction in respect of subsidiaries of U.S. companies in the United Kingdom.

The objection on principle to the extent claimed by the USA for the reach of nationality jurisdiction in the case of subsidiaries follows from the particular nationality of the companies concerned.

We would regard companies incorporated in the United Kingdom as having British nationality even if they are entirely foreign owned. A company is a legal entity that owes its personality to a particular system of law and its nationality is that of the state which has established that system of law. We believe that it is generally accepted internationally, and supported in effect by the International Court of Justice, that the general test of the nationality of a corporation is not the "control" test, but that which follows the traditional rule attributing the right of diplomatic protection to the state under the laws of which the company is incorporated and in whose territory it has its registered office. There are indications in the *Sumitomo* case that the Supreme Court also favors the test of place of incorporation.

My second illustration of the problems in this area is the difficulty last year over the Siberian pipeline. Under the U.S. regulations promulgated by the President, foreign subsidiaries of U.S. companies were forbidden to execute existing contracts for the Siberian pipeline project. This would mean that such a company incorporated or registered in the United Kingdom and doing business there, employing a British workforce and manufacturing equipment of British design and using British materials would have been prohibited by United States regulations from carrying out existing contracts. Even without taking account of the background of high unemployment in the United Kingdom and any policy factors arising from British membership of the European Community, there were clear grounds here for questioning whether the U.S. claim to jurisdiction could be properly founded on the basis of nationality.

This shows most starkly the problem of extraterritoriality which endangers the feeling of contentment and trust between us. It has become politically divisive, and we feel in Britain that we must not allow this issue to persist.

Extraterritoriality, or "ET" as it is known for short requires control. We say most firmly "ET—Go home!" Reasonable people (and not only in our two countries but elsewhere in Europe as well) are increasingly recognizing that "ET"—notably in the context of the Export Administration Act which is now up for renewal—has, following the Siberian pipeline episode, got to be dealt with to our mutual satisfaction. We cannot afford a repetition of the pipeline fiasco, a fiasco that damaged the Western alliance far more than it hurt the Russians. We cannot allow our trading partnerships to be placed under the strains and uncertainties which the Export Administration Act engenders.

We very much hope that the U.S. administration and others such as the distinguished company gathered here will use all their influence to see that the Act is amended to meet our concerns. Let me try to summarize our main objections:

First, the application of export controls to companies incorporated overseas on the basis that a U.S. shareholding (not necessarily a majority shareholding) makes them subject to U.S. jurisdiction;

Second, the extension of export controls to the re-export of goods from one overseas country to another, on the basis that those goods were originally manufactured in the USA, or contain components or materials originating to the USA, or were made with the use of data and technology of U.S. origin;

Third, the retroactive application of export controls, so as to frustrate the execution of contracts entered into in good faith and in full conformity with all U.S. laws in force at the date of the contract;

Fourth, the unilateral use of export controls not only for reasons of national security or to protect commodities in short supply, but also for reasons for foreign policy not falling within these categories.

Our businessmen, especially our multinational businessmen, on both sides of the Atlantic understand full well the strains and uncertainties which the Export Administration Act creates. We are afraid that while this issue hangs over our heads, it will to some degree restrain the investment and industrial collaboration, especially in the high technologies, that both our economies need for a healthy future. I think that American businessmen probably feel the same way especially in relation to their position as reliable suppliers and technical collaborators.

We are afraid that this is an issue which, with its perceived infringement of British and other countries' sovereignty, will, unless removed from our agenda of differences, weaken the instinctive trust which, I suggest, is at the heart of our particular relationship. As I mentioned earlier, the objection to extension of nationality jurisdiction beyond proper limits is compounded by circumstances which have a bearing on each country's own policies and their undoubted right to have those policies respected in their own territory. We have seen, in the United Kingdom at the worst moment of the recession, when three million of our people were (and are) unemployed how the dole queue could have been lengthened because of the outreach of American law. You will realize, with the sense of fairness which is the hallmark of your Association, that no British Government could ever have accepted such a situation. We defended ourselves with the legislative means of our disposal; and I have little doubt that our readiness to defend ourselves when we were obliged to will have been noted.

But let there be no doubt about it. We cannot afford, either of our countries, another pipeline row. I trust we have, both of us, learned from that bitter experience. For our part we drew the conclusion that we need a removal of the objectionable features of the Export Administration Act if this divisive issue is to be laid to rest.

What of the future? I think that there are grounds for optimism. I have already referred to the speech by Deputy Secretary of State Kenneth Dam

to the American Society of International Law. That speech contains, if I may say so, some very positive proposals which I warmly welcome, particularly those for improving consultations and cooperation and for reducing the risk of repeated instances of conflicts of jurisdiction. There are few points on which I would disagree and these are rather minor. For example, the Vredeling proposals under consideration by the European Community even if they were to be adopted in something like their present form, and the European Commission's investigation into IBM's activities in Europe, can scarcely be equated with the kind of U.S. measures I have been considering today. But that apart I do firmly believe that the ideas which Deputy Secretary Dam suggests for the future will repay attention.

I also think that there may be a number of fairly simple propositions which ought to be acceptable to all states. For example, I think that few could disagree with the proposition that whatever principles of international law govern the exercise of extraterritorial jurisdiction, those principles are the same for all states; that consequently no state would claim a jurisdiction which it is not willing also to concede; and where conflicts of jurisdiction reflect conflicts of policy, an attempt should be made to resolve the latter conflict by negotiations.

Let me in conclusion stress that this is a complex field. I have necessarily only touched on a few features. But I hope the cases which I have cited have illuminated my remarks. I would, however, before I finish like to leave with you a few basic thoughts:

First, no state is entitled to seek to impose on other sovereign states its own economic policy, whether based on economic or political considerations, in respect of activities carried out in those other states;

Second, possible conflicts about an activity which takes place within or between two states should be avoided by restraint and by respect for the sovereignty of other states;

Third, such problems should be considered *ad hoc* by the two governments in order to reconcile their difficulties, and wherever possible they should be resolved by agreement in advance;

Fourth, since these principles apply in relations between the states, they should be followed by all parts of the machinery of each state, including the judicial and legislative branches of the state.

I would suggest that only in this way can it be ensured that disputes of this character do not cause economic and political damage in the relations between two friendly states.

In the poem by Robert Frost which recalls the maxim from which the title of my address, "Good Fences Make Good Neighbors," is taken, the two neighbors carry out their annual repairs to the wall between their properties. One of them reflects that a wall is really unnecessary to prevent his apple trees getting at his neighbor's pines; but where there are cattle roaming across the territory neighbors need a wall. We in Britain have a

strong tradition of fencing even a small garden. This is partly because the fence is convenient to lean on when chatting to one's neighbor. It is the thought of discussions over the fence which I hope we can keep uppermost in mind while observing the principle that good fences make good neighbors.

RT. HON. SIR MICHAEL HAVERS

