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Extraterritoriality: an Unexceptional Exception

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I. Introduction

In his famous dissenting opinion in the *Lotus Case*¹, Justice Loder linked the strictly territorial effect of national regulation to the principle of sovereignty and thus the mutual independence of States, which is a “postulate” of international law. The “fundamental consequence” of that postulate, according to Loder, “is that no municipal law (...) can apply or have binding effects outside the national territory”.

This cornerstone of classical international law² is mirrored in national public law principles, which traditionally regard the extraterritoriality of domestic regulation as an exception to the opposite rule.

In an influential 1895 work, the German scholar Otto Mayer wrote that “*notre Etat ne prétend que par exception à exercer son autorité dans la sphère du territoire étranger*” (our State claims the right to exercise its authority in a foreign territory only as an exception)³.

About fifteen years later, in the United States, Justice Holmes was equally clear in expressing the same concept: “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done”⁴. This sentence is probably the most frequently quoted statement of the “presumption against extraterritoriality”, a long-standing canon of statutory interpretation according to which the “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”⁵.

¹ Case of *S.S. Lotus (France v. Turkey)*, Judgment No. 9, Sept 7, 1927, P.C.I.J. Reports 1928, Series A, No 10.

² See A. L. PARRISH, *Reclaiming International Law from Extraterritoriality* – Electronic copy available at: <http://ssrn.com/abstract=1013740>, at. 26.

³ O. MAYER, *Deutsches Verwaltungsrecht*, Leipzig, 1895-1896. I’m quoting from the French edition: O. MAYER, *Le droit administratif allemand*, Giard-Brière Editeurs, Paris, 1906, § 62, (*Le droit administratif international*) p. 354

⁴ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

⁵ *EEOC v. Arabian American Oil Co. (“Aramco”)*, 499 U.S. 244, 248 (1991)

⁶ *Hartford Fire Insurance Co. v. California*, 509 US 764 (1993).

⁷ The reasons for this are well-explained by K. W. DAM, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 *Sup. Ct. Rev.* 289 (1993), p. 297: “the core of their concern was their liability to insureds under “occurrence-based” policies, which cover claims with regard to any occurrences during the period in which the policy was in force whenever the claim might later arise. Policies written on occurrence forms therefore subjected the insurers to liability that could not be quantified or even known until years or even decades after the policy had expired. To deal with this problem, the insurers sought to eliminate the occurrence form not just from their own set of forms but for the industry as a whole. They sought to substitute an industry-wide “claims-made” form. Under the latter form the policy covered only claims made during the policy period. Since such a form for newly written policies would otherwise expose them to retroactive and unforeseeable liability with regard to prior occurrences, they included in the claims-made industry form a cut-off date before which no claims would be recognized”.

⁸ *United States v. Aluminium Co. Of Am* (“Alcoa”), 148 R 2d 416, 444 (2d Cir. 1945).

⁹ *Timberlane Lumber Co. V. Bank of Am.*, 549 F.2d 597, 611-12 (9th Cir. 1976) (*Timberlane I*).

¹⁰ The factors to be balanced are the following: “the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad” (*Timberlane I* 549 F.2d 597, at 614). In 1987, the *Restatement (third) of the Foreign Relations Law of the United States* adopted a similar balancing test . The factors to consider include: “(a) the link of the activity to the territory of the regulating state, i.e. the extent to which the activity takes place within the territory, or has a substantial, direct and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state might have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state” (§ 403).

¹¹ *Hartford Fire Insurance Co. v. California*, at 796.

¹² *Id.*, at 799.

¹³ M. IVALDI AND O. BERTRAND, *European Competition Policy in International Markets* (October 2006). Available at SSRN: <http://ssrn.com/abstract=951594> , at 8-9

¹⁴ *Ahlström Osakeyhtiö and others v Commission*, case 89,104, 114, 116, 117, 125, ECR 1988, p 5193.

¹⁵ M. IVALDI AND O. BERTRAND, *European Competition Policy in International Markets*, cit., at 9.

¹⁶ M. T. BATZ, *A Comparative Analysis of United States and European Union Jurisdiction in Extraterritorial Antitrust Law and The Need for International Standards*, Duq Bus L.J. 65 (2007), at. 82.

¹⁷ See *Hartford Fire Insurance Co. v. California*, at 820.

¹⁸ D.A. SABALOT, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 Loy. L. Rev. 213 1982. See also *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 Law & Contemp. Probs. 197 1987 (stating that “these blocking statutes evidence foreign disdain for American antitrust laws, and are designed to create a disincentive for the extraterritorial reach of U.S. antitrust laws. There are two kinds of blocking statutes: First, there are discovery blocking statutes aimed at preventing compliance with foreign state requests or orders for documents or information. Second, there are judgment blocking provisions that declare unenforceable in whole or in part the decisions or orders of a foreign court purporting to affect foreign nationals”).

¹⁹ A. GUZMAN, *The Case for International Antitrust*, 22 Berkeley J. Int’l L. 355 2004, at 360 (giving an example of the phenomenon: “Suppose [...] the activities of a firm are subject to the competition laws of country A and country B. Assume that country A has, relative to country B, a restrictive policy with respect to horizontal restraints of trade and a permissive policy with respect to vertical restraints [...]. Country B, however, believes that its regime, which is relatively permissive with respect to horizontal restraints but restrictive with respect to vertical restraints, is optimal. Firms subject to the jurisdiction of both states face a de facto regime that includes the strict horizontal restraint regulations of country A and the strict vertical restraint regulations of country B. This is a stricter policy than either country A or country B believes should exist. In short, firms doing business in both the United States and the EU face an international competition policy regime that is more burdensome than the regime of either the EU or United States and very likely more restrictive than what either jurisdiction would choose if it were a closed economy”).

²⁰ E. FOX, *National Law, Global Markets and Hartford: Eyes Wide Shut*, 68 Antitrust L.J. 73 2000-2001, at 80.

²¹ TRIBUNAL DE GRANDE INSTANCE DE PARIS, Ordonnance de référé 22 mai 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France* ; TRIBUNAL DE GRANDE INSTANCE DE PARIS, Ordonnance de référé du 11 août 2000, *Association "Union des Etudiants Juifs de France", la "Ligue contre le Racisme et l'Antisémitisme" / Yahoo ! Inc. et Yahoo France* ; TRIBUNAL DE GRANDE INSTANCE DE PARIS, Ordonnance de référé 20 novembre 2000, *UEJF et Licra c/ Yahoo! Inc.* Available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte>.

²² Specifically changing its auction policy to prohibit individuals from auctioning “any item that promotes, glorifies or is directly associated with groups or individuals known principally for hateful or violent positions or acts,



such as Nazi or the Ku Klux Klan”.

²³ *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'Antisémitisme*, 145 F. Supp. 2d 1168, 1179 (N.D. Cal. 2001), at. 19, available at <http://www.juriscom.net/en/txt/jurisus/ic/dccalifornia20011107.htm>.

²⁴ Decision of the Board dated October 27, 1999, SOCAN – Tariff 22 (Transmission of Musical Works to Subscribers Via a Telecommunications Service Not Covered Under Tariff Nos. 16 or 17) [Phase I: Legal Issues] (SOCAN 22 (1999)).

²⁵ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* (C.A.), 2002 FCA 166

²⁶ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45

²⁷ Id.

²⁸ See *The legal implications of the Yahoo! Inc. Nazi memorabilia dispute: an interview with Professor Michael Geist*, in *An international discussion of the implications of the Yahoo! Inc. Nazi memorabilia dispute*, Interviews organized by Lionel Thoumyre, Juriscom.net, January/March 2001 at <http://www.juriscom.net/en/uni/doc/yahoo/geist.htm> : “I would instead argue that [...] courts are moving toward an effects based analysis whereby jurisdiction will be asserted where the court believes that the Web site has had an effect within the jurisdiction. That [...] approach can be found in this case as the French judge reached a determination that the "Yahoo.com" site, despite being passive from a French perspective, still had an effect within France and was thus subject to French jurisdiction”.

²⁹ See D. Post, *Whose Law? Activity on the Internet and the Problem(s) of Jurisdiction*, p. 26 (stating that “in a networked world, [...] the principles of the international legal system cannot require everyone to comply with all law”)

³⁰ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, para 152: “The real and substantial connection test proposed by Binnie J. is inconsistent with the territoriality principle in that it may reach out and grasp content providers located in Bangalore who post content on a server in Hong Kong based only on the fact that the copyrighted work is retrieved by end users in Canada. Unlike a broadcaster, a content provider does not know in advance which territories will receive its transmissions. [...] A danger with Binnie J.’s approach is that it could result in a layering of royalty obligations between States. This danger is particularly acute with the Internet: content posted on a server is usually accessible from anywhere on the globe”.

³¹ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, para 78: “This conclusion also raises the spectre of imposition of copyright duties on a single telecommunication in both the State of transmission and the State of reception, but as with other fields of overlapping liability (taxation for example), the answer lies in the making of international or bilateral agreements, not in national courts straining to find some jurisdictional infirmity in either State”.

³² M. J. ROBINSON-DORN, *The Trail Smelter, Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 *NYU Env'tl L. J.*, Vol. 14, 233, 235 (2006).

³³ *Pakootas v. Teck Cominco Metals Ltd.*, No. CV-04-256-AAM, 2004.

³⁴ *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 n.2 (9th Cir. 2006).

³⁵ Traditionally U.S. courts have accepted the extraterritorial application of antitrust and securities law, but have generally not accepted the extraterritorial application of environmental law. On this topic, see J. TURLEY, *When in Rome: Multinational Misconduct and the Presumption against Extraterritoriality*, 84 *Nw. U. L. Rev.* 598 (1989-1990), particularly at 663-664 (stating that “Antitrust and Securities violations are generally viewed from a transnational perspective. Since the market is viewed transnationally, market violations and prohibitions are given similar meaning. Conversely, courts continue to view environmental and labor conditions as local matters and thus interpret ambiguous statutes in this area as limited to domestic applications [...]. Yet, at a time when the world is developing inexorably toward a unified and interdependent system of economies and environments, American courts continue to adopt an archaic territorialist view of labor and environmental disputes that is more reflective of the early 1900s. In the meantime, the presumption against extraterritoriality stands as a judicially maintained barrier to worker and environmental protections, behind which American multinationals can essentially turn back the clock on corporate responsibility”).

³⁶ The reasoning of the Court of Appeals was different, but came to substantially the same conclusions. The Court determined that holding Teck liable did not constitute an extraterritorial application of CERCLA, because the release or threatened release of hazardous substances from the site into the environment, the act that created liability under CERCLA, actually occurred within the United States. To sum up: according to the district court, extraterritorial application of CERCLA was appropriate because the effects of the polluter’s conduct, which took place abroad, were felt within the United States; according to the Court of Appeals, as the conduct (release of hazardous substances) took

place where its effects were felt, that is within the United States, CERCLA was not applied extraterritorially.

³⁷ See SUPREME COURT OF THE UNITED STATES, *Teck Cominco Metals Ltd v. Pakootas, On Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit*, Brief of the Government of Canada as Amicus Curiae in Support of Petitioner, No 061188, available at <http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/> .

³⁸ See SUPREME COURT OF THE UNITED STATES, *Teck Cominco Metals Ltd v. Pakootas, On Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit*, Brief of the Chamber of Commerce of the United States of America s Amicus Curiae in Support of Petition for a Writ of Certiorari, at 13-15, No 061188, available at <http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/> .

³⁹ See SUPREME COURT OF THE UNITED STATES, *Teck Cominco Metals Ltd v. Pakootas, On Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit*, Brief of the United States as Amicus Curiae, at 17-18, No 061188, available at <http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/> .

⁴⁰ C. SCHMITT, *Land and Sea*. Simona Draghici, trans. (Plutarch Press, 1997). Original publication: 1954

⁴¹ R. KEOHANE,

⁴² P. MANDELSON, *Europe's openness and the politics of globalisation*, The Alcuin Lecture, Cambridge, 8 February 2008, available at http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm191_en.htm : “So, in 1990, two in ten people on this planet lived in societies that were significantly integrated into a global economy. Today about nine in ten do. These may not be politically open societies, but they are economically open enough to have allowed for membership of the WTO and with it the open global trading system. That is more than three billion people and probably one billion workers entering the global economy - pretty much creating the modern global economy - in less than two decades. This is the single most important change you need to grasp to understand the modern world. We are living in the wake of an openness boom”.

⁴³ SPENCER WEBER WALZER, *An International Common Law of Antitrust*, *New England Law Review*, vol. 34, 1, 1999, electronic copy available at: <http://ssrn.com/abstract=984490> , p. 164.

⁴⁴ See Convention on Cybercrime, Budapest, 23.XI.2001, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm> .

⁴⁵ Particularly OECD, *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade*, 27 July 1995 - C(95)130/FINAL

⁴⁶ *Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws*, OJ L 95, 27.4.1995 p. 47-52 Approved by the decision of the Council and the Commission of 10 April 1995 (95/145/EC, ECSC); See also *Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws*, OJ L 173, 18.6.1998, p. 28-31

⁴⁷ See OECD, *CLP Report on Positive Comity*, DAF/CLP(99)19, Dist. 14-Jun-1999, para 18.

⁴⁸ See OECD, *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade*, cit. art. I.A.1: “When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive practices”. See also art. I.B.4: “a) A Member country which considers that an investigation or proceeding being conducted by another Member country under its competition laws may affect its important interests should transmit its views on the matter to or request consultation with the other Member country; b) Without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding”.

⁴⁹ OECD, *CLP Report on Positive Comity*, cit., para 18. See OECD, *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade*, cit. art. I.B.5: “a) A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the Member countries concerned; b) Any Member country so addressed should give full and sympathetic



consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the anticompetitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country". More generally, see *Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws*, cit.

⁵⁰ Artt. 14-15 of the Agreement foresee a "Citizen Submissions on Enforcement Matters mechanism", which enables members of the public to trigger the process by submitting to the Commission for Environmental Cooperation (CEC) a claim alleging a failure to enforce its environmental laws effectively on the part of any of the partners. Following a review of the submission, the CEC may investigate the matter and publish a factual record of its findings, subject to approval by the CEC Council.

Thus, the principle of the mutual independence of States has traditionally permitted extraterritoriality only as an exception to the rule.

Today, however, the interdependence between States is making extraterritoriality increasingly unexceptional.

This paper addresses the change. It argues, on the basis of an analysis of recent case law, that the increasing extraterritoriality of domestic regulation, either *de jure* or *de facto*, is an unavoidable effect of globalization.

Globalization is of course a multifaceted phenomenon, and a careful description of it must consider at least three dimensions. First of all, the economic dimension: a global market, in which most, if not all, countries participate, has been realized. Second, the information technology (IT) dimension: people can share and communicate a mass of data and information every day and in real time, irrespective of their geographical location, provided they have access to the Internet. Finally, the environmental dimension: sustainable development is a truly global common good, which can only be achieved by people from every country, and is likewise jeopardized by them.

The impact of each of these dimensions upon the territorial reach of domestic regulation is examined in the following sections. Section II addresses the relationship between market integration and extraterritorial antitrust regulation. Section III illustrates how the IT dimension of globalization leads domestic authorities to regulate foreign Internet content. Section IV examines transboundary pollution and the extraterritorial application of environmental regulation. Section V concludes by briefly highlighting the fundamental public law problem raised by extraterritoriality, which is democratic legitimacy: the national extraterritorial regulator is not accountable to foreign regulated subjects.

II. *The Economic Dimension: Global Markets and Extraterritorial Antitrust Regulation*

Hartford Fire is the leading U.S. case on extraterritorial antitrust regulation⁶. The facts in *Hartford Fire* are also a perfect demonstration of the relationship between economic integration and the extraterritoriality of economic regulation.

Four major U.S. primary insurers decided to promote an industry-wide change from "occurrence-based" to "claims-made" insurance policies⁷. Their efforts were successful thanks to the assistance of British reinsurers, who agreed to reinsure American primary insurers only for claims-made policy forms. The Attorneys General for several states and many private plaintiffs brought antitrust suits against American and British insurance companies, including the British reinsurers, maintaining that their conduct amounted to an illegal conspiracy under the Sherman Antitrust Act.

National antitrust legislation normally aims at protecting domestic consumers from anti-competitive activities carried out on the national territory by producers or service providers. However, economic integration breaks down this spatial congruence between regulations and the regulated activities. In a global market, the anti-competitive activities of producers or service providers can affect consumers in every country in which their goods are sold or their services are provided. In the *Hartford Fire* case, the conduct of the British reinsurers had a direct, negative impact on U.S. policy holders. In order to adequately protect them, U.S. antitrust rules would have had to reach the British reinsurers as well. But how can U.S. antitrust rules apply to British reinsurers doing business in London? Can national antitrust regulations apply *extraterritorially* to activities taking place entirely beyond national borders?

U.S. courts have given different answers to this question over time. The general trend, however, has been away from strict territoriality and towards a broad extraterritoriality. A strict territoriality approach was first adopted by the Supreme Court in 1909. In *American Banana Co. v. United Fruit Co.*, Justice Holmes firmly rejected the extraterritorial application of the Sherman Act, using the words I quoted above. In 1945, however, Holmes' strict territorial approach was abandoned. In the *Alcoa* case⁸, the Court of Appeals for the Second Circuit, acting for the Supreme Court, announced the new "effects test" approach. Under this rule, the Sherman Act would be deemed to apply to wholly foreign conduct if it was intended to, and did, have some *effects* within the U.S. market. As Judge Learned Hand stated: "any state may impose liabilities [...] for conduct outside its borders that has consequences within its borders which the state reprehends". The effects test was modified about thirty years later by the consideration of "international comity". In the 1976 *Timberlane* decision, the Court of Appeals for the Ninth Circuit held that the effects test is "by itself [...] incomplete, because it fails to consider other nations' interests"⁹. Consequently, the court set forth a new balancing test that involved taking

a number of factors into account. This enabled U.S. courts to limit their jurisdiction over foreign anticompetitive conduct having effects within the United States when considerations of international comity suggested deferring to the foreign State, whose interests were stronger¹⁰. Finally, however, in the 1993 *Hartford Fire* decision, the Supreme Court refused the *Timberlane* balancing test. The Supreme Court held that U.S. antitrust rules are applicable to the conduct of British reinsurers, because it is “well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States”¹¹. In such a case, according to Justice Souter, international comity considerations could prevent the exercise of U.S. jurisdiction only when there was a “true conflict” between U.S. and foreign law. But a true conflict does not exist “where a person subject to regulations by two states can comply with the laws of both”¹². Therefore, since the British reinsurers did not argue that British Law required them to act in violation of U.S. law, there was no reason to decline jurisdiction. Ultimately, in *Hartford Fire* the U.S. Supreme Court embraced a pure “effects test”, without any international comity limitation: that is, a broad extraterritorial approach.

A similar approach has come to prevail in Europe. The European Commission first affirmed the extraterritoriality principle in 1977, stating that the Commission “can act against restrictions of competition whose effects are felt within the territory under its jurisdiction, even if the companies involved are locating and doing business outside the territory, and of foreign nationality, have no link with that territory, and are acting under an agreement governed by foreign law”¹³. This approach was later embraced in 1988 by the European Court of Justice in the *Wood Pulp* case¹⁴. The ECJ was asked to determine whether Art. 81 of the EC Treaty should apply to US, Canadian, Swedish and Finnish producers conspiring to fix wood pulp prices in the EU. Defendants claimed that the EU lacked jurisdiction over them, since they were not incorporated in the EU. Furthermore, as one of the U.S. defendants was involved in an export cartel legally authorized in the U.S., they also claimed that application of the EU law would actually violate the international public law duty of non-interference. The ECJ rejected both claims, using arguments very similar to those used by the U.S. Supreme Court in *Hartford Fire*. As to the defendants’ first claim, the ECJ reasoned that EU laws were applicable because “the producers implemented their pricing agreements within the common market”: therefore, “what matters is not the place where the agreement or the decision is taken but where it is implemented, i.e., where products are sold”¹⁵. The European “implementation doctrine” – as observed by an official from the Antitrust Division of the U.S. Department of Justice – “is very close to, if not indistinguishable from the American effects test”¹⁶. As for the defendants’ second claim, the ECJ stated that the international duty of non-interference could be violated where the duties in one country are prohibited by the laws of another country. Such a “true conflict” – as the U.S. Supreme Court would have probably characterized it – did not arise in *Wood Pulp*, where the agreements prohibited by EU laws were not also a duty under the U.S. laws regulating export cartels.

To sum up, both the U.S. and the EU do apply their respective antitrust laws extraterritorially to anticompetitive conduct taking place outside their borders, but producing effects, or being implemented, within them. This is a form of *de jure* extraterritoriality, in which foreign producers or service suppliers, in acting overseas, are the formal addressees of decisions adopted by national judicial or administrative authorities enforcing domestic rules.

The *de jure* extraterritorial application of antitrust rules has many drawbacks.

First of all, it produces international conflicts, as Justice Scalia observed in his dissenting opinion in *Hartford Fire*, predicting that the majority’s broad extraterritorial approach “will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries – particularly our closest trading partners”¹⁷. The extraterritorial reach of U.S. antitrust laws has in fact created international tensions, leading several foreign countries to introduce blocking statutes, aimed at “shortening the long arm of American antitrust jurisdiction”¹⁸.

Secondly, extraterritoriality produces *over-regulation*. Producers and service providers doing business in global markets, and thus operating in many different countries, also have to comply with many different antitrust laws. That means, at a minimum, the multiplication of the costs of doing business, as firms must satisfy the regulatory agencies in each country. Moreover, given the differences between various national regulations, all of which must be respected, firms are subject to a complex legal regime consisting “of a medley of the strictest elements of each national regime”¹⁹. For example, a proposed merger between two large firms doing business in both the U.S. and Europe (such as Boeing and McDonnell Douglas, or General Electric and Honeywell) could go forward only if both U.S. and EU authorities permitted it. Consequently, the merger must satisfy the strictest regulator: as it has been observed, “in matters of antitrust, the most prohibitory nation wins”²⁰.

Thirdly, both international conflicts and over-regulation may be exacerbated by the risk of bias. National regulators could be tempted to apply stricter standards to foreign anticompetitive conduct than to the same conduct by domestic producers and service providers. They could be tempted to externalize the costs of a restrictive policy (which are borne by producers abroad), while internalizing its benefits (which are enjoyed by consumers and competitors locally). For example, in both the *McDonnell Douglas/Boeing* and *GE/Honeywell* cases, European antitrust authorities were accused of prohibiting a merger, approved by U.S. antitrust authorities, in order to protect European producers from American competition, even to the detriment of European consumers.

Given the drawbacks of extraterritoriality, we must nevertheless reflect upon the consequences of the opposite approach. In a globalized economy, the alternative to *de jure* extraterritoriality is not actually strict territoriality, but rather *de facto* extraterritoriality.

As Law & Economics scholars have explained, antitrust authorities in countries that do not apply their antitrust law extraterritorially tend to be more relaxed in their enforcement. As they are not able to regulate foreign firms importing goods into their country, they tend to adopt a policy which is optimal for a net exporting country. This policy, while taking into account all the costs borne by (domestic) producers affected by potentially strict antitrust regulation, does not fully consider all of the potential benefits to consumers, specifically ignoring the benefits to foreign consumers. The result is a less restrictive policy, thus a form of under-regulation, which could also be exacerbated by the risk of bias. National regulators could be tempted to apply a preferential treatment to domestic anticompetitive conduct which only (or mainly) produces negative effects abroad. Export cartels’ explicit or implicit exemptions are the clearest example: antitrust authorities internalize the benefits of exemptions (which are enjoyed locally by domestic firms), while externalizing the costs (which are borne abroad by foreign consumers and competitors).

Although this under-regulation is not formally extraterritorial, it can nevertheless have a broad *de facto* extraterritorial impact. The same effects test which is applied to foreign anticompetitive conduct could be extended to the foreign antitrust regulations allowing this conduct. If American policy holders have been affected by the British reinsurers’ behavior, they have been also affected by the British regulatory regime for the reinsurance market, in which that behavior is perfectly legitimate. Either the stricter American antitrust rules apply extraterritorially to the conduct of British reinsurers *de jure*, or the more relaxed British rules extraterritorially impact American policy holders *de facto*.

To sum up, the interaction between global markets and national antitrust laws necessarily implies extraterritoriality in one form or another, as well its respective drawbacks. Either firms face the burden of over-regulation due to the *de jure* extraterritorial application of foreign antitrust rules, or consumers are harmed by the *de facto* extraterritorial impact of foreign under-regulation. Both firms and consumers are thus increasingly exposed to foreign administrative regulation.

III. *The IT Dimension: Regulating Foreign Internet Content*

Two recent cases clearly illustrate the relationship between the IT dimension of globalization and the increasing extraterritoriality of national regulation. The *Yahoo* case is probably the most familiar one, and thus worth discussing from the outset.

In 2000, two human rights organizations (LICRA – *Ligue Internationale Contre le Racisme et l’Antisémitisme*, and UEJF – *Union des étudiantes juifs de France*) filed a lawsuit against Yahoo in the *Tribunal de Grande Instance de Paris*. Yahoo was accused of permitting French Internet users to access its U.S.-based auction site, in which Nazi artifacts were offered for sale by other users, in conflict with Art. R-645-1 of the French Penal Code.



The French Court ruled that Yahoo, by failing to implement a filtering system to identify French users and prevent them from accessing the prohibited content, was violating French Law. The Court then ordered Yahoo “to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction site and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes”. Yahoo was ordered to comply within three months or face a penalty for each day of non-compliance²¹.

Although Yahoo partially complied with the order²², it claimed that it could not fully comply without banning all Nazi-related material from Yahoo.com, which would infringe upon its rights under the First Amendment of the U.S. Constitution. Yahoo then filed a lawsuit in California, seeking a declaration that the French Court’s order was unenforceable in the United States. The U.S. District Court ruled that the First Amendment precludes the enforcement within the United States of a French order intended to regulate the content of speech over the Internet: “although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the U.S. Constitution by chilling protected speech that occurs simultaneously within our borders”²³.

The Supreme Court of Canada recently faced similar issues, though in the different field of copyright regulation.

In 1995, the Society of Authors, Composers and Music Publishers of Canada (SOCAN), a collective society which administers the music copyrights of Canadians and foreigners in Canada, applied to the Canadian Copyright Board for approval of a tariff for the communication of musical work over the Internet (called Tariff 22). SOCAN wanted to collect royalties from Internet service providers located in Canada because, by allowing Canadian Internet users to download music from foreign websites, they were infringing the copyright owner’s exclusive right to communicate the work to the public. The Board decided to deal with legal and jurisdictional issues separately from the determination of the tariff. After a hearing in 1999, the Board held that: a) copyright liability does not attach to Internet service providers, as they only provide the means of telecommunication necessary for the content provider to communicate a work; therefore, the Internet service provider is not liable unless it exerts a significant level of control over the activities of those who post content; b) even where the ISP does more than act simply as a conduit, no copyright liability is incurred in Canada unless the communication originates from a server located in Canada²⁴.

The Board’s decision was reviewed by the Federal Court of Appeals²⁵ and subsequently appealed to the Supreme Court of Canada²⁶. While upholding the first part of the decision, the Supreme Court disagreed with the Board on the issue of jurisdiction. The Board’s view, according to which Canadian copyright laws only apply to Internet communication originating from a host server located in Canada, was shared by the dissenting Justice LeBel, who considered it the only approach fully consistent with the territoriality principle. However, the majority of the Court considered this approach to be “unduly formalistic”: “a content provider is not immune from copyright liability by virtue only of the fact that it employs a host server outside the country”. Speaking for the majority, Justice Binnie stated that the existence of a “real and substantial connection” to Canada is sufficient to support the application of Canadian copyright laws to a transnational Internet communication. The location of the point of origin of the communication, that is the *situs* of the content provider, is certainly an important “connecting factor”. But it is not the only one. The location of the end user is also relevant. Therefore, the Court concluded that “Canada could exercise copyright jurisdiction in respect both of transmissions *originating* here, and transmissions originating abroad but *received* here”²⁷.

Both the French and the Canadian courts affirmed a State’s right to regulate foreign Internet content. Both courts affirmed the extraterritorial application of national laws limiting the free circulation of information to foreign web-sites in order to protect the public morality or intellectual property rights inside their borders.

The same rationale underlies extraterritoriality, both in these cases as well as in *Hartford Fire* or *Wood Pulp*: as an Internet communication takes place in both the originating and the receiving countries, courts can apply the receiving country’s regulations to actions taken in the originating country, following an “effects test” approach. What makes the *Yahoo* case “uniquely challenging” – as observed by the U.S. District Court in declaring the French order to be unenforceable – “is that the Internet allows one to speak in more than one place at the same time”. Because of that, the French High court could have applied French criminal laws to limit “a speech by a U.S. resident within the U.S., on the basis that such speech can be accessed by Internet users in France”. French jurisdiction was asserted because “the damage is suffered in France”. In other words, the French court adopted an effects test approach: “jurisdiction is asserted where the courts believe that the web-site has had an effect within the jurisdiction”²⁸. Similarly, in the *SOCAN* case, Justice Binnie held that “an Internet communication that crosses one or more national boundaries *occurs* in more than one country, at a minimum the country of transmission and the country of reception”. Because of that, the Supreme Court of Canada could have extended the reach of Canadian copyright laws to communications of musical works originating outside Canada, on the grounds that Canadian Internet users can receive those communications. The communication originating abroad produces an effect in Canada, where the “harm is suffered” (that is, the infringement of the exclusive right of the Canadian copyright’s owner to communicate the musical works to the Canadian public).

The IT dimension of globalization leads to extraterritoriality for largely the same reasons, and with similar consequences, as the economic dimension.

The reasons for territoriality are that both global markets and the Internet contribute enormously to the widening effects of human conduct. The effects of anticompetitive conduct occurring “here” can be felt “everywhere”, that is wherever the relevant goods can be sold. Likewise, the effects of posting data on a website located “here” can be felt “everywhere”, that is wherever people can access the Internet.

The widening consequences of human activities inevitably drives the extraterritorial regulation, *de jure* or *de facto*, of them.

On the one hand, regulatory agencies and courts increasingly take an “effects approach”, according to which something “occurs” wherever its effects are felt. Therefore, they claim jurisdiction over conduct that physically takes place abroad, subjecting it to national regulation.

As we have seen, this *de jure* extraterritoriality has many drawbacks, particularly over-regulation. If a communication occurs both “here” (that is, in the originating country) and “there” (in the receiving country) – as the French and the Canadian courts have held – it can be regulated both from “here” and “there”. And as Internet communications can be received “everywhere”, Internet activities must then “comply with all law”²⁹. An *amici curiae* brief submitted by various American NGOs in support of Yahoo clearly illustrates the risk of over-regulation: “If French law can be enforced here, Yahoo! could likewise be required to block access to information that “sabotages national unity” in China, undermines “religious harmony and public morals” in Singapore, offends “the social, cultural, political, media, economic, and religious values” of Saudi Arabia, fosters “Pro-Israeli speech” in Syria [...] just to name a few examples”. Similarly, in the *SOCAN* case, the dissenting Justice LeBel warned against the “effects approach”, stating that it “could result in a layering of royalty obligations between States”³⁰ and even Justice Binnie had to admit that his conclusion “raises the spectre of imposition of copyright duties on a single telecommunication in both the State of transmission and the State of reception”³¹.

On the other hand, the alternative to this *de jure* over-regulation of Internet content is the *de facto* extraterritorial impact of under-regulation of Internet content.

If the more restrictive French regulation of speech does not apply to U.S. residents communicating over Internet, then the U.S.’s heightened protection of freedom of speech impacts French users, by undermining the balance between freedom of speech and public morals that French citizens consider to be appropriate. Therefore, either the French Code penal applies *de jure* extraterritorially in the United States, or the First Amendment of the U.S. Constitution has a *de facto* extraterritorial impact on France. Likewise, either Canadian copyright laws apply extraterritorially, for instance, to “content providers located in Bangalore who post musical works on a server in Hong Kong”, or the potentially poor enforcement of copyright laws in Bangalore or Hong-Kong *de facto* impacts copyright owners in Canada.

IV. The Environmental Dimension: Dealing with Transboundary Pollution

Like global trade and Internet communications, pollution also “respects no borders”³². Economic activities in one country increasingly

have an impact upon the environment of other countries. The adoption of an effects-based approach to problems of transboundary pollution inevitably leads countries affected by foreign pollution to extend their domestic environmental rules extraterritorially to activities taking place outside their borders.

Pakootas v. Teck Cominco (the *Trail Smelter* case), provides a good illustration.

For nearly a century, from 1895 to 1995, a smelter located in the Canadian city of Trail, approximately ten miles north of the U.S. border, discharged its “slag”, a by-product of the smelting process composed of such dangerous substances as arsenic, cadmium, mercury and zinc, into the Upper Columbia River. The Columbia River carried the slag across the border into the United States, polluting the surrounding area, including Lake Roosevelt in Washington State, which is occupied by the Confederated Tribes of the Colville Reservation. Acting upon the Tribes’ petition, the U.S. Environmental Protection Agency determined that the U.S. portion of the Upper Columbia River had been contaminated primarily by the slag discharged from the Trail Smelter. In 2003, the EPA issued a Unilateral Administrative Order, pursuant to the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA): Teck Cominco, the Canadian corporation operating the Smelter, as a “responsible party”, was directed to undertake an investigation and feasibility study finalized to clean-up actions. Cominco refused to comply, arguing that U.S. law did not apply to a Canadian corporation operating in Canada, after which two members of the Tribes (Pakootas and Michaels) filed a suit seeking to compel Cominco to comply with the EPA order. Cominco moved to dismiss the complaints, but the District Court of the Eastern District of Washington denied the motion to dismiss³³ and the Court of Appeals for the Ninth Circuit affirmed³⁴.

The reasoning of the District Court is very interesting, as it transplants the “effects-doctrine” from market to non-market issues³⁵, supporting the extraterritorial application of U.S. environmental regulation. According to the Court, “the well-established principle that the presumption [against extraterritoriality] is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States, leads [...] to conclude that extraterritorial application of CERCLA is appropriate in this case”³⁶. Therefore, U.S. environmental regulation, like its antitrust law, could apply to a foreign corporation operating exclusively in a foreign country in accordance with that country’s laws, just because the effects of its actions were felt within the United States.

This *de jure* extraterritoriality is highly controversial, for reasons that are well-known and clearly articulated in the various *amici curiae* briefs submitted to the U.S. Supreme Court in support of Cominco’s petition for *certiorari*.

First of all, as Canada’s Government argued in its brief, extraterritoriality violated the principle of comity of nations, infringing “Canada’s strong interest in regulating its own corporate citizens” and thus constitute an “unreasonable interference with the sovereign authority of other nations”³⁷.

Moreover, extraterritoriality led to environmental over-regulation, affecting not only the Canadian, but also the American, business community, which in fact strongly rejected the “effects doctrine” in environmental matters. The arguments put forward in the U.S. Chamber of Commerce’s brief are very illustrative and worth highlighting: “Canadian companies faced with the unexpected requirement to comply not only with their country’s domestic regulation but also with [...] U.S. environmental statutes when acting solely on Canadian soil will have every incentive to pressure their government to respond [...]. Canada could very well [...] impos[e] corresponding liability on companies operating within U.S. territory whenever their operations produce pollution that later ends up in Canada. [As a result], the need to become familiar with foreign laws and regulations, and to conform domestic company activities to these requirements, would impose a significant informational and operational cost on all business in the border regions”.

The U.S. Chamber of Commerce also warned against the risk that embracing the “effects doctrine” could lead to a “potentially unbounded” extraterritorial application of environmental statutes, extending to air and water pollution emanating not only from Canada, but also from non-border regions, such as Asian countries: “Given the sweeping nature of cross-border contamination, a limitless range of foreign companies operating solely on foreign soil could be captured by the [...] expansive interpretation of our domestic laws. Correspondingly [...] any foreign nation that can trace at least some of its environmental pollution to economic activity occurring in the United States [could] subject the alleged polluter to protracted litigation and potential liability in that country”³⁸.

The U.S. Solicitor General, invited by the Supreme Court to express the position of the United States, did not share these concerns, arguing that under the “effects doctrine” extraterritoriality is only justified when it is “reasonable”. It would be reasonable in cases similar to the “traditional example”, in which a person in State A shot a victim across the border in State B. And the *Trail Smelter* does look like such a case, “because it was inevitable that the river would carry the pollution directly into the United States”, and because the slag is “directly attributable” to Cominco’s actions. On the contrary, extraterritoriality would certainly be unreasonable in the unanalogous case in which “distant sources [...] contribute to widespread and diffuse air pollution”³⁹.

The Solicitor General’s opinion, however, seems to overlook two important considerations.

First, it would often be difficult to determine whether an environmental “effect in one country environment is caused “directly” and “foreseeably” enough by a foreign action to justify extraterritoriality. Moving away from the traditional example, when does reasonable extraterritoriality become unreasonable?

Second, no matter where one locates the threshold, when *de jure* extraterritoriality ends, *de facto* extraterritoriality begins.

Either the stricter U.S. environmental laws can apply extraterritorially to the smelting process taking place in Canada *de jure*, or the more lax Canadian environmental regulations (or the more lax Canadian enforcement of those regulations when pollution is exported outside Canada) can have a *de facto* extraterritorial impact upon the health of Tribes resident in U.S. territory.

Similarly, either the higher U.S. environmental standards can be applied extraterritorially *de jure* to economic activities taking place in Asia, or the lower Asian environmental standards can extraterritorially impact U.S. citizen’s welfare *de facto*, due to the long-range transport of atmospheric pollutants. Therefore, either the business community bears the costs of environmental over-regulation through *de jure* extraterritoriality, or citizens are exposed to harmful environmental effects of economic activities due to the *de facto* extraterritorial impact of foreign under-regulation.

The more the world shares one market, one Internet and one environment, the more meaningless the choice between territoriality and extraterritoriality becomes. The real choice is increasingly between *de jure* and *de facto* extraterritoriality.

V. Globalization, Extraterritoriality and the Problem of “Regulation without Representation”: a New Challenge for Administrative Law

Globalization makes extraterritoriality less exceptional. It is useful to go back to *Lotus*, in order to understand how this happens. To review the well-known facts in *Lotus*, in August 1926, a collision occurred on the high seas between a French vessel (*S.S. Lotus*) and a Turkish one. The Turkish vessel sank and eight persons died. Turkish authorities arrested the first officer of the French ship for involuntary manslaughter. Before the Permanent Court of International Justice, the French Government argued that international law did not allow Turkey to undertake proceedings with regard to offences committed by a French national on board a French vessel (that is to say, on French territory). The Court rejected the argument, stating that “(no rule of) international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory [...]. On the contrary, it is certain that the courts of many countries [...] interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there”.

This passage of the *Lotus* judgment highlights an important aspect of the relationship between territory and (prescriptive) jurisdiction. The



more that the territory in which the regulated conduct takes place is decoupled from the territory in which it produces its effects, the more a conflict over jurisdiction is likely to arise. Both the State regulating the place of conduct and the possibly different State regulating the place of its effects can claim territorial jurisdiction. In other words, if something happens both here and there, it could be regulated both here and there.

In 1926, human conduct and its effects rarely occurred in places subject to the overlapping territorial jurisdiction of different States. A manslaughter occurred either in France or Turkey. It could have occurred in both countries only in such an exceptional situation as when the high seas had brought two otherwise removed territories together.

The main effect of globalization however is precisely to make the world smaller, bringing different, distant territories into closer communication and thus significantly increasing the transnational nature of economic and social relationships.

Today, globalization makes commonplace what the high seas in *Lotus* made possible only exceptionally.

The various, highly intertwined dimensions of globalization have set off a kind of “spatial revolution”⁴⁰, whereby actions carried out in one place often produce effects in many different and sometimes very distant places. Consequently, national legislatures and administrative agencies are increasingly challenged to regulate transnational phenomena. Either they regulate conduct which occurs outside their borders and produces effects inside, or they regulate conduct which occurs inside their borders and produces effects beyond. In both cases, as I have tried to show, national regulation has either a *de jure* or a *de facto* extraterritorial reach.

The increasing extraterritorial reach of national regulation raises the fundamental public law problem of “regulation without representation”. On the one hand, national authorities adopt rules and administrative decisions which have a direct or indirect external impact on foreign citizens and firms. On the other hand, national authorities do not receive any legitimacy from – and are in no way accountable to – the foreign citizens and firms which are affected by their rules and decisions.

This “external accountability gap”⁴¹ is the consequence of an imbalance caused by a far-reaching economic and social integration (an “openness boom”, according to the European Commissioner Peter Mandelson⁴²) without a similar political and legal integration.

How to achieve a recalibration is beyond the scope of this paper. It is worth observing, however, that two paths can be and in fact have been pursued.

The first one is the path of vertical integration. States can delegate their power to regulate, or at least their power to harmonize the substantive content of their domestic regulations, to common global institutions, which are indirectly representative of the citizens of all of their member States.

Vertical integration stimulates the development of a large body of global administrative regulation, produced by formal international organizations, global networks of national administrative agencies and hybrid organizations composed of public and private transnational institutions.

Vertical integration, however, also has its drawbacks.

First of all, the legitimacy issue. International Organizations represent the citizens of their Members States only *indirectly*. Their “global regulation”, moreover, is not itself subject to the administrative law of any country. When the power to regulate is transferred to international institutions, affected citizens risk losing their domestic administrative law protections. That is why International Organizations are slowly creating a “Global Administrative Law” to govern their own rules and decisions, but this law is still at an embryonic stage of development.

The second drawback refers to the efficacy issue. The decision making process of International Organizations is inevitably cumbersome, as it is often very difficult, in harmonizing the different national regulations, to reach a multilateral consensus on substantive rules, let alone to realize their uniform enforcement. The sectors previously analyzed provide good examples of these problems. In the area of antitrust, the WTO negotiations for a competition agreement have failed. The U.S. has raised important objections to the EU position in favor of an international antitrust code enforced by the WTO. According to the U.S., “there is no consensus on substantive competition rules [...] and an international code, even if enacted, would necessarily reflect a lowest common denominator approach [...] would be a rigid and static set of rules that could not be adapted to the rapidly changing circumstances of the global market”⁴³. As for the regulation of Internet content, the Convention on Cybercrime, adopted by the Committee of Ministers of the Council of Europe on 2001⁴⁴, does not include, among the “content related offences”, the distribution of racist propaganda through computer systems. The Committee drafting the Convention discussed this possibility, but, as clarified in the “Explanatory Report”, did not reach a consensus on the criminalization of such a conduct because “some delegations expressed strong concern about including such a provision on freedom of expression grounds”.

Vertical integration is not the only path to addressing the issue of *de jure* and *de facto* extraterritoriality and remedying the problem of “regulation without representation”. The second path is horizontal integration. States can in fact retain their power to regulate, provided that they follow common rules which oblige them to consider the interests and views of the different territorial communities affected by their decisions.

Let us consider two examples, drawn from the areas of antitrust and environmental regulation.

As for antitrust, both OECD Recommendations⁴⁵ and bilateral agreements such as the EU/US agreement on the application of their competition laws⁴⁶ include “comity” provisions. According to these provisions, a country is required “to give full and sympathetic consideration to other countries’ important interests while it is making decisions concerning the enforcement of its own competition laws”⁴⁷.

“Negative comity” provisions require a country to consider how it may prevent its law enforcement actions from harming another country’s important interests. Art. II of the EU/US bilateral agreement states that “each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party”, for example when the enforcement actions “involve anticompetitive activities [...] carried out in significant part in the other Party’s territory”. That means that the *de jure* extraterritorial application of antitrust law requires a previous notification to the authorities of the country in which the anticompetitive conduct takes place. Moreover, the OECD

Recommendations link this notification requirement to the duty of taking the views expressed by the notified country into account⁴⁸. In a situation such as *Hartford Fire*, therefore, “negative comity” would have required US antitrust authorities to notify the British authorities before commencing a proceeding against the British reinsurers, and to take their comments into account. An international “notice and comment” mechanism, or a global “due process” principle, would have then limited the *de jure* extraterritorial application of national antitrust laws.

“Positive comity” provisions, by contrast, require national antitrust authorities to take into account “another country’s request that it open a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting another country’s interests”⁴⁹. Positive comity is thus a kind of international guarantee against the *de facto* extraterritorial impact of foreign under-regulation or against the extraterritorial impact of poor or ineffective enforcement of foreign antitrust regulation.

In the area of environmental regulation, a similar rationale underlies the *North American Agreement on Environmental Cooperation*, to which Canada and the U.S. are parties. Art. 22 of the Agreement, for example, states that “any Party may request in writing consultations with any other Party regarding whether there has been a *persistent pattern of failure* by that other Party to effectively enforce its environmental law”. The *de facto* extraterritorial impact of the ineffective enforcement of national environmental laws is remedied by these provisions, which allow foreign authorities (and sometimes foreign citizens)⁵⁰ to request enforcement and thus assert their interests in the decision-making process of another country. Applying these rules to the facts of the *Trail Smelter* case, the U.S. authorities, instead of applying US environmental laws extraterritorially to a Canadian company operating in Canada, could have requested a consultation with Canadian environmental authorities concerning their failure to effectively enforce Canadian environmental laws with respect to the Canadian company.

As these examples make clear, horizontal integration involves the application of international, typically administrative law rules to national regulation, such as notice and comment and due process. A kind of Global Rule of Law is thus emerging, aimed at remedying the fundamental problem of “regulation without representation” in our new globalized world. A promising future awaits administrative law, operating beyond the State.