

INTERNATIONAL LAW AND SOVEREIGNTY IN THE AGE OF GLOBALIZATION

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Summary

International law is based upon the sovereign equality of states. Is such a regime viable in a globalized world in which markets escape the regulatory regime of the state, and in which nongovernmental actors often set the political agenda? Political science in particular has produced a stream of literature on this issue. This article, however, looks at the legal side of the debate, acknowledging that for a complete picture of the issue readers ought to refer to political science as well.

The impact of globalization on public international law is often couched in concepts of “sovereignty.” Rephrased as “unilateralism,” it is pitched against “multilateralism,” the latter, the argument goes, providing a better means of dealing with globalized issues.

Globalization of some of modern society's challenges has led some to proclaim the inevitable demise of sovereignty as an apt tool for managing international relations. This article will argue that both unilateralism and multilateralism have their shortcomings and that, in the absence of a better alternative, sovereignty may have to be regarded as the better alternative. The author has opted to illustrate the difficulties in shaping multilateralism by looking at two specific sectors of the law where public international law appears to be struggling to assign jurisdiction in the face of globalization: competition law and environmental law.

1. Territory and Public International Law

1.1. Territory, Sovereignty, Jurisdiction, and the Global Commons

State "sovereignty" and "jurisdiction" are linked to its territory. Territory is simultaneously a condition for a state to exist, and a limitation to its rights: in principle, a state is sovereign and has jurisdiction only within its territory. Jurisdiction is not coextensive with state sovereignty, although the relationship between them is close: a state's title to exercise jurisdiction rests in its sovereignty.

The concepts of sovereignty and jurisdiction are not always clear-cut. Brownlie refers to sovereignty as a concept of a more general nature, the normal complement of state rights, typically represented by legal competence. Sovereignty in regard to a portion of the globe has been described as the right to exercise therein, to the exclusion of any other state, the function of a state. Particular rights, liberties, and powers or accumulations of rights quantitatively less than the norm would then be referred to as jurisdiction. Expressed in a more legal manner, one might speak of jurisdiction as being "a State's authority to subject persons (natural or juridical) and things to its legal order," or "[t]he power of a sovereign to affect the rights of persons . . . by legislation."

Even undisputed sovereignty has its limits. The maxim *sic utere tuo ut alienum non laedas* (Use your property such as not to damage others) has been used to describe the duty of states to exercise their sovereignty in such a way as not to cause damage to the territory of other states. International environmental law in particular has seen the development of this aspect of states' liability, both in arbitration and in the development of treaties.

In terms of globalization, challenges to the traditional means of discerning jurisdiction have emerged, in particular in the environmental field. Measures protecting the environment may concern a relatively new area of states' sovereignty, where they involve the protection of "the global commons." Public international law traditionally distinguishes between three regimes vis-à-vis jurisdiction. Most of the earth is subject to territorial sovereignty. *Res nullius* (meaning "a thing that has no owner") are those parts of the earth capable of lawful national appropriation/sovereignty but that are as yet unclaimed (nowadays a very rare regime). *Res communis* are shared by all nations and may not be placed under state sovereignty. The latter category consists of the high seas and outer space.

It would seem that in recent years a new variant of territory has been recognized. This form is referred to as the “common heritage of mankind,” or the global commons. This category is so far ill defined and open to discussion. The global commons includes the seabed, the ocean floor, and the subsoil thereof as well as, arguably, the moon and other celestial bodies. As for the latter, they seem to have shifted from *res communis* to global commons.

The distinction between *res communis* and global commons is particularly relevant. “Under the regime of *res communis*, as long as a State respects the exclusive quasi-territorial jurisdiction of other States over their own ships, aircraft and spacecraft, general international law allows it to use the area . . . as it wishes, including the appropriation of its natural resources.” By contrast, the global commons’ management and possible exploitation are subject to approval by the international community and are not left to the initiative or discretion of individual states or their nationals.

1.2. Three Elements of Jurisdiction and Traditional Theories

Jurisdiction has three elements: the power of a state to perform acts in the territory of another state (executive jurisdiction), the power of a state’s courts to try cases involving a foreign element (judicial jurisdiction), and the power of a state to apply its laws to cases involving a foreign element (legislative jurisdiction).

No real authoritative pronouncement on the existence of jurisprudence can be found since 1927, when the Permanent Court of International Justice (PCIJ) issued its *Lotus* judgment. The *Lotus* case, it should be pointed out from the start, concerned a criminal case. The fundamental view upon which the court based its decision was that “international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usage generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed” (see *International Trade Law and International Trade Agreements*).

2. Challenge to the Jurisdiction Issue by Modern Economic Law—The Effects Doctrine in International Antitrust Law

The application of American antitrust legislation by U.S. courts remains the foremost battleground for cases involving jurisdictional and legislative jurisdiction. Both the European Community (E.C.) and the U.S. have adopted the “effects doctrine” in order to determine jurisdiction for their courts and the applicability of their respective laws protecting free competition. The response of U.S. and E.C. courts to the limits of the classic territoriality principle in modern economic law may help establish whether any lessons may be learnt for globalization challenges generally.

2.1. The Effects Doctrine in the United States—International Comity

The debate on alleged extraterritoriality in U.S. courts has focused on the degree of input by public international law and by “comity.” Comity is a concept of international law that has received particular attention in Anglo-American doctrine and jurisprudence. In its purest sense, it refers to “rules of politeness, convenience and goodwill, observed by States in their mutual intercourse, without being legally bound by them.” Comity refers to the non-binding obligation of states to conduct their international affairs in a manner that gives due regard to the legitimate interests of other states.

A strict reading of the sovereignty principle, based on territory arguments, was laid down in the 1909 *American Banana* case. This approach was swiftly abandoned through the *American Tobacco* judgment, in 1911, which adhered to the effects doctrine: U.S. courts were said to have jurisdiction over foreign undertakings when a direct effect on commerce and some conduct within the U.S. could be shown. The *Alcoa* case went down in legal history as the affirmation of the effects doctrine in determining U.S. courts’ jurisdiction. *Alcoa* determined that U.S. law would apply to “foreign” anti-competitive agreements, where the agreement was intended to have an effect on U.S. commerce, and in practice also produced such effect. The crudeness of the *Alcoa* test sparked considerable international criticism. Even though *Alcoa* includes “intent” and an “effects” test, in practice the intent requirement largely fell out of use.

Both *Timberlane* and *Mannington Mills* introduced a jurisdictional “rule of reason” requiring judges to consider and balance the interests of the different governments involved. In *Timberlane* (Federal Court, 9th Circuit), Judge Choy considered that an effect on U.S. commerce, although necessary to exercise jurisdiction under antitrust laws, is not alone a sufficient basis on which to rest assertion of American authority as a matter of international comity and fairness. He came to the conclusion that “at some point, the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.” The comity part of the exercise in his view should be determined using a non-exhaustive list of seven elements of which the following would seem of particular importance: the degree of conflict with a foreign rule; the nationality of the parties and the locations or principal places of business of the undertakings concerned; the relative significance of the effects in the United States as compared with the effects produced elsewhere; and the extent to which there is an explicit purpose to harm or affect United States trade, and the foreseeability of such effect. *Mannington Mills* endorsed the rule of reason approach, and added some elements to the *Timberlane* list.

The *Restatement (Third) of Foreign Relations Law (1987)* endorsed the rule of reason approach. It incorporates principles of reasonableness and comity into determinations of jurisdictional authority. The restatement recognizes the potential effects of domestic laws on the international market and adopts an approach that essentially balances the rights of the countries interested in regulating the activity. The formalist approach of jurisdiction, found *inter alia* in *American Banana*, adheres to the boundaries of the classic territorial doctrine and therefore provides for clear-cut boundaries in international disputes. The restatement may be less clear, but more apt from an international law point of view.

In *Hartford Insurance*, the U.S. Supreme Court was given the opportunity to set out the benchmark for the assessment of international comity in antitrust cases. The court accepted the application of U.S. law, in view of the “substantial effect” the conduct of foreign insurance operators was intended to produce and did in effect produce. *Hartford Insurance* has been named the “true conflict” doctrine, a rather crude form of the effects doctrine. Indeed, it would seem that in the vast majority of cases, comity would not influence the application of U.S. law. Under the true conflict rule, this would seem to be the case only where foreign law either directly orders the defendant to act in a way prohibited by U.S. law, or generally where the defendant is not able to comply with both sets of law simultaneously. *Hartford Insurance* triggered renewed international criticism.

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Biographical Sketch

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Geert van Calster graduated from the Law Faculty of Leuven University in June 1993 (LL.B. 1990, LL.M. 1993) and obtained a master's degree (LL.M.) at the College of Europe, Bruges, in July 1994. In September 1994, he was granted a fellowship at the University of Leuven, first at the Institute of Administrative Law, as of 1995 at the Institute of Environmental and Energy Law (IMER). From September 1997 until September 1998, he was a Chevening Scholar at St. Edmund Hall, Oxford University. He obtained a Ph.D. degree at Leuven University in May 1999, on the conflicts between international trade law and environmental protection.

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