

2003

# The Structural Rules of Transnational Law

William S. Dodge

UC Hastings College of the Law, [dodgew@uchastings.edu](mailto:dodgew@uchastings.edu)

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## Recommended Citation

William S. Dodge, *The Structural Rules of Transnational Law*, 97 *Am. Soc'y Int'l L. Proc.* 317 (2003).

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**Author:** William S. Dodge  
**Source:** American Society of International Law Proceedings  
**Citation:** 97 Am. Soc'y Int'l L. Proc. 317 (2003).  
**Title:** *The Structural Rules of Transnational Law*

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Overall, transatlantic institutional adaptation has been slow (often creeping), but where it has occurred, the United States has made most of the changes. Although Europe certainly has borrowed from U.S. experiences with regulation, as in the fields of competition and consumer and environmental law, more recent transatlantic regulatory change has tended to adopt important aspects of an EU model. Unlike their U.S. counterparts, EU regulatory authorities have operated for over a decade with a dual mission of ensuring both public safety and the free movement of goods within the EU's single market. They consequently are more experienced than their U.S. counterparts in managing coordination of distinct national regulatory systems. The EU experience has offered workable models that might be adapted to the transatlantic context.

Regardless of one's views of the appropriateness of the EU model, the European Union exercises significant market leverage in determining transatlantic standards and regulatory structures because of the size of its single market, the largest in the world. After the EU expands in 2004 from fifteen to twenty-five member states, the EU's population will be greater than the combined populations of the United States, Canada, Japan, Australia, and New Zealand.

The shift of European regulation to the EU level has strengthened the EU's ability to represent the interests of European constituents in its relations with the United States. In pooling their sovereignty on regulatory matters, EU member states now speak transatlantically with a more powerful voice. The timing of the U.S. reaction to the threat of bans on data transfers from Europe demonstrates this. When the threat moved to the EU level, the United States took it more seriously. As the EU enters into data privacy protection arrangements with other developed countries, such as Canada, Japan, Australia, New Zealand, and Switzerland, and as these countries adapt their systems to interact with the EU model, the pressure on the United States to adapt its own regulatory structures will augment. Consciously or unconsciously, the EU is exporting its regulatory systems globally. The 2000 Safe Harbor Principles attest to this.

## THE STRUCTURAL RULES OF TRANSNATIONAL LAW

by William S. Dodge\*

The ability of a country to regulate extraterritorially depends not simply on rules of prescriptive jurisdiction but also on rules of judicial jurisdiction and the enforcement of judgments. The most extraterritorial law in the world will have little impact if a court cannot or will not exercise jurisdiction over defendants who violate it, or if the resulting judgment cannot be enforced against the defendants' assets. Extraterritoriality must therefore be examined not in isolation but as part of a larger set of rules that I have called the "structural rules of transnational law."<sup>1</sup> These rules together determine the effectiveness of transnational regulation, at least as enforced by courts.

The structural rules of transnational law may be rules of customary international law, treaty law, supranational law, national law, or subnational law. Customary international law, for example, contains limits on prescriptive jurisdiction that require some connection such as conduct, effects, or nationality, between the regulating state and the activity or person being regulated.<sup>2</sup> National rules, such as a presumption against extraterritoriality, may further constrain the reach of a nation's laws.<sup>3</sup> In the United States, rules of

\* Professor of Law, Hastings College of the Law, University of California.

<sup>1</sup> William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 162 (2002).

<sup>2</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §402 (1987).

<sup>3</sup> See, e.g., *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), rev'd by statute on other grounds, 42 U.S.C. §§2000e, 12111, 12112 (2000).

judicial jurisdiction are generally established as a matter of national law through the due process clause, but state long-arm statutes may impose additional limitations. Within the European Union, rules of judicial jurisdiction and the enforcement of judgments were established by a treaty, the Brussels Convention,<sup>4</sup> which has since been converted into a supranational regulation.<sup>5</sup> In the United States, by contrast, enforcement of judgments is primarily a matter of subnational (i.e., state) law.

Once you start to see the structural rules of transnational law as a package, you begin to notice interesting things about the power dynamics of extraterritorial regulation. First, it becomes clear that a “big” country like the United States is better able to apply its laws extraterritorially because a foreign defendant is likely to have more contacts with the United States on which personal jurisdiction might be based and more assets in the United States against which a judgment might be enforced. This may explain why the United States has historically favored the extraterritorial application of antitrust law, while other countries have been more resistant.<sup>6</sup>

Second, in the areas of prescriptive and judicial jurisdiction, unilateral changes to these rules can increase a country’s ability to regulate extraterritorially. A country might, for example, modify or abandon the presumption against extraterritoriality. Or it might use effects within the forum as a basis for exercising personal jurisdiction, as the Australian High Court recently did in an internet defamation case, *Dow Jones & Co. v. Gutnick*.<sup>7</sup> Gutnick, an Australian businessman, brought suit against Dow Jones in Victoria based on an allegedly defamatory *Barron’s* article posted on the WSJ.com Web site. Victoria’s rules permit service of process on a foreign defendant when a tort has caused damage in Victoria. The High Court held that service was proper:

[O]rdinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged.<sup>8</sup>

Despite U.S. Supreme Court authority authorizing effects as a basis for personal jurisdiction in libel cases, recent U.S. Court of Appeals decisions have taken a narrower view of jurisdiction over Internet publishers than the Australian High Court, requiring that the publication be specifically targeted at readers in the forum,<sup>9</sup> although one of the characteristics of the Internet is that it is often targeted at everywhere in general and nowhere in particular.

Third, however, a country cannot increase its ability to regulate extraterritorially by making unilateral changes in its rules for the enforcement of judgments. The enforceability of a judgment depends on the presence of assets within the jurisdiction of the court that rendered it or the willingness of a foreign jurisdiction to enforce the judgment. A French court cannot stop Yahoo! from offering Nazi memorabilia on its Web site unless Yahoo! has assets in France or a U.S. court is willing to enforce the French

<sup>4</sup> See Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 29 ILM 1413 (1990).

<sup>5</sup> See Council Regulation (EC) 44/2001 (Dec. 22, 2000), 2001 O.J. (L 12) 1.

<sup>6</sup> See William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL’Y INT’L BUS. 363, 381 (2001).

<sup>7</sup> See (Austl. 2002), 42 ILM 41 (2003).

<sup>8</sup> *Id.*, at 49.

<sup>9</sup> See, e.g., *Revell v. Lidov*, 317 F.3d 467, 475–76 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256, 262–63 (4th Cir. 2002).

judgment.<sup>10</sup> It is in this area, therefore, that international cooperation promises the greatest gains in the effectiveness of transnational regulation.

Such cooperation could take several forms. Smaller countries in a region might, for example, increase the effectiveness of their extraterritorial antitrust laws by agreeing to enforce one another's antitrust judgments so that a judgment rendered against a foreign defendant in any of those countries would be enforceable against the defendant's assets in all of them. It is worth noting that fines levied by the European Commission are enforceable in the courts of all EU member states. As Professor Shaffer observed, "In pooling their sovereignty on regulatory matters, EU member states now speak transatlantically with a more powerful voice."<sup>11</sup>

Alternatively, countries concerned that other countries were engaging in too much extraterritorial regulation might offer to enforce foreign judgments in a particular area in exchange for limitations on judicial or prescriptive jurisdiction. This is what the non-U.S. parties to the Hague Judgments Convention negotiations proposed in the October 1999 draft (now off the table); they offered to enforce U.S. antitrust judgments in exchange for limits on personal jurisdiction in antitrust cases.<sup>12</sup> A similar trade might be attractive to the United States in the area of Internet regulation, overturning *Yahoo!* in order to limit *Gutnick*.

The structural rules of transnational law determine the effectiveness of extraterritorial regulation as enforced by courts. By regulating through other institutions, it is sometimes possible to bypass the limitations that these structural rules impose. One example is the EU Data Privacy Directive,<sup>13</sup> Article 25 of which provides that member states shall prohibit data transfers to third countries that do not ensure adequate data privacy. In response, the U.S. Department of Commerce and the European Commission in 2000 created a set of Safe Harbor Principles to which U.S. companies may adhere to avoid EU restrictions on data transfers. The EU was thus able to affect the level of privacy protection provided by U.S. firms by threatening to prohibit European firms from giving them data that they needed, without having to establish personal jurisdiction, apply its law outside its borders, or worry about enforcing a judgment.

However, regulating extraterritorially with nonjudicial sanctions is not always practical. Even when it is, it will sometimes violate WTO rules. Thus, judicial sanctions will remain important. So, too, will the structural rules of transnational law concerning judicial jurisdiction, prescriptive jurisdiction, and the enforcement of judgments.

In my view, countries should respond in two ways. First, they should attempt to increase the effectiveness of their own extraterritorial regulation through unilateral changes to their rules on judicial and prescriptive jurisdiction and by forming alliances of like-minded countries for the enforcement of judgments. Second, they should be willing to accommodate each other's interests by making deals, agreeing to enforce judgments in exchange for limitations on jurisdiction.

<sup>10</sup> See *Yahoo!, Inc. v. La Ligue Contra le Racisme et l'Antisemitisme*, 169 F.Supp. 2d 1181, 1192-93 (N.D. Cal. 2001).

<sup>11</sup> Gregory Shaffer, *Extraterritoriality in a Globalizing World: The Case of Data Privacy Regulation*, 97 ASIL PROC. 314, 317 (2003).

<sup>12</sup> Dodge, *supra* note 6, at 374-80.

<sup>13</sup> See Directive 95/46/EC (Oct. 24, 1995), 1995 O.J. (L 281) 31; Shaffer, *supra* note 11, at 314.