

INSTITUTE FOR INTERNATIONAL AND FOREIGN TRADE LAW

Transcript of a Speech Delivered by Professor Heinrich Kronstein
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The Institute for International and Foreign Trade Law is an independent organization within the general scope of Georgetown University. It maintains a unique position within the family of legal-economic institutions. It combines a single unit remarkable potentialities in a broad range of fields: in American legal-political education, in research on American-European legal institutions as applied in national and international trade, in writing, as a result of such research, of public documents and important books covering practical and theoretical legal-political developments within the United States and elsewhere, in presentation of highly informed positions on problems of American and American-European trade policy to leading lawyers and economists, both within and without the government, and finally, in representing an American view in international conferences in the field of foreign trade.

Accomplishments of the Institute

Since 1956, 19 European professors worked and lectured in the Institute, and, in connection with the Institute, in the Georgetown University School of Law. During the same period 39 graduate students have been exchanged, partly European students and young scholars on the staff of the Institute, and partly American graduates, within the program of the Institute in Europe. We attach a list of biographies of the people involved, which indicate the positions they now hold.

The primary point of departure in the research undertaken in permanent cooperation with the Frankfurt Institute and with various American and European individual scholars, has been the way in which legal institutions in the different countries are utilized for the purpose of regulation of international trade. This point of departure led our research into problems of public international law as well as of public national law on the one side and private agreements and the utilization of private business entities and corporate forms in the different countries in the interest of international trade regulation on the other. These methods of research led the Institute into new aspects of comparative law and of international law and to the general problem of the social role of legal institutions within the fabric of society. Some important research was undertaken also in the field of history of economics and methodology. These ramifications are no accident, but follow necessarily from the premise that the analyses of legal and of economic organizations cannot be separated one from another. The Institute has undertaken and completed research on American and European as well as on American-European private

regulation of interrelation of corporate entities, and on the role of public regulation in this field. The Institute has consistently combined the effects of public and private regulation to come to a total view of this problem. In particular, the Institute has undertaken a thorough study of the Federal Trade Commission of the United States as an example of a partly successful, partly unsuccessful public regulator of trade.

The Institute has presented to the institution preparing the Common Market and the policy on international and national trade within the Common Market the experience made by the United States in the field of private regulation as well as of public influence in private regulation. The Institute has prepared research for the German legislature on American experience with disclosure in corporation and security laws. For some years the Institute has participated with Frankfurt in the preparation for the OECD of a general analysis of the adverse effects of private restrictive practices on international trade. The Institute is at present preparing an additional study on the legal and economic organization in the field of energy.

For reasons I shall presently describe, the Institute has for the past years participated in the preparation of publications which have come out first in Europe; reference is made to the book just published: "The Law of International Cartels" and to "The No Par Value Share" and to the disclosure rules for corporations regarding their interrelationship with the distribution of corporate profits. An American edition of the cartel book, described later in this memorandum, is on the way.

The Institute became an important meeting place for leading government officials and members of the bar and economists, whether in

government, in Congress or in private service. The Institute undertook during the last years numerous discussions in the fields of international monetary problems, international and national cartel operation, GATT and the Kennedy Round, and finally in the field of the balance of payments and particularly investments abroad.

The Institute participated in a conference on Restraints of Competition in 1960 in Frankfurt, Germany, and was an organizer of the conference on Extraterritorial Effects of Trade Regulation in 1962 in Washington. The Institute is going to represent an American group in the preparation of the proposed conference in Oxford in 1968, prepared under the auspices of the British Board of Trade.

All these operations and activities of the Institute are to be understood as one single and inseparable unity. There cannot be any better influence in the field of sound and good comparative and international law than the integration of this educational and instructive operation into one team, engaged together in research. On the other hand, there cannot be any more sound or better research in these fields than that undertaken with active collaboration of young and forceful scholars and graduate students who are curious and anxious to penetrate into other sorts of legal and economic systems as well as into the finding of legal and organizational connecting links between nations. There cannot be any more free and more effective research and training of young people than such with the very practical and political purpose of determining the public interest, whether in connection with international organizations or with different national governments. There can be no better agent for presentation of the developments in these particular fields to the Washington government lawyers and economists than a group as living and active as ours.

There cannot be any better and more effective presentation of American views in international conferences than that presented by a group which is so continuously within this work, but is also continuously exposed to permanent discussion with the other nations. Each of the particular characteristics and activities of the Institute benefits from the special and unique contribution of the Institute's work

The Institute's Unique Role

We are now at a time when American Law Schools and legal practice have to recognize that the outstanding service of European, especially German and Austrian scholars, and practitioners who came to the United States as a result of the Hitler expulsion, is coming to a necessary end on account of their age. The Institute believes that their methods of training and education have done a particularly efficient and effective job, especially for European lawyers learning American ideas, but also for Americans studying European law. The Institute seeks to replace the personal service these men rendered by an organization which exchanges young European and American lawyers, and introduces them to local law by entering them in a Law School. This, after all, is how they became lawyers at home. Everyone who works in the field realizes that despite the recognition of outstanding individual performances by visiting students and scholars in foreign universities, it has been very difficult to establish such a program on a regular basis. Nevertheless, we believe that our combination -- an actual research program, classroom study, and participation in an existing team in the United States or in Germany -- is a powerful pedagogical tool, not only for the young people who actually participate in each aspect of the research program, but also for those people who, though engaged in their own studies, become members of the team by spending most of their time with the American team members here or the German team members over there. This combination almost guarantees a solid grounding in the other law. Attached hereto is a list of persons presently connected with the Georgetown Institute.

For quite a number of years, the Institute under Professor Kronstein has undertaken regular meetings of the whole group comparing and contrasting American and European ideas of law, government, state, and economic policy. These discussions examine the practice in detail sufficient to make the American and European people aware of the actual points of contrast, and the historical, philosophical, or economic reasons they are based on.

Our educational program for visiting professors, both here and over there, is a point of special pride. It is, on the basis of our experiences, not in the best interest of a European scholar's acquaintance with American law and ideas, if, upon arrival he is immediately included in the teaching program, especially in European subjects. It appears absolutely necessary to leave the guest sufficiently alone to give him a chance to develop his own understanding of American law without continuously being referred to European law for the purpose of the preparation of his class. We have made the experience that it is very helpful to invite these professors a second or third time and then to use them for teaching purposes, but certainly not before. We have placed more and more emphasis, in Washington, on a practical introduction of our guests to the operation of American law of administrative agencies, the role of congressional committees and such institutions as the Marshal of the United States. An institute which combines, as we do, practical and theoretical education and research comes by natural steps to these new methods of instruction.

There is a very important new aspect in our approach to doing research in the law of the other nations, that is, comparative law, as well as in the legal relations between private organization of international

trade and public international law. It is an old story that legal institutions can only be understood on a "functional" basis, that is, as they are actually used. In the field of comparative law, we have continued to investigate, for example, the rules on tribunals of arbitration or the rules on enforcement of contracts, or the rules on establishment and organization of corporations, as they exist in different countries. In our approach we investigate the laws of each country trying to find how these institutions are being used or can be used for the purpose of organization of international trade by private interests. The young scholar who confronts himself with inquiring and examining to what an extent particular rules of law can be used or have been used for a particular purpose in international trade will get a much better understanding of the legal institutions in each country as they function in the service of the relationship, for instance between the United States and Germany. That will then give him a better chance to compare the legal rules and legal institutions themselves.

The whole system of the research of trade regulation by utilization of particular legal institutions also leads to a better understanding of the purpose of public regulation in the different countries and of the meaning and operation of international legal rules, established by commercial treaties, the GATT-agreement, the OECD-Treaty, and many others.

If we now take a look at the actual research and publications undertaken during the last years, we see that our method has been unusually productive. On the first plane are tools of teaching and information of practitioners, such as the practical books on the regulation of trade

(Regulation of Trade, New York (1953); Modern American Anti-Trust Law, New York (1958); Major American Anti-Trust Law, New York (1965)).

The Institute tackled the problem of the conflicts arising between different and often contradictory laws and practices of trade and competition in the United States and in Europe. The conference of 1962 in Washington prepared by this Institute was devoted to just this conflict which was bound to develop between these contradictory and different rules. The purpose of this conference was to use a real case method, presenting the facts of the principal cases of conflicts, such as shipping, watches or patent agreements, and the different positions taken by governments like the United States, England, Switzerland or Germany. The combination of experts of international law with the actual practitioners engaged in these trade problems led to a clarification of the real international law positions free from very many of the emotional statements and outcries made before.

Two books grew out of our discussions: the book of Ivo Schwartz who was in the Institute in Washington in 1957/60 on German International Cartel Law, Berlin (1962) and Eckard Rehbinder's book who was with the Frankfurt Institute since 1961 and at the Washington Institute in 1966/67 on the Extraterritorial Effects of the German Anti-Trust Laws (1965). Furthermore the article by John Miller on Extraterritorial Effects of Trade Regulation, 111 U. Pa. L. Rev. 1092 (1963) reports on the conference in Washington itself.

In this entire work, it came more and more in the open that the problem of conflicts between the legal rules of "law", and the so-called extraterritorial effects of national laws had been discussed too much, at the expense of perhaps a more important problem; the increasing

effects of international agreements between private enterprises, whether you call them cartels or not, on the application and enforcement of public national and international laws.

The Institute then concentrated in a year-long work of collecting one little item after the other and under my guidance piecing together the actual contents of the modern post-war law as to forms of regulation of international trade by private agreement and by subjecting public rules and public institutions to private agreements and interests. In Kronstein's book on "The Law of International Cartels (1967)", the result of this work has been presented. The book has been published in Germany first for the very simple reason that a book like that could not be published in the United States without the participation of foundations, and we hesitated to submit applications in this respect. However, the book is soon going to be published in the United States.

An especially important finding in result of these studies has to do with the role of conflicts of law, especially the rules on contracts, including the validity of contracts; in combination with the new arbitration rules, the private regulators are almost free from law altogether. The liberal use of subsidiaries and other corporate affiliations in different laws makes public regulation increasingly difficult.

It was very logical that the Organization for Economic Co-operation and Development in 1964 under the contract with the Frankfurt Institute in co-operation with the Washington Institute requested a study on the adverse effects of private restrictive business practices on international trade. Fifteen reports on particular sectors of trade, raw-materials, industrial products and technology have been prepared. A final report

on the present situation has been presented. It was favorably adopted by the Committee of Experts on Restrictive Business Practices of the OECD in Paris.

The Institute as Coordinator

This entire operation was possible only because of the very close relationship, even almost unification, with an established European Institute in Frankfurt, Germany. It should not be understood as a merely accidental, or personal friendship. It has been indeed a very healthy and sound cooperation of the traditional European idea of a scholarly institute, which is not usual in the United States in the field of law, with the American experiences in teaching law based on the case-system, closely connected with the sociological background of the facts of each of the cases. It has been a merger of the ideology of young European, especially German, scholars who are willing to devote their lives to the university in research and teaching even if it does not bring really good financial reward, with young Americans, who brought into the partnership the anxiety for an open confrontation with the legal economic facts, national and international. The mutual integration of these two institutes supplemented by very excellent relations with the universities in Berne, Muenster, Tuebingen, and Bochum opened the channels for very successful exchange programs.

Americans who in the scope of these programs came to Europe did not have to spend a year looking for friends and open doors, to begin their studies. As we have observed in a good deal of the regular exchange programs, young German and Swiss scholars as well as famous scholars who came to the United States found already the bed completely prepared. They stayed in Washington but traveled in vacations to many other universities and law-schools, such as Harvard, Berkeley, Texas, and others. The mutual integration of the two institutes made possible the development of a working team and a group of life-long friends to do an important job in research as well as in education.

Only this cooperation between institutes in the service of a common aim and basic common ideology made possible the important international conferences in Frankfurt in 1960 and in Washington in 1962. We are now preparing the conference in London in 1968, at least as far as American and German participation in this work goes. Anyone who has ever worked on the preparation of scholarly conferences has learned how often they do not accomplish more than bringing together people who do not ordinarily meet. But the conferences in Frankfurt and in Washington, and, we are sure, the coming conference in London, confront the actual issues in real situations.

They are carefully prepared by a long exchange of information and notes. They present to the participants the actual facts around which apparently theoretical discussions, such as the extra territorial effects of American and European anti-trust laws, have grown up. The method is an extension of the American Law School case-method. At the Washington conference, officials of the different countries sat as judges or mediators listening to the presentation of the factual problems by members of the staff of the Institute. . . . This conference succeeded in piercing through the useless slogans which had grown up in the field of application of American Anti-Trust Law under foreign conditions.

The 1960 Frankfurt conference, in which Washington had an important share, speaks for itself: the discussions and conferences have been published in two volumes -- Cartel and Monopoly in Modern Law, Karlsruhe (1961); it has been stated again and again by high officials of the United States, of the Common Market, and the Common Market countries that the Frankfurt and Washington conferences prepared the way for the solution of many relevant problems in the practice of the government agencies in different countries,

especially in the Common Market itself. It has been stated repeatedly by highest officials that the present European generation of professors and officials in the field of international trade regulation comes directly or indirectly from the school of these institutes.

The Institute has made good use of its location in Washington, D.C. For reasons not totally obvious the law schools and the graduate schools in business and policy have not made full use of the fantastic reservoir, the many experts in Washington, nor did they try to offer their own experience and personnel to Washington's governmental or extra-governmental experts. The Institute, though, has increasingly for many years maintained a whole line of lectures and luncheon meetings for such exchanges.

The luncheon meetings, held mostly in the National Lawyers Club, have become a meeting place of the experts in our field, no matter whether they are connected with Congress, with law practice, with governmental agencies, or with diplomatic corps and international institutions such as the World Bank. The problems discussed for instance during the last year were the plans for the solution of international monetary problems (Donner, Executive Director of the World Bank), the drafts of the rules prepared by the World Bank for the protection of international investment (Broches, General Council of the World Bank), the development of European cartel law (Guenther, President of the German Federal Cartel Office), a critical view to the new GATT policy from the Swiss point of view (Bachmann, Director of the Swiss Institute for International Trade) and just last month the impact of the German domestic policy on American foreign policy (Biedenkopf, President of the Ruhr University). Very soon we shall have a lecture by the Deputy Assistant Secretary for Economic Affairs in the Department of Commerce, Pollack, who regularly attends our conferences. He will speak on American

investments abroad and the balance of payments deficit. It is our experience that these meetings have an effect much beyond their own scope. They bring together people who would otherwise not meet; and they bring the Institute in contact with all different sides of Washington.

The Structure of the Institute

During the past years our Institute has become a permanent organization. It fulfills a unique function, one which no one else has undertaken, or could easily undertake. A team has been built up, close-knit and reliable, which could be utilized, even after a change in the leadership, without too much difficulty.

Especially interesting and successful is its position within Georgetown University. It is an old and an important problem in both American and European universities, whether institutes can be given sufficient independence to do their own job with their own scholarly and political means without sacrificing their connection with the university and its ideals. We believe that the charter of our Institute has proved to be especially successful. It was based on the experiences of Germans, within their institutes, such as those connected with the Max-Planck-Stiftung, on matters of organization and financial set-up. American scholarly institutions frequently operate on a budget which exceeds absolute necessity and indeed the optimum for scholarly efficiency.

Our institute, for the last years, has been on a budget which no doubt was too small. It was heavily dependent on the dedication of the staff members and directors. A middle ground should be possible to establish. The Institute has had ideal financial supporters who have never tried to obtain the slightest influence on the activities of the Institute or on the selection of its personnel, or even on the kind of fellowships. But now it becomes necessary to enlarge not only the total budget amount but also the number of participating personnel. It is probably necessary to have, besides the permanent contribution by

corporations and individual persons, the support of foundations, especially to fund particular research projects. During the last few years many European foundations have supported young scholars sent to the Institute here, which gave us a substantial increase in people permanently connected with the Institute without imposing much financial burden.

The Institute is at present at 511 E Street, N.W., just opposite the Georgetown Law Center. It would not be difficult to enlarge the rooms at our disposal, since there is more space in the building. These rooms would be necessary to do a satisfactory job, on an enlarged program.

The charter of the Institute requires that there be one principal director and two executive directors. The directors have all served heretofore on a part-time basis, which the charter allows, while employed in law firms or the Law Center. In the future, however, the Institute requires a more permanent staff. Under previous conditions it was not possible to establish research positions to be held for a number of years by the same people, as is done in the German institutes. These researchers and directors should receive a salary which by itself or with their teaching income would give them a secure economic basis, somewhat competitive with other research positions.

Plans and Projects

The excellent relationship with Georgetown University and its Law Center should continue. This Institute should also be one of the instruments of coordination between the different universities in and around Washington. The present set-up of the executive board of the Institute would make it easy to include members of institutions outside Washington; just as this Institute developed into an important bridge between American and European universities it could become a bridge between American institutions, serving as their instrumentality in Washington.

In the educational field, the exchange program should be expanded substantially. We should try to reach agreements with the American Association of Law Schools and with the American Association of Comparative Law to integrate some of their programs into our own work. It is proper that some of these programs have not only a base in Washington but also continuous contacts with European universities and programs. In Washington itself it should be possible to provide in our research program a number of positions for students who would like to be introduced into active research work. Outside of the law reviews the law schools cannot give them supervised writing and research jobs; these easily fit within the program of the Institute.

In our research in the next years we should deepen and enlarge the program on which we have been embarked, especially in two main areas: the energy industries, and restrictions in the major sectors of international trade.

1) We should concentrate first on the study of organization and regulation (public and private) of the sources of energy. The

finalization of the Common Market in Europe, the actual abolition of tariff-walls and establishment of effective instruments of joint economic administration for its territory make it necessary that a common, coordinated program for energy be prepared. Such a program will have somewhat contradictory aims: while the market must be opened as soon as possible for all new sources of energy and methods of utilization by modern technology, on the other side, traditional sources such as coal must be phased out without precipitating a far-reaching social revolution.

America has a direct interest in this program and its problems, since the United States, through its corporations, is a supplier of oil, and interested in its prospects, (and by the same token interested in natural gas); America is also a very substantial exporter of coal to the Common Market. The European corporations, on the other hand, are very interested in American development experience, and would like to build up a basis of mutual negotiations leading to help and understanding with their problems. (A special memorandum on this research proposal is attached.)

2) The study of restrictive practices in international trade undertaken for the OECD should be deepened and extended. The sector reports and the final reports present quite voluminous and unique material. It would be really almost shameful not to bring this material to a conclusion to be published.

Both research programs require a new agreement with the Frankfurt Institute and with Professor Biedenkopf of Bochum and it would be desirable to include similar organizations in other countries, especially England.

There are other important matters we are researching. For some years Professor Donner, Executive Director of the World Bank, has been a member

of the executive board of our Institute; together with Dr. Aufricht, formerly counsel of the International Monetary Fund. We have jointly projected interesting studies in the economic and legal development of the international monetary system. This developing field is ripe for an examination of the present status of the existing national and international rules and regulations. Dr. Aufricht was connected with the International Monetary Fund almost from its foundation. His acquaintance with international and national developments in monetary policy is outstanding; he has published extensively.

Monetary policies and market regulations are inseparable, which will be more evident from day to day. We believe that these aspects of trade policy have been dealt with much too independently in practice. If we developed a close working relation with lawyers and economists in the monetary field, our work in the regulation of international trade would be helpfully illuminated by an examination from the monetary aspect. Furthermore, our study of regulation of new fields, such as energy, could take into account problems of balance of payments and of monetary rules. An important step in this direction would be to undertake the proposed study of monetary regulation as a major element of our Institute's program. It would be helpful if for each of the proposed research operations a special advisory board composed of experts in the field would be added to the Institute.

The Institute is engaged in the preparation of the 1968 Oxford Conference on trade regulation. This conference will debate the merits of administrative versus judicial control of market-dominating powers. The example for study will be the policy of the British government, applied by

the Board of Trade. It will be the job of our Institute in Washington to prepare the American side of this conference. Important conversations have been held already with British representatives. The Frankfurt Institute will be called on to prepare this conference from Continental-European side. Thus, we will be able to utilize our work done years ago comparing the Federal Trade Commission's administrative control over market dominating power with the experiences of the Anti-Trust Division of the Justice Department and the United States Federal courts, before which the Anti-Trust Division must appear to bring an action. Our Institute will seek to guarantee that coming young experts in this field will be included in the preparation and actual holding of the conference.

In Washington our Institute will be able to extend its program of discussions and speeches in the University and other places such as the National Lawyers Club. The present development in our field is so fast and far-reaching that there will always be a problem of interest to discuss if we meet once a month during the academic year. Our personal connections here and with visitors are so close that we are sure to have the best people available for these meetings. There is an obvious interrelation between these lectures or luncheon meetings, our regular research program, and our exchange program.

During the last ten years, our Institute passed a period of organization finding its place in the family of universities and research institutions. The next ten years should be years of extension and utilization of its unique position.

Today our Institute is an American, basically a Washington, Institute connected with Swiss and German universities and scholars on

the European side. It is very much to be hoped that these contacts can be maintained. Switzerland always has been extremely important in the development of international law of any kind. Our scholarly Swiss friends are outstanding men in the family of international lawyers, and our young Swiss guests proved to be excellent men who very quickly conquered a position for themselves. The same is certainly true of the German members of our circle.