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PERSPECTIVE

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I. INTRODUCTION

The extraterritorial application of national laws has become a battle ground over the last forty years for both private parties and states, who are either seeking to enforce their laws or to protect their nationals and their own interests. The conflicts have been most intense over the application of economic regulation to international business conduct where the situs and the effects of the conduct may be quite difficult to locate within the borders of any single state. Often, the United States has sought to enforce its laws when conduct abroad by foreign nationals adversely affected its interests.

In the middle and the late 1970s, government and private antitrust actions in the United States aimed at the actions of international uranium

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producers created great concern among the governments of Canada, Great Britain, Australia and other principal United States trading partners.[1] Other United States antitrust actions that generated equally significant levels of international controversy included investigations and cases involving ocean shipping,[2] international aviation,[3] and consumer electronic products.[4] Outside of antitrust law, actions by the United States in the areas of securities regulation,[5] export controls,[6] taxation,[7] and drug enforcement[8] have also been the subject of increasing international concern over the expansive application of United States law to the conduct of foreign parties and firms outside the United States.

The United States is not alone as the center of attention in the debate over the extraterritorial application of national law. The European Economic Community asserts an extraterritorial application of its own competition rules. In the *Dyestuffs* case[9] and the more recent *IBM* pro-

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[1] *See In re* Uranium Antitrust Litigation Westinghouse Elec. Corp. v. Rio Algom Ltd., 665 F.2d 1049 (7th Cir. 1981); *In re* Uranium Antitrust Litigation Westinghouse Elec. Corp. v. Rio Algom Ltd., 617 F.2d 1248 (7th Cir. 1980); *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977); United Nuclear Corp. v. General Atomic Co., 1980-81 Trade Cas. (CCH) ¶ 63,639 (N.M. 1980); *see also In re* Westinghouse Elec. Corp. Uranium Contract Litigation, 1978 A.C. 547.

[2] United States v. Atlantic Container Line, Crim. No. 79-00271 (D.D.C. filed June 1, 1979), United States v. Bates, Crim. No. 79-00272 (D.D.C. filed June 1, 1979). The Justice Department then began a civil investigation of price fixing on Pacific routes. Numerous private treble damage actions have also been filed. *See In re* Ocean Shipping Antitrust Litigation, 1980-81 Trade Cas. (CCH) ¶ 63,630 (S.D.N.Y. 1980). For a more complete discussion of the application of U.S. antitrust law to international shipping, see J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 3.26 (2d ed. 1981).

[3] Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); Laker Airways Ltd. v. Pan American World Airways, Inc., 604 F. Supp. 280 (D.D.C. 1984); *see also* British Airways Board v. Laker Airways Ltd., 1985 A.C. 58, 79. On November 19, 1984, President Reagan terminated, on foreign affairs grounds, a grand jury investigation relating to the bankruptcy of Laker Airlines. This did not, however, terminate private treble damage actions. *See* 47 ANTITRUST & TRADE REG. REP. (BNA) No. 929 (Nov. 22, 1984).

[4] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983), *cert. granted in part*, 105 S. Ct. 1863 (1985). The United States, as amicus curiae, filed a brief in support of certiori. The brief discusses the potential impact of this and similar cases on U.S. trade relations. *See* Brief for the United States as Amicus Curiae at 14-20, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983).

[5] *See generally* PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffin ed. 1979).

[6] Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L.R. 739 (1981).

[7] United States v. Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983).

[8] United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

[9] Imperial Chem. Indus. v. Commission des Communautés Européennes, 1972 C.J. Comm. E. Rec. 619, (1971-73 Transfer Binder) COMM. MKT. REP. (CCH) ¶ 8161. *See also* British Aide-

ceeding,[10] the application of these rules to international business has been as controversial as any United States action. In addition, a growing number of other states have applied their laws and regulations on an extraterritorial basis.[11] Ironically, even "blocking" statutes, self-help measures enacted by states in response to perceived abuses of extraterritorial application of national laws, have extraterritorial application.[12]

Increasingly, these conflicts have involved not only the parties to the dispute, but the home states of the parties as well. The states have interceded in domestic court proceedings and government investigations which normally would be limited to the parties to the dispute, citing a lack of jurisdiction in the proceedings themselves and/or an invasion of state sovereignty as a basis for their intervention.[13] Such claims have been presented in foreign municipal courts, in the course of bilateral diplomatic negotiations, and in a variety of international forums. The resolution of these claims, more often than not, depends upon expedience and politics rather than principle and substantative rules of international law.

The intention of this paper is to develop an objective framework within which to analyze the opposing claims of states embroiled in international economic disputes, wherever they arise. This paper presents a framework which departs from the traditional analysis of extraterritorial jurisdiction. Instead, it focuses on the assertion of sovereignty claims as the more fruitful avenue of inquiry. The paper proposes a set of criteria to assess: 1) the validity of claims that the extraterritorial application of national law constitutes an infringement of sovereignty; and 2) the pro-

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Memoire to the Commission of the European Communities, in I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310 (3d ed. 1979). The objections tend to center around the use of the effects test and the enterprise entity theory. *See id.*

10 47 ANTITRUST & TRADE REG. REP. (BNA) No. 272 (Aug. 9, 1984).

11 *See generally* ENFORCING ANTITRUST AGAINST FOREIGN ENTERPRISES (C. Canenbley ed. 1981).

12 *See generally* Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1981-82). *See also* Comment, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT'L L. & BUS. 476 (1980).

13 *See* Submission of the British Attorney-General, Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1978 A.C. 547. Viscount Dilhorne in *Westinghouse* noted that the Attorney General had intervened before the House, "an intervention which, if I may say so, it was, in my opinion, not only his right but also his duty to make on the ground that despite the representations made by Her Majesty's Government, the sovereignty of this country had been prejudiced and that there had been 'an excess of sovereignty or an excess of jurisdiction' on the part of the United States." *In re* Westinghouse Elec. Corp. Uranium Contract Litigation, 1978 A.C. at 630 (H.L.). *See also* Radio Corp. of America v. Rauland Corp., [1956] 1 Q.B. 618; British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd., 1953 Ch. 19 (1952); Lord Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS, *supra* note 5, at 155.

priety of states using such claims as a basis of intervention to protect their nationals.

II. Distinguishing Sovereignty and Jurisdiction

While issues of sovereignty and jurisdiction often arise in the course of the same dispute, they are separate concepts for analytical purposes. Historically, the debate over the propriety of extraterritorial application of national laws has been cast in terms of the presence or absence of jurisdiction. Questions of personal and subject matter jurisdiction have been addressed from a number of perspectives—the enterprise entity theory,[14] the effects doctrine,[15] comity,[16] and the jurisdictional rule of reason embodied in the draft revisions to the Restatement of Foreign Relations Law.[17]

Thirty years of scholarship on the limits of national jurisdiction have produced little more than an impressively long list of monographs and law review articles.[18] Disputes over the limits of jurisdiction ultimately come down to which of two views of the *Lotus* case[19] is subscribed to by the author of the moment. Advocates of an international law basis for extraterritorial jurisdiction cite *Lotus* as a permissive rule. Opponents of extraterritoriality cite *Lotus* as a restrictive rule, authorizing jurisdiction only in those situations examined in the opinion of the Permanent Court of International Justice. In the absence of vertical or hierarchical authority, this dispute, now nearly sixty years old, unfortunately has no ultimate resolution.

Examining jurisdiction as a key to resolving disputes over transnational economic regulation fails to take into account that in most cases the problem is one of concurrent jurisdiction. In cases of concurrent jurisdiction the question is which state should proceed, not which state

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14 *Imperial Chem. Indus.*, 1972 C.J. Comm. E. Rec. 619, (1971-1973 Transfer Binder) COMMON MKT. REP. (CCH) ¶ 8161.

15 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (on certification and transfer from the United States Supreme Court for lack of a quorum of qualified Justices).

16 Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

17 REVISED RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (Draft 1984).

18 The authors have identified over 300 published works on the subject.

19 The S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J., ser. A., No. 10. The *Lotus* case concerned a collision between French and Turkish ships on the high seas. The watch officer of the French ship was tried and convicted of involuntary manslaughter in a Turkish court. The lawfulness of the prosecution under international law was submitted to the Permanent Court of International Justice by special agreement of the parties. The majority of the Court held that international law did not prohibit the exercise of Turkish jurisdiction. In a number of separate opinions, the dissenting judges argued that the Turkish actions were improper, since international law did not specifically permit the exercise of such jurisdiction.

has the power to proceed. Reliance on jurisdictional concepts can produce nothing more than a ludicrous spectacle, as in the *Laker* case,[20] where parties in both the United States and Great Britain sought and obtained numerous injunctions and counter-injunctions against one another, from proceeding or interfering with national court proceedings.

The resolution of jurisdictional claims is not automatically a matter of concern to the home states of nationals involved in a proceeding. The presence or absence of jurisdiction in a government investigation, government suit, or private lawsuit may have absolutely no effect on any interests of a foreign government, let alone its sovereignty interests. There are many lawsuits and legal disputes between individuals or corporate entities of different states, which are ultimately dismissed on jurisdictional grounds, of which the foreign state has no knowledge of the proceeding or interest in the outcome. The mere fact that a foreign national was involved in a lawsuit ultimately found wanting on matters relating to service of process, subject matter jurisdiction or personal jurisdiction, is itself insufficient to trigger an invasion of a nation's sovereign rights under international law. In most situations it is the litigant who is aggrieved, not the foreign state of which he is a subject.

The interplay of jurisdictional claims and sovereignty claims is illustrated in the diagram below:

		Jurisdiction	
		Present	Absent
Sovereignty Interest	Present	Case resolved under rules of international law to be developed	Case dismissed based on municipal law
	Absent	Case proceeds to decision on merits	Case dimissed based on municipal law

20 *See supra* note 3.

A dispute will be dismissed in favor of the respondent[21] in the two of the four situations shown where jurisdiction is not present. Beginning with the simplest case, where neither a jurisdictional nor sovereignty claim can be shown, the respondent clearly wins. Where jurisdiction is not present, though sovereignty claims may be supportable, the respondent similarly wins dismissal. This result occurs as a matter of municipal law, since jurisdictional issues normally would be examined prior to the consideration of sovereignty claims or any other substantive matter. If jurisdiction is found to be lacking, the sovereignty claim becomes moot.

The situation where both valid jurisdiction and sovereignty claims are present is the only situation involving a dispute of international law between states. Where jurisdiction is present, but sovereignty claims are either not advanced or found to be unsupported, there is no real conflict. The case would proceed to a decision based on the merits. However, when both jurisdiction and sovereignty claims are present, the case must be decided based upon rules of international law relating to the validity of claims of sovereign interest. The presence or absence of sovereignty is an independent objective decision which will affect the outcome of the dispute.

There must be a concrete connection between the lawsuit and the interests of the foreign state before the state should seek to enter a dispute claiming to be protecting its sovereign interests. In the broadest sense, the validity of a sovereignty claim is a question of the standing of a foreign state seeking to elevate a lawsuit or law enforcement proceeding to the level of an international dispute involving the rights of states. Where the foreign state lacks a tangible and substantial connection to a dispute involving one of its nationals, its intervention represents merely a mercantilistic desire to frustrate the imposition of economic liability on its nationals or corporations, and not an assertion of sovereign rights.

III. Towards a Concept of Pure Economic Sovereignty

Sovereignty, as used in this paper, refers to those fundamental rights of states at the international level. This is a fundamentally different meaning of sovereignty than the Austinian notion of sovereignty familiar to the discipline of political science.[22] In the domestic context, sovereignty refers to the allocation of lawmaking functions within a state. This particular concept of sovereignty arose in the medieval supremacy

21 The term "respondent" is used to identify a defendant in a court proceeding as well as a party named as responsible for a grievance in an international relations context.

22 *See* J. Austin, 1 Jurisprudence 251-55, 286 (4th ed. 1983). *See also* A.V. Dicey, Law of the Constitution 35-50 (9th ed. 1939).

struggle between national monarchs and feudal lords, and is fundamental to the creation of the modern nation state.[23] To establish sovereignty meant to establish supreme legal authority and the source of all positive law within the body politic.[24] For example, to speak of the sovereignty of Parliament is to utilize this sense of the concept since Great Britain has lodged its entire lawmaking powers in its legislature. However, such observations do not speak to the sovereign rights of states vis-a-vis other states in an international setting.

Traditionally, sovereignty at the international level was a concept linked to territorial integrity.[25] When one state's armed forces entered another state's territory, a breach of sovereignty had clearly occurred. As the nature of the international order changed, so too did the use of the term sovereignty.

Recent notions of sovereignty developed under the New International Economic Order (NIEO),[26] The Charter of Economic Rights and Duties of States,[27] and The Convention on the Law of Sea,[28] retain many of the traditional territorial aspects of sovereignty. Most of the so-called economic sovereignty provisions of these instruments are assertions of rights and interests in natural resources located within the expanded definition of a state's territory.[29] It is only those provisions dealing with rights of development which begin to approach a concept of pure economic sovereignty.[30]

In certain narrow situations, a notion of a pure economic sovereignty, lacking any tangible connection to territorial claims, may have validity. A growing percentage of international interaction is solely economic. Modern economic events may have as cataclysmic an impact on states as political and military events have had in past centuries. In order to acknowledge the increased significance of economic forces, some form

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23 J. MATTERN, CONCEPTS OF STATE, SOVEREIGNTY, AND INTERNATIONAL LAW 164 (1928).

24 *Id.* at 159.

25 *See, e.g.*, J. BRIERLY, THE LAW OF NATIONS 162 (6th ed. 1963); W. BISHOP, INTERNATIONAL LAW 398-400 (3d ed. 1971); A. KELLER, O. LISSITZYN, F. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS (1938).

26 *See, e.g.*, Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, 6 (Special) U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974), *reprinted in* 13 INT'L LEGAL MATERIALS 715 (1974).

27 G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

28 United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 INT'L LEGAL MATERIALS, 17 Third U.N. Conference on the Law of the Sea Official Records 151, 1261 (1982).

29 *See, e.g.*, G.A. Res. 3281, *supra* note 27, Art. 2.

30 *Id.* at Art. 4, Art. 7.

of economic sovereignty should be recognized, at least where the integrity of a state is endangered.

Nevertheless, assertions of economic sovereignty by developed nations in response to the extraterritorial application of national law are generally inappropriate. The integrity or existence of a state is not necessarily threatened by litigation of economic claims against one of its nationals. Any recognized notion of pure economic sovereignty unrelated to territorial considerations should be a narrow concept that is used with precision.

Professor A.V. Lowe, writing in the American Journal of International Law has stated:

> What is needed is a refinement of the concept of sovereignty in international law, so that it can accomodate both notions of the independence of states and of the increasing interdependence of states without losing its coherence as a legal principle.[31]

The refinement of the concept of sovereignty that Professor Lowe seeks lies in the formulation of specific criteria rather than in the formulation of abstract definitions. Claims of economic sovereignty do not arise in the abstract, but in specific disputes between states.

IV. Analyzing Claims of Economic Sovereignty—Three Criteria

As a general matter, economic sovereignty encompasses the right to continue and preserve economic activities closely linked to the existence of the state. A test for the validity of a claim of economic sovereignty involves consideration of three elements: 1) the interference with a preexisting fundamental state policy; 2) the relationship between the party to the dispute and the state policy; and 3) the presence or threat of injury to the state itself.

A. Preexisting Fundamental State Policy

In order to establish a violation of economic sovereignty, a state must first demonstrate that the extraterritorial application of national law relates to a preexisting fundamental state policy. Such a policy must go beyond merely reciting general national principles. Rather, the policy must be designed to promote certain specific identifiable aims and goals that are crucial to the integrity of the state. For example, a general preference for laissez-faire economics would not justify the assertion of a sov-

[31] Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 281 (1981). *But see* Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A.V. Lowe*, 75 AM. J. INT'L L. 629 (1981).

ereignty claim in every instance where another state engages in any form of regulation. In contrast, a policy of maintaining an indigenous defense industry may well constitute a fundamental state policy.

For practical reasons relating to proof, the state asserting a sovereignty claim should be required to demonstrate that the policy under examination predated the controversy involving its national. The policy must be preexisting in order to avoid a situation in which a state purports to create fundamental policies through legislation or other unilateral action, in effect creating retroactive protection for its nationals. The policy in question need not have had written expression. A policy which can be identified as having existed in the customary practice of a state would be sufficient to avoid the potential problem of instant declarations of state policy.[32]

B. The Party to the Dispute

The second element relates to the individual or firm subject to the extraterritorial application of national law. A nation seeking to protect its national from the impact of governmental regulation or economic liability on the grounds of an invasion of sovereignty must be able to demonstrate the relationship between its own nationals and the sovereign interest at stake. A determination must be made as to whether the party to the dispute is undertaking private economic conduct, or if it is in fact acting as an instrumentality of the state carrying out the type of fundamental national policies discussed above.

The character of the party to the dispute, as well as the nature and degree of control exercised by the state over the economic activity of the actor, will determine whether a state may properly intervene. For example, if the party subject to the extraterritorial application of national law was a state-owned enterprise of the state asserting a sovereignty grievance, the interference with the function of that state's economy might be great. Such a conclusion is not necessarily automatic, even in the case of a state-owned enterprise. The degree of autonomy and discretion exercised by the enterprise and the particular activities at the center of the dispute will indicate whether the enterprise is engaged in ordinary commercial activity, or is serving a sovereign purpose.

It is extremely unlikely that ordinary commercial activity of private parties would bear a close relationship to the sovereign interests of the sponsoring state. If a state asserted a sovereignty claim to protect the

[32] For example, a foreign state might declare a retroactive policy and then intervene in a U.S. court proceeding, claiming the policy be given conclusive effect under the U.S. Act of State doctrine. *See generally* United States v. Pink, 315 U.S. 203 (1942).

conduct of private firms or individuals, its burden would be significantly greater to show that the conduct was so deeply intertwined with the execution of fundamental national policy that regulation or the imposition of liability would constitute an infringement of sovereignty. The extent to which the private firm or individual exercised decision-making power independent of the state would be an important consideration. Therefore, it is unlikely that this test could be met except in situations where a private economic entity has acted at the command of its home state, or directly in furtherance of a fundamental national policy.

C. Injury to the State

Injury to the state is the most significant of the three criteria. Justification of an injury test can be derived by analogy to the common law concept of trespass. Both traditional sovereignty and trespass sought to redress claims based upon invasions of land. The law of trespass evolved to meet the demands of an economy where land was being subjected to conflicting uses.[33] In the course of economic development, trespass evolved from a doctrine of strict liability to a doctrine requiring a showing of injury.[34] The change was based on the realization that one landowner's use of his property necessarily affected the possible uses of someone else's land.[35]

The law and principles of economic sovereignty must similarly evolve towards a focus on whether the state asserting an invasion of its sovereignty has suffered an injury. In an interdependent global economy, activities conducted within one state have effects in other states. All such activities cannot constitute an invasion of economic sovereignty. An invasion of economic sovereignty must involve an economic injury which threatens the integrity of the state. Anything less may represent a hardship to an entrepeneur or firm, but is not an injury to the sovereign interest of the state under international law. This does not mean that a state must wait until irreparable injury has occurred to advance its claim of interference with its economic sovereignty. A demonstrable likelihood of irreparable injury to the integrity of the state, in some instances, should satisfy the injury test.

The nature of the required injury should go well beyond a mere loss of revenue, tax contributions, or other similar economic effects at the microeconomic level. A state would have to demonstrate the type of significant macroeconomic effects that threaten the state itself. For exam-

33 M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 31-108 (1977).
34 *Id.* at 40.
35 *Id.* at 101-02.

ple, decreased profits in a firm or industry are insufficient to meet this showing. On the other hand, the likely destruction of a vital segment of a state's infrastructure would be sufficient.

The injury aspect of the three part test will be the principal focus of inquiry. In most situations, the requirement will be difficult to satisfy. This is entirely appropriate. If the injury to the state does not remain a stringent requirement, then states will once again justify intervention solely on the basis of economic harm to its nationals.

V. Conclusion

This paper is an attempt to strip away one of the layers of nationalistic posturing and propaganda involved in conflicts over the extraterritorial application of national law. Claims that specific instances of extraterritoriality violate principles of sovereignty under international law require careful scrutiny to prevent states from injecting themselves into private disputes, thereby transforming ordinary litigation and regulatory matters into international disputes between states.

This paper has set forth objective criteria which can form a framework within which to evaluate assertions of economic sovereignty in bilateral forums and municipal courts of states applying national law on an extraterritorial basis. Our framework would reject the all too frequent assertion of sovereignty interests merely to prevent the imposition of economic liability on a national. Claims of infringement of economic sovereignty would be proper only in those relatively few situations where the extraterritorial application of national law has harmed a national engaged in the execution of some preexisting fundamental national policy, and has resulted in, or is likely to result in an injury that threatens the integrity or existence of the state.

The authors do not labor under the misapprehension that such definitional exercises will diminish the controversy over extraterritorial application of national law. The aim of this paper is to distinguish between rhetoric and reality. States will continue to intervene in international economic disputes. While there are many legitimate bases for such intervention, sovereignty interests are rarely present in these disputes. It must be recognized that in most situations, states are seeking to protect the economic interests of their nationals, and not the interests of the state. The realization that most of the controversies relate to the protection of pocket books will lessen conflict by promoting negotiation and settlement, and reduce the amount of posturing over abstract principles.