MANAGING EXTRATERRITORIAL JURISDICTION PROBLEMS: THE UNITED STATES GOVERNMENT APPROACH

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I

INTRODUCTION

A good deal of criticism is aimed at the United States for extraterritorial assertions of jurisdiction. However, the United States is not the only country to assert and exercise jurisdiction over conduct occurring outside its territory. A number of other nations do so.

Competition laws provide the clearest example. The Federal Republic of Germany's competition law reaches extraterritorial conduct with effects in its territory. The competition law of the European Community similarly reaches extraterritorially. The competition laws of a number of other jurisdictions assert extraterritorial reach, although the practice under these laws is not extensive.[1]

Economic sanctions are another example. The Arab nations' boycott of Israel imposes sanctions on foreign companies for economic activity outside the boycotting countries. Several countries have extended their sanctions against South Africa to reach the foreign activities of non-national companies.[2]

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1. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RESTRICTIVE BUSINESS PRACTICES OF MULTINATIONAL ENTERPRISES (1977) (identifies Austria, Denmark, Spain, France, Sweden, and Finland as also asserting extraterritorial reach). *See also* LOWE, EXTRATERRITORIAL JURISDICTION 63 (1983); REPORT OF THE INTERNATIONAL CHAMBER OF COMMERCE COMMITTEE ON EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS (Sept. 16, 1986) (Document No. 225-4/11). The new Canadian Competition Act, CAN. REV. STAT. ch. 26 (1986), clearly contemplates extraterritorial reach in enforcement. Section 9(2) provides: "Where the person against whom an order is sought . . . in relation to an inquiry is a corporation and . . . an affiliate, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records." A foreign blocking action may provide a defense under Section 42 of the Act which provides: "Every person who, without good and sufficient cause, the proof of which lies on him, fails to comply with an order made under section 9 . . . is guilty of an offence. . . ."

2. *E.g.*, the Swedish Act on the Prohibition of Investments in South Africa and Namibia (entered into force on Apr. 1, 1985) and the Danish law on the subject (adopted on May 29, 1985). These statutes bar not only the investments of domestic legal persons, but also require them to

Even the United Kingdom has asserted extraterritorial jurisdiction over non-nationals. For example, under the Protection of Trading Interests Act of 1980, the United Kingdom asserts the right to control the activities of persons outside the United Kingdom when her trade interests are threatened by any foreign State's trade measures which would apply extraterritorially. The statute does not require, as a precondition, that the other state's exercise of extraterritorial jurisdiction be unlawful.[3]

While the United States is not alone in asserting extraterritorial jurisdiction, it is the most prolific source of extraterritorial law, regulation, and enforcement action. Not surprisingly, it is the most significant target of international complaint about extraterritoriality. This article briefly reviews the range of extraterritoriality conflict, the basic U.S. thesis in the legal debate, its management framework for these problems, and some of the recent U.S. practice.

II

THE BROAD RANGE OF EXTRATERRITORIALITY CONFLICT

Conflict over extraterritorial jurisdiction has occurred in a variety of areas in recent years: antitrust, export controls, and law enforcement. There have been problems in antitrust since Learned Hand's *Alcoa* decision enunciated the "effects test" in 1945.[4] The most celebrated case generating foreign relations problems was the oil cartel investigation by the Justice Department in the 1940's and early 1950's which raised such intense international concerns that, for national security reasons, Presidents Truman and Eisenhower required the Justice Department to proceed civilly rather than criminally.[5] More recently, foreign governments have objected to such

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exercise their control over subsidiaries to avoid such investments. The Swedish Government rejected criticism that this was an unlawful exercise of jurisdiction in the territory of another state:

> What is demanded by Sweden is that a Swedish group management, in exercising its possibilities to issue directives to a Swedish-owned or Swedish-dominated subsidiary, shall follow the rules of Swedish law. In the event of collisions of law, however, the basic principle, according to international law, must be not to coerce one's own legal subjects, when they are under the territorial jurisdiction of a foreign state, to actions incompatible with the legal system of that state.

Statement of Minister in Government Bill 29 (1985) (copy on file with author).

3. *See infra* note 9, in which U.S. jurisdiction was found lawful by the House of Lords in the *Laker Airways* antitrust action. *Cf.* P.T.I.A., Order and General Directors (June 27, 1983) (barring production of evidence located in the United Kingdom, the United States, and third countries, by both U.K. and third-country companies present and doing business in the United States); Rules of the Supreme Court, Order 24, rules 3, 11 (English discovery rules requiring a party to produce documents in its possession outside the United Kingdom).

4. United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945). Even English jurisprudence may not be entirely hostile to "effects" based criminal jurisdiction, at least where the criminal rule is not inimical to state policy where the conduct occurred. *See* Treacey v. Director of Public Prosecutions, 1971 App. Cas. 537, 561, 1 All E. R. 110, 121 (Diplock, L.) (indicating in dictum that, taking into account comity requirements, territoriality can be judged either by the place where the physical acts were committed or where the results were obtained). *But see* Regina v. Markus, 1976 App. Cas. 35.

5. *See* 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 2.24 (2d ed. 1981).

inquiries as the North Atlantic shipping investigation[6] and the North Atlantic aviation investigation (the latter terminated by President Reagan for foreign policy reasons).[7] Serious concerns have also been expressed over such private proceedings as the uranium cartel cases[8] and the recent suit by the bankrupt Laker Airways alleging predation by its former competitors.[9]

Problems began to arise in the area of trade and economic embargoes as U.S. policies diverged from those of its trading partners on such issues as the proper treatment of China and the threat posed by Castro's Cuba.[10] The difficulties took new direction and characteristics when the petrodollar explosion enlarged the impact of the Arab boycott[11] and foreign bribery practices,[12] as the United States responded with legislation having some reach to conduct abroad of companies not incorporated in the United States. Today a major problem is to strike a proper balance between, on the one hand, economic competition and the free flow of technology among the Western countries and, on the other, the need to limit military benefits derived by the Soviet Union.[13]

For the present Administration, extraterritoriality became an acute problem when, in June 1982, it broadened sanctions imposed six months earlier against the Soviet natural gas pipeline.[14] Promulgated under a 1977 amendment of the Export Administration Act by which Congress intentionally granted broad extraterritorial authority,[15] the newly broadened regulations

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6. *Id.* § 3.26.

7. *See* Hershey, *Reagan Orders an End To Air Travel Inquiry*, N.Y. Times, Nov. 20, 1984, at D1, col. 4.

8. *In re* Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979).

9. Laker Airways, Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124 (D.D.C. 1983), *aff'd sub nom.* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984). *See also* British Airways Board v. Laker Airways, Ltd., 3 W.L.R. 544 (1983), *aff'd in part* 1985 A.C. 58. *See generally* J. ATWOOD & K. BREWSTER, *supra* note 5, § 6.16.

10. Multilateral cooperation in Chinese controls began to break down after the Korean War. Serious strains arose with Canada in 1957, when a Ford (Canada) sale of 1000 trucks to China was blocked by a U.S. order to Ford (U.S.). A similar 1964 order to Freuhof (U.S.) regarding sale of semi-trailers by Freuhof (France) to Berliet (France), destined for China, led to the French court appointing a temporary administrator for Freuhof (France). Societe Freuhof v. Massardy (Ct. of App. Paris, May 22, 1965), *reprinted in* 5 INT'L LEGAL MATERIALS 476 (1966). *See generally* G. HUFBAUER & J. SCHOTT & K. ELLIOT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 221-30, 315-23 (1985).

11. Export Administration Act Amendments of 1977, Pub. L. No. 95-223, 91 Stat. 1629 (codified as amended at 50 U.S.C. § 2407 (1982)).

12. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78dd-1, -2 (1982)).

13. *See, e.g.*, NATIONAL ACADEMY OF SCIENCE, U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION (1987).

14. Prior to December 1981, the United States had foreign policy controls on exports to the Soviet Union of both oil and gas exploration and production equipment, and also technical data. Citing the Soviet Union's direct responsibility for repression in Poland, the United States expanded these controls in December 1981 to cover exports for the transmission or refinement of petroleum or natural gas and announced that outstanding licenses and re-export authorizations were subject to review. *See* 47 Fed. Reg. 141 (1982) (amending 15 C.F.R. §§ 379, 385, 399).

15. Export Administration Act Amendments of 1977, *supra* note 11, providing authority under § 4(b)(1) of the Export Administration Act of 1969 to prohibit or curtail exports of goods and technical data regardless of origin "exported by any person subject to the jurisdiction of the United States." The legislative history stated that this amendment was intended:

applied, by their terms, to exports from other countries of non-U.S. origin goods and technical data by foreign subsidiaries of U.S. companies as well as to exports even by entirely foreign companies of commodities produced abroad under licensing agreement with the U.S. firms. The regulations also purported to override existing contracts.[16]

While the pipeline sanctions were particularly criticized for asserting jurisdiction over foreign corporations based on U.S. nationality of the parent company, it is doubtful that any of the cases which actually arose under those controls was a pure foreign subsidiary control involving no U.S.-origin goods or technology. In the most prominent case, the French subsidiary of Dresser Industries of Dallas, Texas was denied certain U.S. export privileges for violating the pipeline controls by shipping natural gas equipment produced in France to the Soviet Union. The case was not, however, predicated solely on the status of Dresser (France) as a subsidiary of a U.S. firm: The manufacture in question involved technology licensed to Dresser (France) by its U.S. parent.[17] Nonetheless, these controls produced harsh criticism, intense levels of diplomatic controversy, and a Netherlands court judgment characterizing the United States control of exports from the Netherlands to the Soviet Union as a violation of international law.[18] The Administration eventually resolved that crisis diplomatically, terminating the sanctions in November 1982,[19] on the basis that it had achieved some improved Western understanding on East-West trade.[20]

Despite strong foreign government comment during the protracted consideration of Export Administration Act Renewal during 1983-1985,[21] Congress preserved the extraterritorial reach of that law. Thus, the potential for controversial extraterritorial regulation remains and so does the concern of the United States' trading partners.

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to provide authority for control over exports of non U.S. origin goods and technology by foreign subsidiaries of U.S. concerns. This is in addition to the authority currently provided in the Export Administration Act for control over the export of U.S. origin goods and technology, whether from the United States or abroad.

H.R. REP. No. 459, 95th Cong., 1st Sess. 17 (1977). Despite widespread criticism, this authority has survived two major revisions of the Export Administration Act in 1979 and 1985.

16. 47 Fed. Reg. 17,250 (1982) (amending 15 C.F.R. §§ 376, 379, 385).

17. *See* Note, *Dresser Industries: The Failure of Foreign Policy Trade Controls under the Export Administration Act*, 8 MD. J. INT'L L. & TRADE 122 (1984).

18. Companie Europeenne des Petroles v. Sensor Nederland No. 82/716 (Dist. Ct. The Hague, Sept. 17, 1982), *reprinted in* 22 INT'L LEGAL MATERIALS 66 (1983).

19. 47 Fed. Reg. 51858 (1982) (amending 15 C.F.R. §§ 379, 385, 390, 399).

20. *See* K. Dam, *Economic and Political Aspects of Extraterritoriality*, Address by Deputy Secretary of State to the Committee on International Aspects of Antitrust Law of the International Section of the American Bar Association (Apr. 16, 1985), *reprinted in* 19 INT'L LAW. 887 (1985).

21. For instance, the European Community called the extraterritorial aspects of the Export Administration Act "unacceptable" and "contrary to international law" and stated that "it may be necessary to consider means by which the effects on persons doing business in the Community of the extraterritorial application of U.S. export controls might be countered." Aide-Memoire, Delegation of the Commission of the European Communities (Mar. 14, 1975), *reprinted in Extension and Revision of the Export Administration Act of 1979: Hearings on H.R. 3231 Before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 1856 (1983). Similar views were expressed by Germany, France, the United Kingdom, Canada, and Australia. *Id.* at 1865-99.

There have been difficulties over the extraterritorial application of U.S. law and regulation in a variety of other areas in recent years. Diplomatic as well as courtroom clashes have occurred over foreign evidence production in cases such as *Marc Rich* (tax fraud),[22] *St. Jo* (insider trading)[23] and *Bank of Nova Scotia* (narcotics investigations).[24] In the area of international merger regulation, the United States has on occasion been accused of using a small U.S. tail to wag a foreign merger dog. Finally, use of the worldwide unitary tax method by California and some other U.S. states has been persistently challenged by U.S. trading partners as an improper tax on extraterritorial values, incompatible with the multinational enterprise system.[25]

III

THE UNDERLYING NEEDS ARE LIKELY TO REMAIN

In the continuing international extraterritoriality debate, suggestions have often been made by foreign officials and both American and foreign commentators that the United States should abandon the extraterritorial reach of certain laws and limit itself in offshore investigations and evidence gathering to the channels other states have traditionally utilized. Sometimes this has been urged on policy grounds. Often, it has been urged as well that proper application of existing international law principles and rules would avoid most of the current extraterritoriality conflicts. U.S. officials have been unable to accept these suggestions, since conflict has occurred mostly in areas in which the government believes action is required by compelling underlying interests.

For example, it has occurred regarding investigations into offshore money laundering, a common adjunct to both domestic and transnational racketeering. Getting at the money laundering is an important tool for prosecuting the criminal enterprise. It is difficult to get at it without reaching outside U.S. borders.[26]

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22. *In re* Marc Rich & Co., 736 F.2d 864 (2d Cir. 1984).

23. SEC v. Banca della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

24. United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); United States v. Bank of Nova Scotia, 722 F.2d 657 (11th Cir. 1983), 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

25. *See, e.g.*, Brief for the Government of Canada, the Government of the United Kingdom, and the Member States of the European Communities and the Governments of Australia, Japan, and Switzerland, Alcan Aluminum, Ltd. v. Franchise Tax Bd., No. 84-C-6932 (N.D. Ill. 1984). The problem has moved toward a practical solution. *See infra* p. 299 & note 80.

26. Pursuant to the Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1352(a), 100 Stat. 3207-18 (codified at 18 U.S.C.A. § 1956 (West Supp. 1987)) U.S. law now prohibits money laundering when the conduct is (i) by a U.S. citizen or (ii) by a non-U.S. citizen and occurs in part in the United States. The offense requires an intent to facilitate "specified" unlawful activity or knowledge that the transaction is to conceal the fact that the proceeds come from such activity. Some foreign concern has been expressed that only marginal conduct "in the United States" will be regarded as sufficient for the exercise of jurisdiction and that non-racketeering transactions will be included since violations of the Export Administration Act, Arms Export Control Act, International Emergencies Economic Powers Act, and Trading with the Enemy Act are listed as "specified" unlawful activity. However, the United States has informed OECD members that "[t]he Department of Justice is requiring approval by the head of the Criminal Division . . . in Washington before the

The securities markets, to take another example, now function in an internationalized trading environment. The "level playing field" American law is intended to foster cannot be maintained if the foreign located player, or a domestic player channelling his activity through a foreign agent, enjoys a tactical high ground, out of reach of rules and referees.[27]

In the competition area, U.S. law is not likely to be limited to the decreasing portion of commerce which is purely domestic and conflicts are likely to arise as long as competition laws and policies differ among nations. Unilateral U.S. restraint may not always be desirable. For example, when the U.K. carrier Laker Airways brought a private antitrust action in the United States against British and other carriers in North Atlantic Aviation alleging secret price fixing and the United States opened a grand jury investigation of North Atlantic Aviation, the United Kingdom argued that one nation's law and policy may be applied to bilateral aviation (or other bilateral commerce) only to the extent of bilateral agreement. That superficially attractive U.K. formula, however, was a demand that laissez-faire U.K. law apply automatically. The U.S. competition authorities did not consider that the United States should, as a matter of comity, subject American consumers to such practices or legal policies. Nor did the United States approve when the United Kingdom tried to block companies present and doing business in the United States from producing evidence (located here and elsewhere) for the U.S. legal proceedings.[28]

National security trade controls provide another example. The conditions causing the United States to want to deny strategically important goods and critical technologies to the Soviet block are likely to continue. For effective denial, the United States cannot be indifferent to what happens to U.S. origin goods and technology after they depart U.S. territory for an authorized destination. For this reason, the United States proscribes and sanctions diversions of those goods and technology to unauthorized foreign destinations.[29] There is, however, a broad western commitment to and cooperation in strategic denial which not only makes these controls more effective than unilateral ones would be, but also minimizes their potential for generating extraterritoriality problems.

Foreign policy export and re-export controls are also likely to continue to be used to some degree. It is questionable whether unilateral foreign policy controls remain affordable, even without extraterritorial reach, given the adverse impact on U.S. competitiveness abroad and the scant evidence that

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extraterritorial provisions can be enforced. Such approval is not likely for laundering the proceeds of any of the four above-referenced violations." Unclassified State Department telegram (Dec. 3, 1986) (on file with Office of Legal Adviser).

27. *See Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 134-46, 318-48 (May 24, 1983) (testimony of John M. Fedders, Director, SEC Division of Enforcement).

28. *See supra* p. 284 & *infra* note 33.

29. *See, e.g.*, 15 C.F.R. §§ 374.1, 387.4, 387.6 (1987) (provisions and penalties applicable to unauthorized transfers abroad of national security controlled items).

unilateral economic sanctions are effective.[30] However, U.S. policy makers give no signs of abandoning the felt need for foreign policy controls as an important symbolic nonmilitary option when diplomatic protest is inadequate.[31] By contrast with national security controls, foreign policy controls have tended to be unilateral since other major trading countries do not generally undertake economic sanctions. This gives foreign policy controls more potential than national security controls for creating extraterritoriality conflicts. The United States Government presently appears sufficiently concerned with the costs that extraterritoriality adds to unilateral economic sanctions to accept the alternative of reduced scope in adopting new sanctions under the International Emergencies Economic Powers Act. However, this concern has not eliminated all re-export aspects of foreign policy controls; some re-export reach has been included when the government has expanded Export Administration Act controls against countries like South Africa[32] and Syria.[33]

Given the increasingly transnational nature of modern day activity, U.S. agencies will not be able to limit their activities to U.S. territory. They recognize that their agents and employees may not physically operate within another state's territory without its consent.[34] They also recognize that they need the cooperation or acquiescence of foreign jurisdictions in order to conduct effective investigation and evidence gathering abroad. But, absent viable cooperative channels, they reserve the right to take unilateral measures, such as demands that persons subject to the *in personam* jurisdiction of U.S. courts provide evidence from wherever located.[35]

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30. *See, e.g.*, G. HUFBAUER, J. SCHOTT & K. ELLIOT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (1985).

31. *See, e.g.*, Address by Abraham D. Sofaer, Legal Adviser, Department of State, Washington Foreign Law Society (Feb. 2, 1986) (on file with the Office of the Legal Adviser). The extensive foreign policy export controls currently in place under the Export Administration Regulations include regional stability, human rights, anti-terrorism, Libya, chemical weapons materials to Iran, Iraq, and Syria, countries embargoed under the Trading with the Enemy Act (North Korea, Vietnam, Cambodia, and Cuba), Soviet Union and Afghanistan, South Africa and Namibia, and nuclear non-proliferation. 15 C.F.R. §§ 368-99 (1981). *See also* Department of Commerce, Report to Congress (Jan. 11, 1987). In addition to these and the corresponding North Korean, Vietnamese, Cambodian, and Cuban controls administered by the Treasury Department under the Trading With the Enemy Act, there are economic sanctions with export and/or re-export features in effect under the International Emergencies Economic Powers Act as it applies to Libya, Nicaragua, and South Africa. 31 C.F.R. §§ 500-50 (1986).

32. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 304, 100 Stat. 1086, 1099 (codified at 22 U.S.C.A. § 5054 (West Supp. 1985)).

33. *See, e.g.*, 15 C.F.R. § 385.4(d) (1987).

34. United States investigative agencies routinely obtain permission from foreign governments before conducting investigations on the territories of those governments. In certain instances, permission has been granted in agreements covering a range of activities of a particular agency. All non-military activities of U.S. agencies in a foreign country are under the general foreign affairs oversight of the United States Ambassador pursuant to the Foreign Service Act of 1980, 22 U.S.C. § 3921 (1982).

35. *See* cases cited *supra* notes 22-24. This view has even led U.S. agencies to intercede in private cases against blanket requirements to use international instruments such as the Hague Evidence Convention instead of unilateral U.S. process for obtaining evidence from abroad. *See, e.g.*, Brief for the United States and the Securities and Exchange Commission as amici curiae, Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., No. 85-1695 (S. Ct. Oct. Term 1986).

IV

THE APPROACH OF THE STATE DEPARTMENT

Within the United States Government, the seriousness of the problem of conflicting assertions of jurisdiction has become more widely appreciated than it was in past decades. The State Department has placed more emphasis than other agencies on the need to manage this problem effectively. The Department has stressed the vital importance of the sovereignty and interests of the foreign countries affected by extraterritorial assertions of U.S. law. It has also emphasized that, over the long run, cooperation with foreign countries best serves the interests of the United States in dealing with transnational problems.

Secretary Shultz has called attention to the fact that extraterritoriality conflicts have a number of seriously damaging results: (i) diplomatic conflict damaging to U.S. efforts to achieve important national and security objectives; (ii) foreign blocking legislation and frustration of U.S. regulatory and law enforcement interests; (iii) foreign resistance to U.S. investment in activities likely to be subject to U.S. extraterritorial controls, such as high-tech manufacture; (iv) damage to a cherished U.S. foreign investment principle, national treatment, as some foreign states argue that U.S. insistence on treating foreign subsidiaries of U.S. companies as subject to U.S. jurisdiction undermines their claim to national treatment; and (v) efforts by foreign manufacturers to seek non-U.S. sources of supply.[36]

In the wake of the pipeline crisis, Secretary Shultz stated that it was imperative to manage extraterritoriality, since disputes over it could become a bigger threat to U.S. economic interests than concerns about tariffs, quotas, and exchange rates, and they could poison political cooperation among the democracies.[37]

The State Department has, in fact, been actively working since 1981 to improve Executive Branch management of the growing extraterritoriality problems. In 1983, the Department publicly recommended the following agenda: (i) seek to resolve the policy differences that underlie many of the conflicts; (ii) develop appropriate guidelines for assertions of authority over conduct abroad (such as an interest balancing or comity approach); (iii) expand the practice, pioneered in the antitrust area, of notice, consultation, and cooperation with foreign governments where contemplated actions raise a danger of conflicts; (iv) expand international cooperative arrangements; and (v) increase opportunities for advance consultation by the Department of State on U.S. regulatory or enforcement actions that substantially involve other countries' interests.[38]

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36. G. Shultz, *Trade, Interdependence, and Conflicts of Jurisdiction*, Address by the Secretary of State to the South Carolina Bar Association (May 5, 1984).

37. *Id.*

38. *See* Dam, *Extraterritoriality and Conflicts of Jurisdiction*, 1983 AM. SOC'Y INT'L L. 370.

V

THE THEORETICAL DEBATE

At the time this agenda was being articulated, Canada and the United Kingdom were each trying to address the extraterritoriality issue bilaterally with the United States on a substantially more theoretical plane. United Kingdom representatives tended to frame the issue in terms of a limited and exhaustive list of internationally permissible bases of jurisdiction of which territoriality was preferred. The Canadian approach was similar but somewhat more flexible on the scope of the categories. U.S. spokesmen rejected and continue to reject that view. They maintain that concurrent jurisdiction is an increasingly frequent fact of life and that comity, rather than rigid legal rules, will be necessary to manage and mitigate the conflicts. Comity, in this context, is a principle pursuant to which a nation exercises its jurisdiction with an eye toward overall reasonableness in the multinational system. As defined by long-standing precedent, it is between pure discretion and hard law,[39] a guide to practice from which legal rules may arise.

An analogous debate occurred regarding the proposed American Law Institute Restatement (Revised): Foreign Relations Law of the United States. The proposed basic jurisdictional provisions (sections 402 and 403) set out an exhaustive list of permitted categories of jurisdiction and subjected the lawfulness of jurisdiction within those categories to an overriding test of reasonableness. Reasonableness was to be determined by weighing a number of factors and, in case of jurisdictional conflict, jurisdiction would lie only with the state with the greater interest.

The State Department Legal Adviser said that the approach proposed to be taken by the Restatement (Revised) was unsound as a matter of existing positive law and undesirable as a legal policy objective; it did not provide a viable framework for the policy choices in the varied and changing circumstances governments face.[40] The search for an exhaustive list of permissible jurisdictional bases runs counter to the reality that jurisdictional practices are necessarily evolutionary. "States, increasingly, attach legal consequences to conduct or events outside their territory involving persons not of their own nationality. They do so, for example, under such legal constructs as 'objective territoriality' or the 'effects doctrine,' or under such theories as 'enterprise unity.' "[41] Moreover, the concept that extraterritorial

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39. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

40. *See, e.g.*, D. Robinson, Legal Adviser to the Department of State, Conference on Extraterritoriality for the Businessman and the Practicing Lawyer (June 7, 1983), *reprinted at* 15 LAW & POL'Y INT'L BUS. 1147 (1983) (conference sponsored jointly by the Int'l Section of the Dist. of Columbia Bar, the Georgetown Univ. Law Center, and Law & Policy in Int'l Business); Conflicting Assertions of National Jurisdiction over Multinational Enterprises 22-29 (1983) (proceedings of the 1983 Conference of the Canadian Council on Int'l Law) (on file with author); *Reflections on the Current State of "Extraterritoriality"* (Nov. 2, 1984) (before the Int'l Law Association) (on file with author) [hereinafter *Reflections*]; Letter from Davis R. Robinson to R. Ami Cutter (Feb. 6, 1985) (on file with the Office of the Asst. Legal Advisor for Economic, Business and Communications) [hereinafter Letter].

41. *Reflections, supra* note 40.

jurisdiction is permitted only on the basis of an exhaustive list of affirmatively recognized links "[stood] the international law principle of jurisdiction, stated unmistakably in the Lotus opinion, on its head."[42] The *Lotus* opinion is based on the proposition that states are left a wide measure of discretion in the assertion of jurisdiction, limited only by established prohibitive rules.[43]

The Legal Adviser was particularly critical of the proposal that a legal rule of reason identify the jurisdiction with the greater interest as the single lawful jurisdiction in conflict situations. This was seen as an unworkable "winner take all" rule, which had the potential for exacerbating conflicts.

> A nation should not be put in jeopardy of violating international law because its good faith judgments in such a difficult area as interest balancing might later turn out to be different from those which a third party arbiter might reach. A rule that encourages international legal second-guessing is not conducive to effective international cooperation. It would be difficult to obtain deference to foreign interests from domestic regulators, enforcers or judges if such deference were to be viewed not as self-restraint in furtherance of comity, but as a precedent evidencing primacy of foreign interests as a matter of law.[44]

U.S. government spokesmen identified only one firmly established international law limit—a threshold requirement that a state have a sufficient nexus with the matter to justify an assertion of jurisdiction.[45] The traditional categories of jurisdiction (territoriality, nationality, protective principle, and universality) were seen as the principal kinds of nexus generally considered sufficient, but the sufficiency or basic reasonableness of other kinds of connections for certain exercises of jurisdiction could not be excluded a priori.[46] Ownership and control of a corporation and jurisdiction based on the origin of goods or technology were given as examples of other real ties which support limited exercises of jurisdiction.

In this debate, the State Department did not argue that there should be anarchy in jurisdictional matters above the "sufficient nexus" threshold. It recognized the need for some principles to deal with the broad areas of potential conflict in such an extensively "concurrent" jurisdictional universe. However, it did not find that much had crystallized in the way of binding legal constraints beyond the general need to avoid interference with the territorial sovereign in certain predominantly domestic situations, such as local labor regulation.[47] The Department argued that, beyond those limits, which

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42. Letter, *supra* note 40.

43. France v. Turkey, 1927 P.C.I.J. (Ser. A) No. 10, at 19 (the *S.S. Lotus* case).

44. *Reflections, supra* note 40.

45. Letter, *supra* note 40. *See also* 2 D. O'CONNELL, INTERNATIONAL LAW 658 (1965) (The test of whether the application of municipal law extraterritorially conforms with international law is "whether the event, act or person to which or to whom it applies bears upon the peace, order and good government of the acting or legislating state.").

46. Letter, *supra* note 40.

47. *Id.* In 1984, the Age Discrimination in Employment Act of 1967 was made applicable to U.S. corporations overseas, but only to the extent that it does not conflict with the law of the foreign workplace. 29 U.S.C. § 623(f)(1) (1982), *as amended by* Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(b)(1), 98 Stat. 1767, 1792 (codified at 28 U.S.C. § 623(f)(1) (1982 & Supp. III 1985)). However, the United States recently legislated the Sullivan Principles to govern the labor practices of U.S. companies in South Africa. Comprehensive Anti-Apartheid Act of 1986, Pub. L.

constitute a kind of threshold reasonableness requirement, good sense and principles of comity, rather than hard and fast legal rules, come into play to avoid, mitigate, and manage the potential conflicts of jurisdiction.[48]

In the context of the debate over the proposed Restatement (Revised), the Office of the Legal Adviser asked that section 402, dealing with jurisdiction to prescribe, be made more open ended and that section 403 be converted back to a principle of comity. These concerns were partly accommodated. The commentary to section 402 has been amended to be more open to additional bases for some limited jurisdiction[49] and, while the process of balancing interests in cases of conflict remains mandatory in section 403, the requirement to defer to the state with the greater interest has been relaxed.[50]

VI

THE OECD AND EXECUTIVE BRANCH CONSENSUS

The early bilateral diplomatic legal debates were followed by both bilateral and multilateral efforts to engage the United States in drawing up some non-binding statements of jurisdictional principle. The common element of such efforts was to identify the legally "more appropriate" jurisdiction, generally on the basis of territorial priority. The U.S. participants were prepared to acknowledge informally the importance of sovereignty over territory as a theoretical, political, and practical matter. They were not, however, prepared to sign on to the proposition that the territorial interest would, in case of conflict, generally take precedence as a matter of law or policy. These efforts produced a document, endorsed by the Organization for Economic Cooperation and Development (OECD) ministers in May, 1984,[51] which still defines the extent of international consensus on extraterritoriality theory, principle, and conflict management.

No. 99-440, §§ 207-208, 100 Stat. 1086, 1097-98 (codified at 22 U.S.C. §§ 5034-35 (West Supp. 1987)). To the extent this exceeds the limits of normally permissible jurisdiction, it may be justified by the fact that it responds to violations of internationally recognized human rights duties owed by South Africa *erga omnes*.

48. *Reflections*, *supra* note 40.

49. *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Final Draft, 1986) (unpublished). Earlier drafts of comment (a) to section 402 described the section's categories as "necessary." *See e.g.*, RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (Tent. Draft No. 2, 1981). As finally approved, comment (a) expressly states that "other links may also be sufficient to support jurisdiction in limited circumstances." RESTATEMENT (REVISED) OF FOREIGN RELATION LAW OF THE UNITED STATES § 402(a) (Tent. Final Draft, 1986) (unpublished).

50. Drafts of section 403(3) would have required the state with the lesser interest to defer to the state with the greater interest. *See, e.g.*, RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3) (Tent. Draft No. 2, 1981). As finally approved, the section requires consideration of the interests of both states, but provides that a state "*should* defer to the other state if that state's interest is *clearly* greater." (emphasis added) *Id.* § 403(3). Thus, for conflict cases, section 403(3) returned to the Restatement (Second) notion of comity. However, the addition of "clearly" introduced a margin of error into the test, which became inappropriate once section 403(3) ceased to assert a binding rule.

51. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES 23-34 (1984).

Part (a) of this document, entitled "General Considerations" states that members contemplating exercises of jurisdiction "which may conflict with the legal requirements or established policies of another member and lead to conflicting requirements being imposed upon multinational enterprises" should:

> i) Have regard to relevant principles of international law;
>
> ii) Endeavor to avoid or minimize such conflicts and the problems to which they give rise by following an approach of moderation and restraint[52] respecting and accommodating the interests of other member countries;
>
> iii) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries;
>
> iv) Bear in mind the importance of permitting the observance of contractual obligations and the possible adverse impact of measures having a retroactive effect.
>
> Member countries should endeavor to promote cooperation as an alternative to unilateral action to avoid or minimize conflicting requirements and problems arising therefrom. Member countries should on request consult one another and endeavor to arrive at mutually acceptable solutions to such problems.[53]

Part (b) of the document, entitled "Practical Approaches," deals with formal and informal arrangements for notice and consultation, primarily on a bilateral basis, regarding potential conflicting requirements. It calls for early notice to other member countries of proposed "new legislation or regulations which have significant potential for conflict with the legal requirements or established policies of other Member countries and for giving rise to conflicting requirements being imposed on multinational enterprises." Finally, it calls upon members to "[g]ive prompt and full consideration to proposals which may be made . . . that would lessen or eliminate conflicts."[54]

This OECD consensus was unavoidably vague and ambiguous, in light of the disagreement among the participants on the content of and interrelationship between the relevant international law and the principle of moderation and restraint. However, by signing on to the OECD consensus, the United States Government politically committed itself to a substantial part of the extraterritoriality management approach adopted by the Department of State following the pipeline crisis.[55]

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52. A footnote to paragraph (ii) states that "[a]pplying the principle of comity, as it is understood in some Member countries, includes following an approach of this nature in exercising one's jurisdiction." *Id.* at 25.

53. *Id.* at 24.

54. *Id.* at 29-30. Pursuant to this language, Sweden and Denmark gave notice of their South Africa and Namibia investment laws. *See supra* note 2. Norway gave notice of proposed legislation introduced into the Storting in May 1986 [St. meld. nr. 26 (1985-86) and Ot.prp.n.r 34 (1985-86)] concerning oil exports to South Africa and the registration of Norwegian-owned ships sailing to South Africa. The notice was vague, however, as to what, if any, extraterritorial ramifications the law would have. The United States gave notice of: the Export Administration Act of 1985; the Senate and House versions of the Money Laundering Act of 1986 and the Act as adopted; the South Africa Sanctions adopted in 1986; and, the Syria sanctions of 1986. The United Kingdom gave notice of its Outer Space Act, which applies to activities of U.K. nationals without regard to their territorial location. Secondary offenses under the Act, such as conspiracy, were described as having extraterritorial implications in keeping with traditional U.K. approaches.

55. *See supra* p. 290 & note 38.

The issue remains on the active agenda of the OECD where some Member State delegations continue to promote theoretical discussions while the United States continues to emphasize practical approaches and review of actual experiences. In the present state of affairs, theoretical discussions drive U.S. representatives to espouse theories which not only encompass all the extraterritoriality in present U.S. law and practice but also keep open undefined future options. Focusing the international discussion on practical approaches and on actual cases is a more promising way of promoting jurisdictional restraint in fact and developing a body of practice which may someday support more widely accepted rules.

VII

COMITY AS A JURISDICTIONAL TOOL

Even as the State Department was promoting the process of interest balancing as international comity, its use as a judicial tool came under increasing criticism.[56] The Justice Department became particularly concerned that courts might apply an open-ended and undefined interest balancing test to limit the reach of U.S. statutes on purely political foreign relations grounds.

Accordingly, the Administration opposed the DeConcini Bill, a proposal to inject pure and undefined interest balancing into the jurisdictional test applied by some courts under the antitrust laws.[57] The Administration did, however, propose a counter to the DeConcini Bill which provided an exhaustive short list of jurisdictional factors for the court,[58] a list suitable to accommodate the needs of international comity, while not inviting the courts to engage in purely political interest balancing. Subsequently, the Administration reached a compromise with Senator DeConcini on a bill with a more extensive, non-exhaustive list of factors, but which expressly excluded

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56. *See, e.g.*, Judge Wilkey's opinion in Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984). The author does not believe that Judge Wilkey's dictum in *Laker* is properly read as rejecting all judicial interest balancing. The suit involved conduct located substantially within the United States, concerning which there was little doubt about the intended reach of U.S. laws. Defendant airline companies of foreign nations, rather than argue principles of jurisdiction and comity to the United States trial court, instead sought a British injunction. Defendants asked for a ruling that the U.S. trial judge, in refusing to stop ongoing U.S. court proceedings so as to allow the United Kingdom to issue an antisuit injunction, abused his discretion and violated principles of comity. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976), and Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), do not stand for the type of interest balancing which the *Laker* court declined.

57. *See A Bill to Amend the Sherman Act and the Clayton Act to Modify the Application of Such Acts to International Commerce: Hearings on S. 397 Before the Sen. Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (statements of Charles F. Rule, Acting Asst. Attorney General, and Abraham D. Sofaer, Legal Adviser to the Department of State).

58. Letter from the Attorney General and Secretary of Commerce to the Speaker of the House (Feb. 19, 1986) (transmitting proposals to amend the Sherman and Clayton Acts, including the Foreign Trade Antitrust Improvement Act of 1986).

considerations of foreign political relations.[59] This approach is not substantially different from the approach adopted by *Timberlane*[60] and *Mannington Mills*.[61]

The Administration view that courts should not be invited to engage in purely political balancing of the interests of the United States and foreign States is based on its view of constitutional separation of powers. However, separation of powers does not preclude judicial consideration of traditional factors such as those listed in the revised DeConcini bill. Nor does it preclude use of even openly political interest balancing as a basis for the legislative and executive branches to moderate the reach of U.S. law and enforcement. Thus, the Administration was able to maintain a clear position in the OECD that comity, including interest balancing, is appropriate and required in the political branches of government. "It may not always give a single unchallengeable answer to complex issues. But it is a valuable guide to the political solution of problems."[62]

VIII

THE RECENT PRACTICE

The United States has insisted with its OECD interlocutors that, if progress is to be made in managing the extraterritoriality problem, it is more likely to be made by working and focussing on practical problems rather than by intergovernmental debate over theory—at least until a substantial body of helpful practice has been accumulated. There are hopeful signs about the developing practice.

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59. S. 397, in the version reported by the Senate Judiciary Committee in the 99th Congress (to be reintroduced in the 100th Congress, 1st session), would, *inter alia*, add the following new § 21(a) to the Clayton Act of 1914 (15 U.S.C. § 12 (1982)):

> Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws which involves trade or commerce with a foreign nation, the court shall enter a judgment dismissing the action as to all parties whenever it determines that the exercise of jurisdiction would be unreasonable primarily on the basis of the following factors—
>
> (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
>
> (2) the nationality of the persons involved in or affected by the conduct;
>
> (3) the presence or absence of a purpose to affect United States consumers or competitors;
>
> (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad;
>
> (5) the existence of reasonable expectations that would be furthered or defeated by the action; and
>
> (6) the degree of conflict with foreign law or articulated foreign economic policies.
>
> Provided, that nothing in this section shall be construed to authorize the court to consider the effect on the foreign political relations of the United States of any action sought to be dismissed.

S. 397, 99th Cong., 2d Sess. (1986).

60. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614-15 (9th Cir. 1976).

61. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979).

62. Following an Approach of Moderation and Restraint (Sept. 11, 1986) (submission of the United States before the OECD Working Group on International Investment Policies) (on file with the Office of the Assistant Legal Adviser for Economic, Business and Communications).

In law enforcement, the Department of Justice moved in 1983 to centralize in Washington the procedure by which offshore subpoenas are authorized in criminal cases conducted by its geographically scattered U.S. Attorneys. This allows more careful consideration of short and long term law enforcement interests in light of all the relevant factors, including the available alternative law enforcement avenues. More importantly, the Justice Department, with the Department of State, is intensively negotiating modern mutual legal assistance treaties to provide practical cooperative alternatives to unilateral investigative and evidence gathering actions abroad.[63] The United States has also reached several new bilateral antitrust arrangements.[64]

The Securities Exchange Commission, in 1982, reached a provisional bilateral agreement with Switzerland for cooperation on insider trading investigations.[65] Subsequently it sought public comment on a unilateral U.S. response to foreign bank secrecy, a staff proposal popularly known as "waiver by conduct,"[66] which provides that persons trading on the U.S. market through foreign banks and agents would be deemed by U.S. statute to have waived their rights under foreign law to have those transactions remain secret. "Waiver by conduct" provoked adverse reaction internationally and has not been pursued. Had the proposal been adopted, it could have exacerbated jurisdictional conflict: The relevant foreign authorities would probably not have agreed that U.S. law effected a waiver, but U.S. courts might have been required to consider the secrecy right waived. Taking its cue from some of the foreign comments which invited cooperative approaches rather than such unilateral measures, the Commission embarked on a multilateral study of the securities enforcement issues in the OECD, negotiated an endorsement of multilateral information exchange agreements in the International

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63. Currently, the United States has mutual legal assistance treaties ("MLAT") in force with: Italy, Nov. 13, 1982 (treaty entered into force Nov. 13, 1985), *reprinted in* S. DOC. No. 25, 98th Cong., 1st Sess. (1984); the Netherlands, June 12, 1981, T.I.A.S. No. 10734 (entered into force Sept. 15, 1983); Switzerland, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302 (entered into force Jan. 23, 1977); Turkey, June 7, 1979, 32 U.S.T. 3111, T.I.A.S. No. 9891 (entered into force Jan. 1, 1981). The United States has ratified an MLAT with: Colombia, Jan. 4, 1982, *reprinted in* S. EXEC. REP. No. 35, S. TREATY DOC. No. 11, 97th Cong., 1st Sess. (1981) (not yet in force); Morocco, July 13, 1984, *reprinted in* S. EXEC. REP. No. 35, S. TREATY DOC. No. 24, 98th Cong., 2d Sess (1984) (not yet in force). The United States has signed but not yet ratified MLAT's with: United Kingdom regarding the Cayman Islands, July 26, 1984; Canada, Mar. 18, 1985, *reprinted in* 24 INT'L LEGAL MATERIALS 1092 (1985); and Thailand, Mar. 19, 1986.

64. The United States is party to the following bilateral antitrust agreements: Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, United States-Canada *reprinted in* 23 INT'L LEGAL MATERIALS 275 (1984); Agreement Relating to Cooperation in Antitrust Matter, June 29, 1982, United States-Australia, T.I.A.S. No. 10365; Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291.

65. On Aug. 31, 1982, the United States and Switzerland signed a Memorandum of Understanding to establish mutually acceptable means for dealing with the problems of inside trading. *See* Greene, *U.S., Switzerland Agree to Prosecute Insider Traders*, Legal Times, Oct. 4, 1982, at 12.

66. Request for comments concerning a concept to improve the commission's ability to investigate and prosecute persons who purchase or sell securities in the U.S. markets from other countries, Exchange Act Release No. 21,186 [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,648 (July 30, 1984).

Organization of Securities Commissions,[67] and began a bilateral securities law enforcement agreement program.[68] The cooperative approach paid large dividends when an ad hoc cooperative arrangement with the Bahamas was instrumental in the *Levine* insider trading case and led to the *Boesky* case.

Despite these successes, differences of discovery and investigative philosophy still raise difficulties for law enforcement. Agreed and practical channels of evidence gathering and other cooperation remain unavailable for much important law enforcement activity, particularly for conduct which is not criminal in the foreign state. There is concern abroad that the United States is too hesitant to commit fully to trying agreed channels before resorting to unilateral methods. Concern has been expressed about legislation providing the Federal Trade Commission and the Commodities Futures Trading Commission with authority to serve subpoenas overseas,[69] an authority not widely held within the United States Government and almost never used in light of the sensitivity of foreign judicial sovereignty.

In the field of economic sanctions, the recent Nicaragua, Libya, and Iran programs are precedents noteworthy for jurisdictional restraint. While the executive orders and regulations are subject to change, the Nicaragua sanctions are limited essentially to direct trade between the territory of the United States and Nicaragua.[70] The Libya sanctions were also originally limited to direct trade and have since been only slightly extended.[71] For the purposes of the Libya sanctions, U.S. persons have not at present been defined to include foreign subsidiaries of companies incorporated in the United States. The Libyan asset freeze order, while applying to foreign

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67. Passed by the Organization on Nov. 7, 1986.

68. In addition to including securities provisions in the Cayman Islands and Canadian MLAT's, *supra* note 63, the SEC has entered into bilateral cooperative arrangements with: United Kingdom, Sept. 23, 1986; Japan, May 23, 1986; Ontario, Sept. 20, 1985; Quebec, Nov. 1, 1984. Other arrangements are pending (all securities cooperation arrangements are on file with the Division of Enforcement, Securities Exchange Commission).

69. The government of the United Kingdom protested the new authorization for the Federal Trade Commission to serve civil investigative demands outside the United States, contained in the Federal Trade Commission Act Amendments of 1985, S. 1078 (99th Congress). The United Kingdom and Switzerland have each protested somewhat similar provisions for service of administrative subpoenas by the Commodity Futures Trading Commission, S. 2045 and H.R. 4613 (99th Cong.).

70. Exec. Order No. 12,513, 3 C.F.R. § 342 (1985); Nicaraguan Trade Control Regulations, 31 C.F.R. § 540.204-05 (1985).

71. Exec. Order No. 12,543, 3 C.F.R. § 181 (1986). As originally issued, Treasury regulations implementing the trade ban did not reach exports to third countries for re-export to Libya where the goods were incorporated into manufactured products, substantially transformed, or come to rest in the third country for purposes other than re-shipment to Libya. This was later modified slightly to prohibit exports of goods to third countries where the exporter knows or has reason to know that the exported goods are intended specifically for substantial transformation or incorporation abroad into manufactured products to be used in the Libyan petroleum or petrochemical industry. A similar prohibition was added for exports of technical data. *See* 31 C.F.R. § 550.409 (1986). Unlike the Commerce Department, export controls previously adopted regarding Libya, which remain in force, see 15 C.F.R. § 385.7 (1985), the new provisions apply only to the U.S. exporter, not the foreign re-exporter.

branches of U.S. banks, is limited abroad to dollar denominated deposits[72] and, due to widely shared opposition to Libyan sponsorship of terrorism, has provoked no diplomatic protest from such jurisdictionally neuralgic nations as Great Britain.[73] The British government instead considered it a matter for the civil courts which, in September, 1987, awarded the Libyan Arab Foreign Bank a judgment against Bankers Trust in London for payment of its dollar accounts.[74] The Treasury Department subsequently licensed payment of that judgment without first requiring Bankers Trust to carry through an appeal.[75] The ban on Iranian imports adopted in 1987 does not reach Iranian crude oil refined in third countries or other Iranian products substantially transformed or incorporated into manufactured products in third countries.[76]

As noted above, the desire to avoid the problems of extraterritoriality has not been sufficient to modify the traditional re-export control pattern used under the Export Administration Act for South Africa[77] and Syria[78] sanctions. In the case of South Africa, Congress codified computer controls with re-export reach. However, in implementing the Congressional mandate for controls on the export of U.S. oil to South Africa, the Department of Commerce has avoided reaching re-exports of that oil from outside the United States by noncitizens, including foreign subsidiaries of U.S. companies.[79]

In the operation of the export controls more generally, the United States is working with a number of countries to develop strategic commodity export control systems parallel to those of the sixteen nations belonging to the Coordinating Committee on strategic exports (COCOM).[80] Such measures reduce the need for unilateral U.S. action in conflict with the law and policy of those countries. The United States has taken diplomatic steps to avoid

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72. Exec. Order No. 12,544, 3 C.F.R. § 183 (1986); Libyan Sanctions Regulations, 31 C.F.R. § 550.516 (1986).

73. Sir Michael Havers, British Attorney-General, in a speech noted with appreciation the limitation of the United States freeze overseas to dollar accounts in branches of United States banks, but was careful not to endorse the freeze as fully meeting United Kingdom extraterritoriality concerns. He also stated: "We understand and sympathize with the reasons behind the United States' blocking of Libyan assets and, as a matter of public policy, we will not object to this particular measure and will not undermine it." M. Havers, Address to the ABA Section of International Law and Practice (June 30, 1986).

74. Libyan Arab Foreign Bank v. Bankers Trust, High Ct., London, Sept. 2, 1987.

75. Marcan & Gutfeld, *U.S. Allows Bankers Trust to Repay Libya $292 Million*, Wall St. J., Oct. 13, 1987, at 17, col. 1.

76. Exec. Order No. 12,613, 52 Fed. Reg. 41,940 (1987); 31 C.F.R. §§ 560.201(b), .407(a) (1987).

77. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 304, 100 Stat. 1086, 1099 (codified at 22 U.S.C.A. § 5054 (West Supp. 1985)).

78. *See, e.g.*, 15 C.F.R. § 385.4(d) (1987).

79. 52 Fed. Reg. 2,105 (1987).

80. The Administration's efforts in this regard follow express Congressional policy. Section 3(3) of the Export Administration Act of 1979, as amended, states that

> [i]t is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments or common strategic objectives.

50 U.S.C. § 2402(3) (Supp. III 1985).

conflict with other governments over the overseas audits required by the new export "distribution license" program.[81] The Commerce Department recently took a small step toward meeting the basic foreign government concern that manufacture or substantial transformation in their countries is essentially their economic activity and not subject to continuing U.S. controls because of U.S.-origin components. It established a *de minimis* threshold (generally twenty-five percent of content; for some countries ten percent and $10,000) below which U.S.-origin content in foreign products would not be subject to continued U.S. export controls.[82] While this change should reduce the range of conflicts, it is probably not enough to end the damage to U.S. companies' supplier relationships with foreign manufacturers. A test of above fifty percent by value of the finished product, while not meeting all the theoretical objections to U.S. controls, might meet this need and avoid further damaging diplomatic conflict.

The United States has also taken some novel steps recently to limit and shape the extraterritorial reach of U.S. legislation. The space launch legislation was carefully shaped both to meet our potential obligations for satellites launched by our citizens from abroad and to respect the jurisdictional prerogatives of the launching state.[83] In the more difficult area of money laundering, the executive branch introduced legislation which had substantially less potential for extraterritoriality conflict than money laundering legislation introduced by others.[84] The bill which ultimately passed is fairly limited in its reach, and the Administration has moved to meet some of the foreign concerns about its implementation.[85] Regarding antitrust, the Administration has, as noted above, supported reform on the foreign commerce jurisdiction issue, calling not for naked interest balancing but for weighing a number of factors in determining when U.S. antitrust law will apply to a situation with international aspects.[86] The Administration has also proposed to reform the internationally troubling antitrust remedies[87] and has interceded amicus curiae to urge Supreme Court approval of the foreign sovereign compulsion defense.[88] The United States has also moved by

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81. Companies holding "distribution licenses" avoid the burden of obtaining transaction-by-transaction export licenses. However, to remain eligible, both distribution license holders and their foreign consignees must establish internal systems, which are subject to audit, to protect against diversions. 15 C.F.R. § 373.3 (1986). The prospect of U.S. officials auditing firms located abroad had originally produced criticism from foreign governments. *See, e.g.*, Diplomatic Note, Delegation of the Commission of the European Communities (Nov. 7, 1985) (on file with the Office of the Legal Adviser, State Dep't).

82. 15 C.F.R. § 376.12 (1986).

83. The Commercial Space Launch Act of 1984, 49 U.S.C.A. § 2605(a)(3)(B) (West Supp. 1987).

84. H.R. 2785, 99th Cong., 1st Sess. (1985).

85. *See supra* note 26.

86. *See supra* notes 58, 59.

87. Letter, *supra* note 58.

88. Brief for the United States as amicus curiae supporting petitioners, Matsushita Elect. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (No. 83-2004). The Supreme Court, however, held for petitioners without reaching the issue. 475 U.S. 574 (1986).

"jawboning," participating in several court cases, and legislating to bring a "water's edge" solution to the unitary tax problem.[89]

IX

CONCLUSION: COMITY, EXTRATERRITORIALITY, AND THE EVER-VIGILANT

The basic thesis of the United States in the debate over the management of the extraterritoriality problem can be simply summarized. Important national interests increasingly require the exercise of jurisdiction over conduct not neatly contained within one nation's borders. Such exercise of jurisdiction is not barred by current rules of international law, under which there is a substantial area of legitimate concurrent jurisdiction and potential for conflicting assertions of law and policy. The effort to eliminate extraterritoriality problems by asserting specific binding jurisdictional legal rules may be counterproductive. Automatic territorial priority is not an adequate solution. While territory is jurisdictionally important, the basic requirements and vital interests of nations do not always balance in accordance with the territorial connections. Comity is the conceptual tool for managing potential conflict in the area where law does not provide an exclusive jurisdiction. Comity in this context involves the exercise of moderation and restraint by all parties to a potential conflict. To make it work, there must be a responsive and cooperative international approach, such as law enforcement assistance arrangements, accommodating the basic national requirements of the parties.

There is reason for cautious optimism. The current level of conscious U.S. government dedication to managing and avoiding conflict over extraterritoriality is relatively high. In this atmosphere, practical cooperative arrangements are progressively reducing the potential for law enforcement conflict. U.S. and foreign counterpart agencies are becoming increasingly aware of what they need to do to work together successfully. Policy makers, at a high level, are factoring extraterritoriality concerns into the early stages of decisionmaking on foreign policy controls and sanctions. The staff level of many agencies has become familiar with the concerns and the management policy.

Substantial prodding from concerned allies, trading partners, the American bar, and the business community has helped develop the

89. In 1986, the Administration recommended legislation that would limit the use of worldwide unitary taxation by the states. *See* S. 1974, 99th Cong., 1st Sess. (1986). Additionally, the United States has appeared as amicus curiae in Alcan Aluminum v. Franchise Tax Bd., No. 84-C-6932 (N.D. Ill. 1984), and Barclay's Bank v. Franchise Tax Bd., No. 325061 (Super. Ct. Sacramento City, Cal. 1984) arguing that worldwide unitary tax is unconstitutional. On Jan. 30, 1986, Secretary Shultz sent a letter to the governors of the states still using the method. A California law granting companies an option out of the worldwide unitary tax method, signed by Governor Deukmajian on Sept. 5, 1986, has substantially reduced the problem, although California's imposition of a substantial fee for the option of avoiding the unitary tax continues to raise questions. Economic Development Act, ch. 660, art. 12, 1986 Cal. Legis. Serv. 381, 391-404 (West) (codified at REV. & TAX CODE § 16429.30).

government's current awareness of the importance of international comity and jurisdictional restraint for a workable, cooperative international system. There is, however, only a small political constituency in the United States advocating something so esoteric as this. The pressures on a government agency to subordinate comity to other interests are enormous. Crisis political pressures may also short circuit the most careful extraterritoriality management strategies. Furthermore, progress depends to a large degree upon advance consultation by other U.S. agencies with the State Department and, in some cases, foreign governments, which runs counter to deeply ingrained bureaucratic tendencies.

Accordingly, while recent experience shows some progress, those concerned with extraterritoriality must remain vigilant. There are sure to be skirmishes and battles ahead.