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# EXTRATERRITORIALITY IN THE 1990s

*Working Paper Number 15*
*June 1993*

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# EXTRATERRITORIALITY IN THE 1990s



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*Working Paper Number 15*
*June 1993*

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# INTRODUCTION

The post-war growth in the international movement of goods, services and capital has posed unprecedented regulatory challenges to states. In the past four decades, states have asserted jurisdiction over activity that occurs outside their territory but effects their economy and affairs. These extraterritorial assertions of jurisdiction, which arise out of both public and private enforcement actions based on domestic public law, have created "conflicts of jurisdiction" or "conflicting requirements".[1] More recently, resident and non-resident private plaintiffs have made expansive jurisdictional claims in legal actions against resident multinational corporations. This second source of jurisdictional conflicts will likely be more prevalent in the future as the number of transnational litigations increases.

In addition to incidental political repercussions, jurisdictional conflicts have had adverse effects on the international business environment.[2] Responding to these conflicts at the multilateral level, member countries of the Organisation for Economic Co-operation and Development (OECD) sought cooperative solutions by drafting the 1976 Declaration on International Investment and Multinational Enterprises. The Declaration, together with the decisions and guidelines related to it, provides a framework for addressing conflicting requirements. States have also signed bilateral and multilateral agreements and understandings that address specific regulatory areas (such as anti-trust law and securities regulation). Despite these efforts, many issues remain unresolved.

The international community's treatment of jurisdictional conflicts continues to evolve. Some governments still favour narrow, territorially based theories of jurisdiction. Such theories hold that states are the exclusive law-makers and regulators over persons and activities situated within their territory.[3] Others, particularly the U.S. government, consider that adherence to strict territoriality ignores the realities of international commerce.[4]

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[1] The Organization for Economic Co-operation and Development (OECD) has used the term "conflicting requirements" to describe conflicts of jurisdiction — where a country's legislative or legal requirements with extraterritorial reach conflict with the legislation or policies in other countries: OECD, *International Investment and Multinational Enterprises: 1991 Review of the 1976 Declaration and Decisions* (Paris: OECD, 1991), at p. 57.

[2] The negative effects of jurisdictional conflicts flowing from traditional sources are examined in detail by the International Chamber of Commerce in: D. Lange and G. Born (editors), *The Extraterritorial Application of National Laws* (Paris: ICC Publishing S.A., 1987). With respect to conflicts arising from transnational litigation, the degree of uncertainty in the international business environment will increase if an investment or business venture is undertaken with the understanding that certain domestic law will govern and it is later found out that legal principles from another jurisdiction can be applied.

[3] As F.A. Mann noted, "[s]ince in the present world sovereignty is undoubtedly territorial in character, in assessing the extent of jurisdiction the starting point must necessarily be its territoriality such as it was developed over the centuries... as a rule jurisdiction extends (and is limited) to everybody and everything within the sovereign's territory and to its nationals wherever they may be.": Mann, "The Doctrine of International Jurisdiction Revisited After 20 Years" (1984), 186 Recueil des Cours 13, at p. 20.

[4] See discussion in P.M. Roth, "Reasonable Extraterritoriality: Correcting the Balance of Interests" (1992), 41 Int'l & Comp. L.Q. 245.

Although there are opposing views on many extraterritoriality issues, there is evidence of some convergence. The highly charged disputes of the last few decades have prompted asserting states to, at the very least, consider the extraterritorial implications of their actions before taking them. Respondent states are also recognizing the legitimacy of expansive jurisdictional assertions in certain instances. With respect to transnational litigation, both asserting and respondent states have recognized the burdens imposed by the "forum shopping" of plaintiffs. There remains, however, no general consensus on the appropriate legal basis for jurisdictional claims. Nor is there an agreed procedure for dealing with the conflicts that may arise when there is more than one claim to jurisdiction over a matter.

The recent *amicus curiae* brief submitted by the Government of Canada in *Hartford Firm Insurance Co. et al. v. State of California et al.*[5] sets out a number of propositions which are relevant to a contemporary analysis of extraterritoriality issues. In that brief, Canada states the following:

> [Its] concern does not lie with the tradition in U.S. anti-trust enforcement whereby U.S. jurisdiction reaches some persons and conduct that are extraterritorial to the United States. Where Canadian law and policy applied in Canada are compatible with U.S. extraterritorial enforcement, no conflict need arise. Both Canada and the United States are committed to a policy of generally promoting competition and consumer welfare.
>
> In view of the extensive links between our two countries, the Government of Canada has an interest in the application of the laws of the United States in a manner consistent with relevant principles of international law. Canada, like the United States, has a long-standing interest in the development and application of international law. The Government of Canada may be able to assist this Court, as it reviews the decisions below, in its consideration of the relevance of customary international law to what appears to Canada, respectfully, as a clear embodiment of these principles in U.S. law.

At least three propositions underlie this statement. The first proposition is that extraterritorial regulation is necessary to effectively regulate business activities in an increasingly integrated world economy. As observed by Professor Roth, it is becoming increasingly unrealistic to attempt to control international transactions within regulatory frameworks that are confined to national territories.[6] Examples of domestic law and regulation that may require extraterritorial scope in such an environment are those concerning antitrust, mergers and acquisitions, securities, and procedures for the production and discovery of documents. Policy makers in the 1990s will increasingly recognize that some extraterritorial scope is essential to the effective regulation of international commerce. Thus, the first task for policy makers will not be to decide whether such scope should be permitted

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[5] A decision of the U.S. Court of Appeals for the Ninth Circuit on appeal to the Supreme Court of the United States, see *Hartford Fire Insurance Co. et al.; Merrett Underwriting Agency Management Ltd., et al. v. State of California*, Nos. 91-1111 and 91-1128 (U.S. Supreme Court, 1991).

[6] *Supra*, note 4, at p. 267.

but rather how to determine the limits on such powers and how to resolve conflicting requirements disputes more effectively.

The second proposition is that where national laws and policies are compatible, conflicts need not arise from the exercise of extraterritorial jurisdiction. The most effective means of addressing conflicts of jurisdiction is through harmonization or mutual recognition of national laws. Although complete harmonization is unattainable, the proliferation of bilateral agreements concerning specific regulatory areas (e.g. securities regulation) shows that a considerable measure of harmonization or mutual recognition is possible. Thus, the second task for policy makers must be to identify further areas for collaboration.

The third proposition is that where there is a conflict in laws or policy, the extraterritorial assertion of jurisdiction should take place in a manner consistent with international principles. The conflicting theories of jurisdiction espoused by different states (and even by different courts within a single state) make agreement on these principles the most difficult task facing policy makers. Given the many different circumstances in which conflicts arise, it is unclear whether it is even possible to isolate general, widely accepted "governing principles". Thus, the third task for policy makers will be to strive to agree on such principles and the circumstances in which they will apply. At the very least, this will assist in harmonization and mutual recognition initiatives.

Although not contained in Canada's *amicus curiae* statement, there is a fourth proposition related to minimizing jurisdictional conflicts. As evidenced by the OECD framework and other instruments that address extraterritoriality issues, it may be possible to reduce conflict by addressing it procedurally when it cannot be addressed substantively. Thus, the fourth task for policy makers will be to refine existing procedural mechanisms and develop new ones.

This paper will attempt to identify the principal areas that will permit further evolution in the treatment of jurisdictional conflicts over the next decade. This will require an examination of the instruments and procedures used to manage extraterritorial assertions and an assessment of the prospects for improving their management. As part of this examination, we will review the primary situations in which extraterritorial assertions have led to jurisdictional conflicts, the grounds advanced to justify such assertions, the responses of the respondent states, and the actions taken in the ensuing disputes. This paper is not meant to be a comprehensive study of all instances in which extraterritorial assertions of jurisdiction have arisen.[7] Its purpose is to illustrate the evolution of the treatment of conflicts of jurisdiction and assess steps that can be taken to address such conflicts in the future.

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[7] For detailed studies of extraterritorial assertions of jurisdiction see: Lange and Born, *supra*, note 2; A.V. Lowe, *Extraterritorial Jurisdiction* (Cambridge: Grotius Publications Ltd., 1988).

## EXTRATERRITORIAL ASSERTIONS AND CONFLICTS

Extraterritorial jurisdictional claims arise (i) when legislative and executive branches of government seek to regulate activities occurring partly in (or, in rare cases, completely outside) the state's territory on the grounds that such activities may affect domestic policy or persons or activities situated in that state; and (ii) when, as a result of international commercial activity, the prescriptive and adjudicative jurisdiction of a national court is invoked. In the latter case, the judicial process can be invoked either publicly by the government or privately by residents or non-residents of the forum state.[8]

Asserting states have used a range of theories or principles to support extraterritorial claims. The "nationality" link has been applied in many instances. In the commercial arena, this theory can take many forms, including the parent-subsidiary corporate link,[9] the parent-branch corporate affiliation,[10] the shareholder connection[11] and even the nationality of technology.[12] The parent-subsidiary corporate link has also been premised on the principle of "territoriality".[13] The most expansive and controversial theory, the "effects" doctrine, was formulated in the United States and has been employed by the European Commission to justify extraterritorial claims.[14]

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[8] Extraterritoriality issues often arise in purely private transactional disputes. Just as increased international commerce generates governmental regulatory responses, it is inevitable that disputes regarding the situs and procedures involved in transnational litigation frequently arise. The perceived generosity of juries and the availability of certain remedies under U.S. law have attracted non-resident plaintiffs to commence suits in the United States and thereby avoid the restrictions of their own national courts and laws in suits against multinationals. Plaintiffs, particularly in tort actions arising out of product liability for internationally distributed goods and in competition law actions, will naturally select the most advantageous judicial forum. This can create disputes that engage the courts and occasionally governments of different nations.

[9] This has also been referred to as the "enterprise theory". Jurisdiction is claimed over a foreign subsidiary by the state in which the parent corporation is situated. The essence of the issue is whether the corporate veil should be disregarded to reveal the underlying corporate link: see *Fruehauf v. Massardy* (1966), 5 I.L.M. 476 (Cour d'appel, Paris); *Imperial Chemical Ltd. v. EEC Commission*, [1972] E.C.R. 619; U.S. Cuban Assets Control Regulations, *infra*, note 58.

[10] Foreign branches are often viewed as analogous to foreign nationals: see *Libyan Arab Foreign Bank v. Bankers Trust Co.*, [1986] 1 Lloyd's Rep. 259; *United States v. Bank of Nova Scotia* 740 F.2d 817 (1984, 11th Cir. C.A.).

[11] Although recognized in *Barcelona Traction*, [1970] I.C.J. Rep. 3, this basis for claiming jurisdiction has not been generally accepted: *Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V.* (1983), 22 I.L.M. 166; *Restatement (Third) of the Foreign Relations Law of the United States*, at ¶ 414(2).

[12] This was viewed as an insufficient basis for the U.S. government to assert jurisdiction: *Compagnie Européenne*, *supra*, note 11.

[13] Referred to as the economic unit theory. According to this theory, a foreign parent corporation is treated as if it were located within a state's borders where the corporation exercises clear control over a subsidiary situated in that claimant state. This theory, which is the inverse of the enterprise theory, is based on the territoriality principle, whereby a state is authorized to regulate persons and activities within its borders.

[14] See discussion *infra*, notes 23 through 35.

Although certain areas of law (antitrust, banking, securities) have been the subject of extraterritorial assertions of jurisdiction more often than others, any activity that crosses national boundaries and is subject to regulation can be susceptible to such assertions.[15] Jurisdictional disputes will be examined in the following areas:

1) the enforcement of antitrust law over international commercial activities occurring partly or wholly outside the state asserting jurisdiction;

2) judicial orders compelling the production and discovery of documents for litigation;

3) securities regulation;

4) the enforcement of laws concerned with certain foreign policy objectives (e.g., export controls and asset freezes); and

5) private transnational litigation (in which plaintiffs seek to take advantage of stronger legal remedies and potentially higher damages awards than are available in other national legal systems that have a connection with the action).

Although extraterritoriality issues have also arisen in the areas of taxation of multinational corporations and bankruptcy regulation,[16] this paper will focus on conflicts arising in the five areas enumerated above.

## The Enforcement of Antitrust Law over International Commercial Activities Occurring Partly or Wholly Outside of the State Asserting Jurisdiction

Conflicting assertions of jurisdiction have occurred most frequently in the enforcement of national competition laws. This is attributable primarily to diverging national policies brought into conflict by the application of one state's law to activities occurring in another.

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[15] As observed by Professor Roth, the pressures for more expansive regulation will increase beyond the traditional areas of antitrust, the discovery of documents, export controls, and securities regulation: Roth, *supra*, note 4, at p. 266.

[16] Lange and Born, *supra*, note 2, discuss the extraterritorial aspects of taxation at pp. 29-31 of their study. They identify double taxation and taxation based on unitary taxation principles as the principal extraterritoriality issues. Although there are various bilateral agreements and informal understandings to address these issues, Lange and Born are of the view these solutions have not eliminated all the problems associated with extraterritoriality in this area.

Where a bankrupt's assets are in more than one jurisdiction, bankruptcy regulation may also have extraterritorial implications. In his article "Canadian/United States Bankruptcy — Questions of Jurisdiction" (February 1985), Comm. L. J. 44, at p. 46, R.F. Fellrath observes that international bankruptcy may subject property within domestic jurisdiction to foreign law. The extraterritorial implications of bankruptcy are dealt with in part by domestic legislation that allows foreign petitioners to file domestically (for a discussion of the U.S. law in this regard see B. Weintraub and A. Resnick, *Bankruptcy Law Manual*, 3rd ed. (Boston: Warren, Gorham & Lamont, 1992), at pp. 2-23 to 2-27) and international agreements (e.g., *The European Convention on Certain International Aspects of Bankruptcy*, June 5, 1990; e.g., reprinted in (1991) 30 I.L.M. 165).

The United States has tended to view the preservation of competition as an end in itself,[17] while other states have considered it as one of a number of policy objectives.[18] This difference in national policies has occasionally led to acrimonious conflicts. Even where the policies underlying the laws have been similar, differences in the detail have led to conflicts.[19]

In administrative,[20] criminal,[21] and civil[22] cases, the United States has applied its antitrust laws to activities occurring substantially outside U.S. territory. The rationale for such assertions has evolved over time. The effects test enunciated in *Alcoa*,[23] which supported jurisdiction even where all activity occurred outside the United States if there was

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[17] As stated by the court in *Northern Pacific Ry. v. United States* 356 U.S. 1 (1958), at 4: the *Sherman Act*, which forbids restraints of trade, was designed to be "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."

[18] To quote Kindred (editor) in *International Law*, 4th ed. (Canada: Emond Montgomery, 1987) at p. 517:

> Implicit in such legislation [i.e., antitrust] are states' concepts concerning the relative advantages or disadvantages of minimizing competition, decentralizing economic decision-making, fixing prices, allocating natural, human and other resources to achieve certain national goals, and other economic policies which are designed to respond to that state's levels of economic development. Such policies are a reflection of basic political notions which undergird a state's economic structure. The application of such policies to activities carried on in other states risks interfering with their pursuit of similar goals within their own territory.

[19] The European Commission's action to block a merger between a Canadian commuter aircraft company and a French-Italian consortium is one example of the detail of merger laws resulting in conflict. In that case, Canadian law would have allowed the merger on the grounds that the Canadian company (de Havilland) faced a real risk of going out of business if the merger did not proceed. The merger guidelines of the European Community (EC) did not provide the same "failing firm" consideration for financially troubled firms, and the merger was disallowed: "Competing views of competition", *Globe & Mail*, October 3, 1991, at p. B1.

[20] Attempts to assert antitrust law in an extraterritorial manner do not necessarily involve formal judicial proceedings. For example, Canadian federal government approval for the takeover of a Canadian company (Connaught Laboratories Ltd.) by a French company (Institut Merieux S.A.) was complicated by concerns of U.S. antitrust authorities that the merged company would have too much market power in parts of the U.S. vaccine market: see "Competing views of competition", *ibid.* Although U.S. authorities did not institute formal judicial proceedings, they did exert significant pressure.

[21] For example, recent antitrust action brought against a number of English companies alleged that they agreed, in England, to restrict the terms on which they would accept certain types of American reinsurance business on the London market. In *re Insurance Antitrust Litigation* 723 F. Supp. 464 (N.D. Ca., 1989), 938 F.2d 919 (9th Cir. 1991), leave to appeal to U.S. Supreme Court is currently being sought.

There are other widely cited cases: *United States v. General Electric Co.*, [1962] Trade Cas. 70,342 (Canadian radio patent pool); *United States v. Imperial Chem. Indus. Ltd.* 105 F.Supp. 215 (1952) (synthetics fibres industry); *re Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Co.* 72 F.Supp. 1013 (1947) (papermaking industry); *United States v. Watchmakers of Switzerland Information Centres* (1955), 133 F.Supp 40, [1963] Trade Cas. 70,600, [1965] Trade Cas. 71,352 (Swiss watchmaking industry).

[22] The United States alone allows extensive private enforcement of its antitrust laws and permits the recovery of treble damages for violations of its antitrust laws: Lange and Born, *supra*, note 2, at p. 8. For example, the American plaintiff, Westinghouse, initiated private proceedings against uranium producers in several countries that were allegedly participating in an international cartel in fixing the world price of uranium: *re Uranium Antitrust Litigation Westinghouse Elec. Corp. v. Rio Algom Ltd.* 617 F.2d 1248 (7th Cir. 1980). In *Laker Airways Ltd. v. Sabena, Belgium World Airlines* 731 F.2d 909 (D.C. Cir. 1984) an American air carrier, initiated a private antitrust action.

[23] The effects doctrine was first enunciated in *United States v. Aluminum Company of America* 148 F.2d 416 (1945), where Judge Learned Hand extended the applicability of the *Sherman Act* to agreements made abroad that were intended to and did in fact restrain trade or commerce within the United States, even if the parties in question had no other connection with the United States.

an effect on U.S. trade and commerce, has been tempered by "interest balancing"[24] and by the "rule of reason" tests in *Timberlane*[25] and in the *Restatement (Third) of the Foreign Relations Law of the United States* (the "Third Restatement").[26] The most recent tests reflect a greater concern for the assertion's impact on respondent states.

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[24] The perceived abuse of the effects test was addressed in s. 18 of the Restatement (Second) of the *Foreign Relations Law of the United States*, which limited the jurisdiction of U.S. courts to conduct causing an effect within the United States if:

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effects are constituent elements of an activity to which the rule applies;
(ii) the effect within the territory is substantial;
(iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and
(iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

S.W. Waller, "Bringing Meaning to Interest Balancing in Transnational Litigation", (1991), 23 Vand. J. Transnat'l L. 925, at p. 930.

[25] See *Timberlane Lumber Co. v. Bank of America* 549 F.2d 597 (C.A., 9th Cir. 1976), where the court stated, in part:

> The effects test by itself is incomplete because it fails to consider other nations' interests.... A tripartite analysis seems to be indicated. As acknowledged above, the anti-trust laws require in the first instance that there be some effect — actual or intended — on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the anti-trust laws.... Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States — including the magnitude of the effect on American foreign commerce — are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.

Extract in Kindred, *supra*, note 18, at p. 520.

[26] Paragraph 403 of the Third Restatement outlines limitations on jurisdiction to prescribe laws:

(1) Although one of the bases for jurisdiction under section 402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:
(a) the extent to which the activity (i) takes place within the regulating state or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
(b) the links, such as nationality, residence, or economic activity, (i) between the regulating state and the persons principally responsible for the activity to be regulated or (ii) between that state and those whom the law or regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation in question;
(e) the importance of regulation to the international political, legal, or economic system;
(f) the extent to which such regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by other states.

(3) An exercise of jurisdiction that is not unreasonable according to the criteria indicated in subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state that is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in subsection (2).

The United States is not alone in making expansive antitrust jurisdictional claims.[27] The European Commission, under Article 85 of the Treaty of Rome,[28] has also exercised jurisdiction over conduct occurring outside the European Community (EC).[29] In *Imperial Chemical Industries Ltd. v. Commission of the E.E.C.*,[30] the Commission fined a British company for participating in an international cartel. At that time, the United Kingdom was not a member of the EC, and the Commission justified its decision on the effects doctrine[31] and the unity theory of corporate ownership.[32] The European Court of Justice upheld the Commission, using the unity theory without finding it necessary to address the effects doctrine. Similarly, in the *Wood Pulp*[33] case, which dealt with an non-EC cartel affecting EC consumption, the Court decided that the implementation of the concerted practice took place within the Community and avoided ruling on the validity of the effects doctrine.[34] Although the status of the effects test in EC law remains unsettled, the thrust of contemporary European practice is toward control over conduct of foreign companies outside the EC that has a substantial effect upon it.[35]

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[27] Convergence between the United States and the EC in the application of their competition laws is evidenced in the cooperation agreement signed by both parties on September 23, 1992. *The E.C.-U.S. Agreement Regarding the Application of Their Competition Laws* (1991), 30 I.L.M. 1491, is designed to facilitate cooperative, and in some cases coordinated, enforcement by U.S. and EC antitrust authorities. For a further discussion of the issue of convergence between U.S. and EC antitrust law see J. Friedberg, "The Convergence of Law in an Area of Political Integration: The *Wood Pulp* Case and the *Alcoa* Effects Doctrine" (1991), 52 U. Pitt. L. Rev. 289.

[28] Paragraph (1) of Article 85 prohibits "...all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market..."

[29] The Federal Republic of Germany (as it then was) has also actively applied its competition laws extraterritorially: Lange and Born, *supra*, note 2, at p. 4; Roth, *supra*, note 4, at pp. 264—5.

[30] [1972] E.C.R. 619 (Euro. Ct. of Justice).

[31] The Commission stated, in part:

> ...[T]his decision is applicable to all the undertakings which have participated in the concerted practises, whether established within or outside the common market; and under Article 85(1) of the EEC Treaty all agreements between undertakings, decisions of associations of undertakings and concerted practises which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, are incompatible with the common market and are prohibited; and the competition rules in the Treaty are, accordingly, applicable to all restrictions on competition which produce within the common market the effects mentioned in Article 85(1); ...it is therefore unnecessary to determine whether the undertakings which have caused the restrictions on competition have their seat (siege) within or outside the Community....
>
> [translated; see Lowe *Extraterritorial Jurisdiction* (Cambridge: Grotius, 1983) at p. 144]

[32] The unity theory equates a foreign parent company and its domestic subsidiary as a single enterprise, subject to the territorial jurisdiction of the state in which the subsidiary is located, where the parent controls the activities of the subsidiary. The Commission advocated the unity theory in certain circumstances: where the parent owned the majority of the subsidiary's capital, or where the parent could and did decisively influence the impugned policies of the subsidiary.

[33] (1985) O.J. L85/1, [1985] 3 C.M.L.R. 474.

[34] Roth, *supra*, note 4, at p. 262.

[35] *Ibid.*

U.S. policy and EC policy are also converging in the area of mergers and acquisitions. Recent EC regulations apply to mergers between non-EC companies that make a sufficient level of sales to EC customers.[36] The EC has applied these regulations to mergers taking place outside the Community, including mergers occurring in Canada.[37]

**Judicial Orders Compelling the Production and Discovery of Documents for Litigation**

Courts increasingly have faced the need to obtain evidence situated outside their territory for use in proceedings before them. In many instances, evidence situated abroad is routinely obtained and used without foreign objections. Conflict can arise when national policies diverge, for example, when the underlying action in which the demand for evidence has arisen is not recognized by (or the impugned activity is lawful in) the state in which the documents are situated, where the production of documents results in a violation of that state's laws, or where the act of gathering evidence is considered to be a judicial act.

The Third Restatement included this comment:

> No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.[38]

In the uranium antitrust litigation,[39] for example, Westinghouse Electric Corporation commenced an antitrust action against U.S. and foreign uranium producers who, it alleged, had conspired to fix world prices and supply. The uranium "cartel" also figured prominently in litigation before other U.S. state and federal courts. Pre-trial demands were made for the discovery of documents situated outside the United States. The foreign governments considered the antitrust claim objectionable because they had established a "marketing arrangement" in response to a U.S. embargo on the importation of foreign uranium for use in U.S. nuclear reactors.

The governments of Australia, Canada, the United Kingdom, and France employed existing legislation or enacted new legislation to authorize the issuance of non-disclosure orders to parties possessing documents situated in their territory. The U.S. court responsible

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[36] The mechanics of the regulations, which came into force on September 21, 1990, are discussed in Roth, *supra*, note 4, at pp. 262-3.

[37] For example, the European Commission's decided to block the sale of a Canadian commuter airplane manufacturer (de Havilland) to a French-Italian consortium. In applying its merger guidelines, the Commission considered the effect of the proposed merger on competition and concluded that the deal had to be halted because the merged company would control about two-thirds of the European commuter aircraft market: "Competing views of competition", *supra*, note 19.

[38] As quoted by Roth, *supra*, note 4, at 249.

[39] (1979) 480 F. Supp. 1138 (N.D. Ill.).

for pre-trial proceedings refused to give effect to these orders and ordered disclosure of the foreign documents.[40] This order effectively required the defendants to violate foreign non-disclosure laws or face sanctions. When confronted with this conflict, the judge presiding in the *Westinghouse* pre-trial proceedings, Judge Marshall, commented: "The competing interests here display an irreconcilable conflict on precisely the same plane of national policy."[41] He was not prepared to moderate the order. This impasse in sovereign decrees forced settlement of the litigation.

There have also been orders to produce foreign banking records. Court orders requiring disclosure may conflict with foreign laws that make it an offence to disclose banking information.[42] Multinational banks can be faced with contradictory regulatory demands, creating legal liability in one country if they comply with the law of the other.[43] A state sometimes asserts jurisdiction indirectly by taking a local branch "hostage" and using the bank's corporate structure to pressure a branch outside its jurisdiction to disclose the documents. As the *Bank of Nova Scotia* case showed, the application of sanctions against a

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[40] See *Uranium Cartel Litigation: Gulf Oil Corp. v. Gulf Canada Ltd.*, [1980] 2 S.C.R. 39 (it would be a wrongful exercise of discretion for the court to ignore government policy by enforcing the letters rogatory); *re Westinghouse Electric Corp. and Duquesne Light Co.* (1977), 16 O.R. (2d) 273 (Ont. H.C.) (the enforcement of letters rogatory is based upon international comity or courtesy, and comity will not be exercised in violation of the public policy of the state to which the request is made); *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 2 W.L.R. 81 (H.L.) (the extending of investigations internationally in a manner that was impermissible as being an infringement of British sovereignty, a context in which the courts could take into account the declared policy of the British government).

[41] In *re Uranium Antitrust Litigation* 480 F.Supp. 1138 (N.D. Ill. 1979), at p. 1148.

[42] For example, in *U.S. v. First National City Bank* (1968), 396 F.2d 897 (U.S.C.A., 2nd Circ.), which concerned demands for disclosure of documents in the United States, potentially in contravention with German banking secrecy laws, the court ordered disclosure to facilitate the investigation of an alleged breach of U.S. antitrust law. The court, after hearing the evidence of various attorneys, concluded that disclosure would not expose the bank to criminal sanctions in Germany.

The Canadian law regarding disclosure in such circumstances is unclear. In *Frischke v. Royal Bank of Canada* (1977), 80 D.L.R. (3d) 393, the Ontario Court of Appeal refused to compel the Royal Bank of Canada and two of its employees to disclose information contrary to Panamanian secrecy laws. In *Spencer v. The Queen* (1983), 145 D.L.R. (3d) 344 (Ont. C.A.); aff'd (1985), 21 D.L.R. (4d) 756 (S.C.C.), the Supreme Court of Canada required disclosure by a Royal Bank of Canada employee, now living in Canada, of the affairs of the bank's customer in the Bahamas, even though that disclosure was in breach of Bahamian law. Finally, in *Comaplex Resources International v. Schaffhauser Kantonalbank* (1991), 42 C.P.C. (2d) 230, an Ontario High Court Master recognized the line of U.S. authorities that advocates "interest balancing" but held that a party should not be allowed to invoke foreign law prohibiting the disclosure of information in an application to compel disclosure. Rather, such a defence should only be raised when the court is considering sanctions for the breach of the order. He therefore ordered the defendant bank to disclose information, even though such disclosure would expose the bank and its representatives to criminal and civil sanction under the laws of Switzerland. In a later appeal of this decision, Justice Southy of the General Division of the Ontario High Court of Justice dealt with the question of whether, on the facts before him, Swiss law would prohibit disclosure and therefore provide the basis for a defence if an order for relief was sought. He held that, in the circumstances, the relevant Swiss laws would not prohibit disclosure: *Comaplex Resources International v. Schaffhauser Kantonalbank* [unreported] (October 2, 1991) (Ont. H.C.).

[43] In *United States v. Bank of Nova Scotia*, *supra*, note 10, the Government of Canada protested U.S. demands for disclosure of records held at the Grand Cayman Island and Turks and Caicos branches of the Bank of Nova Scotia. A Florida court issued a subpoena to the Miami branch of the bank in the course of a grand jury investigation in the United States, enforcing the order with a fine of $25,000 daily against another branch of the bank in Florida. Since banking laws in the two foreign jurisdictions prohibited disclosure, the branches there did not disclose records, in order to avoid potential criminal liability and revocation of their business licences. Despite Canadian government pleas, the bank was found liable for fines totally $1,825,000 for failing to comply with the U.S. court order.

bank's corporate presence within the court's jurisdiction can be an effective means of forcing disclosure of foreign records.[44]

In dealing with foreign blocking statutes and secrecy laws, U.S. courts have generally, although not always, sought to preserve their jurisdiction by ordering disclosure despite the possibility of a foreign sanction.[45] There is no uniform test applied throughout the U.S. court system, and even within the same circuit there are inconsistencies in the case authorities.[46] U.S. courts will consider, among other things, the "good faith" test established in *Societé Internationale v. Rogers*,[47] the Third Restatement's "rule of reason" analysis, competing national interests, and principles of international comity.[48]

## Securities Regulation

The emergence of global capital markets has presented national securities regulators with the challenge of protecting the integrity of national capital markets. Extraterritoriality issues in this area generally arise in the context of the enforcement of anti-fraud[49] or anti-circumvention provisions in securities laws, often in regard to the improper use of insider information.[50] In her book, *The Regulation of Insider Trading in Britain*, Professor Suter observes that "internationalization affords greater scope for insiders either to use foreign financial institutions or to trade on extraterritorial securities markets."[51]

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[44] *Ibid.*

[45] P. Erwin, "The *International Securities Enforcement Cooperation Act* of 1990: Increasing International Cooperation in Extraterritorial Discovery?" (1992) B.C. Int'l & Comp. L. Rev. 471, at p. 477.

[46] *Id.*, at pp. 477 and 481.

[47] 357 U.S. 197 (1958). In that case, the plaintiff had failed to comply with a discovery request for documents on the grounds that doing so would violate Swiss banking law. The Court found that the plaintiff had not acted in bad faith because it had demonstrated that it had made full effort to comply with the request, that disclosure would have violated Swiss secrecy laws, and that Switzerland had a strong interest in enforcing these laws. The Court held that U.S. courts may not use such harsh sanctions as dismissal with prejudice absent extreme circumstances: at pp. 208-12.

[48] Erwin, *supra*, note 45, at pp. 478-9.

[49] *Consolidated Goldfields plc v. Minorco S.A.* 871 F.2d 252 (1989) is one example of a clear extraterritorial application of the anti-fraud provisions of U.S. securities law. As observed by Professor Mann, the U.S. court applied U.S. anti-fraud provisions to a transaction involving foreign companies that took place in England. The court did this despite the fact the SEC filed an *amicus curiae* brief urging it to abstain from granting the remedy for reasons of international comity: F.A. Mann, "The Extremism of American Extraterritorial Jurisdiction" (1990), 39 Intl. & Comp. L.Q. 410, at pp. 411-2.

[50] Although securities regulation is principally concerned with the registration of securities dealers and the disclosure of material information in securities offerings, these requirements are generally only applicable to offerings within the regulating state's borders. For example, the registration provisions of the U.S. *Securities Act*, 15 U.S.C. §77(e)(1988), s.5, only apply to offers and sales that take place "in" the United States. Although it is unclear what activity will amount to an offer or sale in the United States, it is clear that such actions, if completely outside the United States, will not be subject to registration and disclosure laws: J. Trachtman, "Recent Initiatives in International Financial Regulation and Goals of Competitiveness, Effectiveness, Consistency and Cooperation", 12 Nw. J. Int'l L. & Bus. 241, at 303.

[51] J.A. Suter, *The Regulation of Insider Trading in Britain* (Butterworths: London, 1989), at p. 355.

The case of *SEC v. Banca della Svizzera Italiana*[52] is an example of the international nature of securities regulation. The case involved allegations of offshore insider trading after a series of transactions were carried out on a U.S. exchange following the instructions of Banca della Svizzera Italiana (BSI), a Swiss bank. The Securities and Exchange Commission (SEC) believed the substantial profit realized in the transactions resulted from the use of inside information. In responding to a U.S. federal court order, BSI pleaded potential criminal and civil liability under Swiss bank secrecy law as grounds for refusing to disclose the identity of its principals. The SEC applied to compel disclosure and for sanctions for non-compliance. The judge indicated that sanctions would be forthcoming unless BSI obtained waivers of confidentiality from its clients. BSI disclosed the names.[53]

Although the *BSI* case caused controversy, the ease with which the trading orders were placed demonstrated the logic of the extraterritorial jurisdictional claim. If parties were free to evade securities laws simply by placing orders from outside the regulating authority's territory, effective regulation could be negated.

Canadian courts have also recognized that it may be necessary to make orders for disclosure where such disclosure may be prohibited by foreign law.[54] There are other instances of extraterritorial enforcement of securities laws, but there have been relatively few disputes. This lack of conflict is due mainly, it appears, to the shared view of national authorities that such enforcement protects the effective functioning of the markets. More than in the antitrust field, there is a consensus on what conduct is undesirable. There are fewer instances where national regulations deviate in material respects.[55]

## The Enforcement of Laws Concerned with Foreign Policy Objectives

### *Export Controls*

There have been many disputes over export controls imposed in pursuit of foreign policy objectives.[56] Once again, the main proponent of such controls has been the United States. It has asserted jurisdiction over foreign transactions based either on (i) a corporate

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[52] 92 FRD 111 (SD NY, 1981).

[53] Suter, at p. 366.

[54] *Comaplex*, *supra*, note 42.

[55] This consensus is reflected in domestic legislation such as the US *International Securities Enforcement Act of 1990*, Pub. L. No. 101-550, 104 Stat. 2714, and bilateral mutual assistance treaties, inter-agency memoranda of understanding, and other enforcement agreements: for a discussion of these treaties and agreements see Erwin, *supra*, note 45, at pp. 481-8 and Suter, *supra* note 51, at pp. 358-66.

[56] For example, the proposed "Mack Amendment" to the U.S. *Export Administration Act* would have made it illegal for any U.S. subsidiary, including those in Canada, to do business with Cuba. The Canadian government announced that it was issuing an order under the *Foreign Extraterritorial Measures Act* to prohibit any Canadian-based company from complying with the U.S. law. In the end, the amendment was vetoed by President Bush: "U.S. trade bill expected to die", *Globe & Mail*, November 3, 1990, at p. A9; "St. Joe averts a 30-second Cuban crisis", *Globe & Mail*, November 7, 1990, at p. B8.

link between the U.S. parent corporation and its foreign subsidiary (the unity theory of corporate ownership) or, less frequently, on (ii) its contention that goods and technical information exported from the United States continue to be subject to its jurisdiction. Extraterritorial ramifications have arisen from the application of U.S economic sanctions upon, for example, China and North Korea,[57] Cuba,[58] and Iran.[59] In response to the Arab boycott of Israel, the United States enacted anti-boycott provisions that had limited extraterritorial implications for foreign subsidiaries of American corporations involved in U.S. commerce.[60]

Perhaps the most notorious assertion of extraterritorial jurisdiction occurred in the Siberian pipeline dispute. In June 1982, in response to Soviet involvement in political repression in Poland, the United States imposed sanctions on the export and re-export of

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[57] The Foreign Assets Control Regulations enacted by the United States, which prohibited trading with China and North Korea, applied to foreign subsidiaries owned or controlled by U.S. citizens or residents: 31 C.F.R. 500.329(a)(1982).

[58] The Cuban Assets Control Regulations, issued in 1963, applied to foreign subsidiaries but included specified exemptions. Regulation 31 C.F.R. 515.541 stated the following:

(a) Except as provided in paragraphs (b), (c), (d) and (e) of this section, all transactions incidental to the conduct of business activities abroad engaged in by any non-banking association, corporation, or other organization which is organized and doing business under the laws of any foreign country in the authorized trade territory are hereby authorized.
(b) This section does not authorize any transaction involving United States dollar accounts or any other property subject to the jurisdiction of the United States.
(c) This section does not authorize any transaction involving the purchase or sale or other transfer of any merchandise of United States origin or the obtaining of a credit in connection therewith.
(d) This section does not authorize the transportation aboard any vessel which is owned or controlled by any organization described in paragraph (a) of this section of any merchandise from a designated foreign country to any country or from any country directly or indirectly to a designated foreign country.
(e) This section does not authorize any person subject to the jurisdiction of the United States other than an organization described in paragraph (a) of this section to engage in or participate in or be involved in any transaction. For the purpose of this section only, no person shall be deemed to be engaged in or participating in or involved in a transaction solely because of the fact that he has a financial interest in any organization described in paragraph (a) of this section.

Amendments to the regulations in 1975 permitted foreign subsidiaries to trade with Cuba if the host state did not prohibit such trade. However, further amendments in 1977 banned any persons within the United States from participating in licensed Cuban transactions. Licences were only issued if the subsidiary was independent from its American parent in the decision making, risk taking, financing and conducting of the trade for which the licence was required and if it generally operated independently. See regulation 31 C.F.R. 515.559(c)(1983) for details.

[59] Following the taking of hostages at the American embassy in Teheran, the U.S. government issued regulations that froze U.S.-dollar-denominated Iranian deposits held in banks within the United States and in their foreign subsidiaries and branches. Foreign governments protested the extension of U.S. regulations to bank branches within their territory, but the hostages were released and the regulations revoked before the fruition of litigations.

[60] See 50 U.S.C. 2407. The provisions applied to U.S. persons, as defined to include "any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern as determined under regulations of the President": 50 U.S.C. 2415(2). For a recent discussion of the anti-boycott legislation see: S.G. Joy, "Application of Selected American Laws to United States Companies Transacting Business in Kuwait: *Foreign Corrupt Practices Act* and Antiboycott Legislation" (1992), 43 Mercer L. Rev. 691.

goods and technical data relating to oil and gas exploration, transmission, and refinement. These measures, which were applied retroactively to contracts already signed but not yet performed, included three facets of extraterritorial jurisdiction: (i) the re-export of American-origin goods and technologies outside the United States; (ii) exports of foreign products manufactured using technology of U.S. origin; and (iii) exports by foreign persons owned or controlled by U.S. nationals or residents.[61] Western European countries vocally criticized the controls as being inconsistent with both the territoriality and nationality principles of prescriptive jurisdiction.[62]

### *Asset Freezes*

States have often ordered the freezing of deposits in domestic banks during times of crisis involving hostile states. Occasionally, such orders have had extraterritorial ramifications. During the Iranian hostage crisis, the United States ordered, among other things, that all Iranian deposits in European branches of American banks denominated in U.S. dollars be frozen.[63]

Again, difficulties arise when directives to foreign bank branches require conduct that is inconsistent with the demands of local law. This was the case when the United States froze Libyan assets in 1986.[64] The order and the subsequent refusal by the London branches of two American banks to release funds led to two legal actions.[65] In both cases,

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[61] 15 C.F.R. 385, 2(c)(2) defined persons subject to U.S. jurisdiction in terms identical to those of 31 C.F.R. 500.329(a)(1982) for the sanctions imposed against China and North Korea.

[62] By seeking to regulate non-U.S. nationals' conduct and proprietary interests outside the United States, the controls applied to foreign activities outside the territorial competency of the United States. Further, the nationality principle was breached by attempting to extend the regulations to companies incorporated outside the United States that had a parent-subsidiary or shareholding link or a licensing or royalty agreement with American persons. See Castel, *Extraterritoriality in International Trade* (Toronto: Butterworths, 1988), p. 162.

More-recent cases involving the extraterritorial enforcement of U.S. export controls include *re Datapoint International GmbH* (August 14, 1987), *Systime Computers Ltd.* (May 12, 1986), *re Sven Olof Hakanson* (January 2, 1988), and *re Datasaab Contracting A.B.* 49 Fed. Reg. 19,090 (1984). In each case, a foreign corporation exported U.S.-origin goods without authorization to states named in the U.S. controls. Each case involved foreign conduct by foreign persons, and with the exception of *Datapoint* (which was an Austrian subsidiary of an American company), the only connection to the United States was the origin of the goods.

[63] The United States Iranian Assets Control Regulations, 31 C.F.R. part 535 (1980), issued under the *International Emergency Economic Powers Act* of 1977, 50 U.S.C. secs. 1701-06, prohibited all transfers of assets in which Iranian entities had interests and applied, *inter alia*, to all foreign branches of U.S. banks holding U.S.-dollar-denominated deposits. The White House statement read in part, "[t]he President has today acted to block all official Iranian assets in the United States, including deposits in the United States banks and their foreign branches and subsidiaries....": see 15 Weekly Comp. Pres. Docs. 2117 (November 14, 1979). Subsequent legal challenges to the scope of these regulations were not concluded, as they became moot after the regulations were revoked following the release of the hostages.

[64] President Reagan, pursuant to the *Trading with the Enemy Act*, 50 U.S.C. sec.5(b)(1)(B), issued an executive order freezing Libyan properties. Executive Order No. 12,544 (1986) 51 Fed. Reg. 1235.

[65] *Libyan Arab Foreign Bank v. Bankers Trust Co.*, [1986] 1 Lloyd's Rep. 259; *Libyan Arab Foreign Bank v. Manufacturers Hanover Trust Co.*, [1989] 1 Lloyd's Rep. 608.

the English court held for the plaintiff, concluding that the law governing the contracts of deposit was that of the place where the deposit was kept. Accordingly, the U.S. executive orders were unenforceable in Britain.[66]

**Private Transnational Litigation**

Lord Denning once observed that, "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[67] Private parties, American and foreign alike, frequently commence law suits in the United States to avail themselves of broader discovery and other pre-trial advantages and, in particular, the prospect of much larger damages awards from U.S. juries. This is facilitated by the generous attitude of the U.S. state and federal courts toward jurisdiction. Legislation of some states, one example being Texas, asserts jurisdiction on the basis of connecting factors that other countries would find insufficient.

This has led litigants to challenge the court's exercise of jurisdiction in foreign courts by arguing that the plaintiff ought not to be permitted to proceed in the U.S. court and seeking an injunction to prohibit the prosecution of the U.S. litigation. The courts of England and Canada have on occasion granted such "anti-suit" injunctions. These in turn have been met with "anti-anti-suit" injunctions in the United States.

These expansive claims may increase the degree of uncertainty in the international business environment. For example, an investor may make an investment on the understanding that a certain law applies (e.g., restrictive Canadian law governing non-pecuniary damages in personal injury claims) and may later find that legal principles from another jurisdiction apply (e.g., the more liberal principles governing personal injury claims in Texas). As transnational litigation becomes more prevalent, conflicts from this non-traditional source will likely become more prevalent.

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[66] In both actions an accompanying submission was that repayment of the London accounts would require transactions through the payment-processing system in New York. Such transactions could not be completed without legal repercussions arising from the executive orders. The British court ruled, however, that deposit obligations could be honoured in London without requiring illegal conduct in the United States.

[67] *Smith Kline & French Laboratories Ltd. and Others v. Bloch*, [1983] 2 All E.R. 72 (C.A), at p. 74.

## RESPONSES TO EXTRATERRITORIAL ASSERTIONS AND THE MANAGEMENT OF CONFLICT

With some nations making expansive jurisdictional claims, other states — the respondents — have reacted by filing diplomatic protests,[68] by commencing legal actions,[69] by directly intervening in judicial proceedings (through *amicus curiae* interventions),[70] and by enacting statutes to block judicial or governmental actions, threaten the "claw-back" of any damages awarded,[71] or block orders such as those compelling production of documents situated in their territory.[72] The result has been diplomatic disputes between states and the

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[68] For example, in the Siberian pipeline dispute the EC presented comments about the 22 June 1982 amendments to the *Export Administration Act* to the United States Department of State on 12 August 1982 (see (1982) 21 I.L.M. 891), which stated, in part:

> 30. The European Community considers that the Amendments to the Export Administration Regulations of June 22, 1982 are unlawful since they cannot be validly based on any of the generally accepted bases of jurisdiction in international law. Moreover, insofar as these Amendments tend to enlist companies whose main ties are to the European Community Member States for purposes of American trade policy vis-a-vis the U.S.S.R., they constitute an unacceptable interference in the independent commercial policy of the European Community. Comparable measures by third States have been rejected by the United States in the past.

[69] For example, French resentment of the application of American export controls on trade with the Peoples Republic of China led to *Fruehauf v. Massardy*, [1965] J.C.P. II 14,274 bis (Cour d'appel, Paris).

[70] For example, the Australian, South African, Canadian and British governments presented *amicus curiae* briefs to the court hearing the *Uranium Antitrust Litigation*, *supra*. For extracts, see Lowe *supra*, note 7, at pp. 106-109, 156-174.

[71] The *Protection of Trading Interests Act* (1980) grants a cause of action to a British person or person doing business in Britain to sue in an English Court to recover a judgment equal to the non-compensatory portion of the treble damages award: M. Novicoff, "Blocking and Clawing Back in the name of Public Policy" (1985), 7 Nw. J. of Int'l L. & Bus. 12.

[72] For example, section 82 of Canada's *Competition Act* R.S.C. 1985, c. C-34, gives authority to direct persons in Canada not to take measures as prescribed by a foreign court or other tribunals where such measures would:

> (i) adversely affect competition in Canada;
> (ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency,
> (iii) adversely affect the foreign trade of Canada without compensating advantages, or
> (iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages.

Other Canadian legislation includes the *Foreign Extraterritorial Measures Act* R.S.C. 1985, c. F-29 (Canada), the *Business Records Protection Act* R.S.O. 1990, c. B.19 (Ontario), and the *Business Concerns Records Act* L.R.Q. 1977, c. D-12 (Quebec).

A case involving a provincial blocking statute — the *Quebec Business Concerns Records Act*, L.R.Q. 1977, C.D. 12 — was argued on October 7, 1992 before the Supreme Court of Canada: *Hunt v. Lac D'Amiante du Quebec Ltée et al*, S.C.C. file No. 22637.

There are examples in other jurisdictions: The *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* (Australia); Law of 27 March 1969 as amended 21 June 1976 and Royal Decree of 6 February 1979 Concerning the Regulation of Marine and Air Transport (Belgium); Act No. 254 of 8 June 1967 on Limitations of Danish Shipowners' Freedom to Give Information to Authorities of Foreign Countries (Denmark); Law Prohibiting a Shipowner in Certain Cases to Produce Documents, 4 January 1968 (Finland); *Commercial Documents Act 1968-80* (France); Law on Federal Duties in Matters Concerning Shipping, 24 May 1965 (Federal Republic of Germany); *Shipping Documents Act 1980* (Italy); *Evidence Amendment Act 1980* (New Zealand); Act No.3 of 16 June 1967 Authorizing the King in Council to Prohibit Shipowners to Transmit Information to Authorities of Foreign Countries (Norway); Presidential Decree No.1718 of 21 August 1980 Providing for Incentives in the Pursuit of Economic Development Programs by Restricting the Use of Documents and Information Vital to the National Interests in Certain Proceedings and Processes (Philippines); *Protection of Business Act 1978* (South Africa); Ordinance Regarding the Prohibition in Certain Cases for Shipowners to Produce Documents Concerning the Swedish Shipping Industry, 13 May 1966; Penal Code, Article 273 (Switzerland); *Shipping Contracts and Commercial Documents Act 1964* (United Kingdom); *Protection of Trading Interests Act 1980* (United Kingdom). For extracts from these statutes, see Lowe, *supra*, note 7.

intentional creation of regulatory conflicts that place private parties between contradictory sovereign demands. Governments and courts have adopted a range of unilateral, bilateral and multilateral methods to manage conflicts stemming from extraterritorial assertions of jurisdiction.

## Unilateral Methods to Manage Conflicts

### *Legislative and Executive Measures*

The most effective method for minimizing conflict in extraterritorial claims is for the asserting state to expressly circumscribe its jurisdiction in the relevant domestic legislation. For example, the recent U.S. *Civil Rights Act* is intended to have some extraterritorial scope but is drafted in a manner that minimizes the possibility of conflict with foreign laws.[73] Legislation can also expressly recognize the interests and claims of foreign statutes.[74] These approaches will tend to reduce the potential for conflicting sovereign decrees.

The fact remains, however, that some laws are expansively applied and will seek to regulate foreign activity without any significant moderating effect. In such circumstances, other states have found it necessary to invoke blocking statutes.[75] Orders that attempt to negate the effect of a foreign order clearly demonstrate that there are other sovereign interests at stake. The enactment of such statutes has contributed to a greater sensitivity on the part of the United States to the foreign reaction to expansive claims. From the private party's perspective, however, blocking orders have not been effective in excusing non-compliance with U.S. judicial orders. The U.S. courts have not hesitated to impose sanctions for non-compliance. Even though such laws have not shielded private parties from U.S. sanctions, they will continue to be employed as long as states are of the view that others will make overreaching claims or take action that may be adverse to their legal, trading, or other commercial interests.

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[73] Although section 109 of the U.S. *Civil Rights Act* Pub. L. No. 102-166, 105 stat. 1071 (1991) extends protection to U.S. citizens working for U.S. companies abroad, subsection 109(b) provides that where compliance with the Act will cause an employer to violate the laws of a foreign country, that employer will be exempt from penalty under the Act. The purpose of this exemption is to avoid conflicts with a foreign country's laws: see discussion in R.S. Orleans, "Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad" (1992), 16 Md. J. Int'l L. & Trade 147.

[74] For example, the U.S. *International Securities Enforcement Cooperation Act of 1990* grants the Securities and Exchange Commission (SEC) the power to maintain the confidentiality of foreign documents, to disclose confidential U.S. documents to foreign regulatory authorities, and to employ judgments of foreign courts to limit the securities trading activities of individuals in the United States. The Act is an example of a trend toward cooperative enforcement in regulatory areas where some extraterritorial scope is necessary: See Erwin, *supra*, note 45, at pp. 471-2. U.S. bankruptcy laws also permit foreign petitioners to file domestically, *supra*, note 16.

[75] The need for such a response stems from the assumption of the state claiming jurisdiction that its claim is valid, that its interest in the regulatory action or litigation at issue is as weighty as or even weightier than that of the other state, or that the foreign sovereign has not manifested a sufficiently strong interest in the matter. This assumption of the absence of a "state interest" has led to foreign legislative acts that enable the executive of the government concerned to act quickly to manifest an interest, as appropriate.

### *Judicial Measures*

The American judiciary's ability to limit the extraterritorial effect of U.S. law is constrained by the fact that Congress or the state legislature may have prescribed that a statute have broad jurisdiction and the court is bound to give effect to it. It is difficult for a court to circumscribe its jurisdiction where the laws or regulations it is charged with enforcing are not so limited. Some courts have tempered the exercise of jurisdiction by resorting to "interest balancing" and "reasonableness" tests.

Although valiant efforts have occasionally been made to take into account the interests of a foreign sovereign, a review of U.S. case history leads inescapably to the conclusion that the courts have had a difficult time managing extraterritorial conflicts. First, the sheer volume of cases that find in favour of jurisdiction (compared with very few cases in which jurisdiction has been declined) shows that the courts have tended to view U.S. interests as being weightier than the foreign interests concerned. Second, there has been a lack of objective standards for the courts to apply. As Mr. Justice Blair of Canada commented in an address to an American audience:

> ... how it is that a judge of a Canadian court or an American court can decide what is the proper balance of international interests, the interests, for example, of Canada in the exploitation of its natural resources and the interests of this country in the maintenance of competition. I feel that this is not a good area for the judiciary.[76]

Similar comments have been made by others, including American jurists.

Finally, practical difficulties are encountered because foreign governments often reject the very balancing test itself and, for reasons of governmental policy, refuse to articulate their interests other than to tersely inform the court that in their view it has no jurisdiction.

Some courts and commentators have suggested that "comity" should play a role in the jurisdictional determination. It is true that many courts have invoked the concept. However, a review of the cases leads to the conclusion that comity is a determinative factor only when the connections to the court's territorial jurisdiction are so weak that the court would likely decline to exercise its jurisdiction in any event.[77] Where there are sufficient connecting factors or a weighty state interest is present, jurisdiction tends to be claimed and comity almost never succeeds in persuading the court to decline jurisdiction.

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[76] Blair, "The Canadian Experience" in J. Griffin (editor), *Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws*, at pp. 65, 67.

[77] This has, in part, led to the criticism that, in applying comity principles, U.S. courts have de-emphasized foreign interests and routinely asserted jurisdiction: Waller, *supra*, note 24, at p. 945.

The courts of other countries have also been called upon to respond to the jurisdictional assertions of the U.S. courts. In the case of private transnational litigation, forum shopping has led American and foreign defendants to seek to stay the proceedings either by applying to the U.S. court or by applying to a court having jurisdiction over the foreign plaintiff for the issuance of an "anti-suit" injunction. This has led to a number of acrimonious disputes between the courts.[78] As in the case of blocking statutes, such responses have not been entirely effective in resolving extraterritorial claims. This has been most obvious in cases where the parties to the litigation are placed in a position where they may violate a court order in one jurisdiction by complying with an order in the other. For example, the *Laker Airways* litigation and the recent *Amchem* litigation have pitted the U.S. courts against the British and Canadian courts, respectively, in "anti-suit" and "anti-anti-suit" injunctions as the courts have sought to stay foreign litigation or to preserve their own jurisdiction.[79]

## Bilateral and Multilateral Methods to Manage Conflicts

Most measures aimed at resolving or managing extraterritorial conflicts consist of formal and informal agreements, understandings, diplomatic consultations, and negotiations. There are numerous formal and informal bilateral and multilateral agreements in the antitrust, securities, and other areas that are intended to address extraterritorial claims. In the antitrust field, conflict was more frequent from the 1950s to the early 1980s than at present. During this time, in addition to enacting blocking and other statutes, respondent states negotiated bilateral antitrust agreements[80] and began to address their concerns in such fora as the OECD. Although confidentiality requirements make it difficult to assess the effectiveness of these agreements, in the view of some observers they have yielded results.[81] The decline in

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[78] See, for example, the English *Laker Airways* cases (e.g., *British Airways v. Laker Airways*, [1984] 3 All E.R. 39 (H.C.) and *Midland Bank v. Laker Airways*, [1986] 1 All E.R. 526 (C.A.) and a current dispute between the Courts of Texas and British Columbia in *Workers Compensation Board and Others v. Amchem Products Incorporated and Others*, S.C.C. file No. 22256 (1992).

[79] *Ibid.*

[80] *Canada-U.S. Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws* (March 9, 1984), (1984) 23 I.L.M. 275; *Australia-U.S. Agreement Relating to Cooperation in Antitrust Matters* (June 29, 1982), T.I.A.S. No. 10365; *E.C.-U.S. Agreement Regarding the Application of Their Competition Laws, supra*, note 27; *FRG-U.S. Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices* (June 23, 1976), 27 U.S.T. 1956; *France-FRG Agreement Concerning Cooperation on Restrictive Business Practices* (May 28, 1984), (1987) 26 I.L.M. 531. See also the OECD Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade (May 21, 1986), 25 I.L.M. 1629; OECD Recommendations Concerning Cooperation Between Member States on Restrictive Business Practices Affecting International Trade (October 5, 1967; July 3, 1973; September 25, 1977). The OECD has also published numerous reports and guidelines on extraterritoriality issues (see discussion infra).

[81] Roth, *supra*, note 4, at p. 270.

the number of controversial cases suggests that states are becoming more experienced in addressing these issues.

Bilateral treaties seem to have been particularly effective in the securities field. A number of countries have entered into bilateral treaties with the United States to provide mutual assistance in criminal matters.[82] Although these treaties have been effective in cases where extraterritorial evidence is gathered, some of them have dual criminality requirements that make them less effective in cases dealing with violations that only amount to civil offences in the United States.[83] Memoranda of understanding have also been concluded to assist in the exchange of information in securities transactions.[84] These agreements have been largely successful in discovery matters related to the securities investigations.[85]

In the multilateral context, an important framework for addressing jurisdictional conflicts has been developed under the auspices of the OECD. Pursuant to the 1976 Declaration on International Investment and Multinational Enterprises[86] and the 1979 review of the Declaration, the OECD member countries agreed to consult and cooperate in good faith to resolve problems arising from conflicting requirements.[87] The 1984 review of the Declaration improved the framework by elaborating on the consultative mechanism[88] and introducing a set of general considerations and practical approaches member countries should take into account when considering the adoption, modification or application of laws that may lead to conflicting requirements.[89] The general considerations

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[82] For example: the *Canada-U.S. Treaty on Mutual Legal Assistance in Criminal Matters* (1985), 24 I.L.M. 1092; *U.S.-U.K. Treaty Concerning the Cayman Islands and Mutual Assistance in Criminal Matters* (1986), 26 I.L.M. 356; *U.S.-Switzerland Treaty on Mutual Assistance in Criminal Matters* (1973), 12 I.L.M. 916.

[83] Erwin, *supra*, note 45, at p. 485.

[84] For example: the *U.S.-Canada Memorandum of Understanding on the Administration and Enforcement of Securities Laws* (1988), 27 I.L.M. 410; *U.S.-U.K. Memorandum of Understanding on the Exchange of Information* (1986), 25 I.L.M. 1431; *U.S.-Switzerland Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement in the Field of Insider Trading* (1982), 22 I.L.M. 1; *U.S. Japan Memorandum on the Sharing of Information* (1986), 25 I.L.M. 1429.

[85] Erwin, *supra*, note 45, at p. 487.

[86] OECD, June 21, 1967.

[87] "Revised Decision of the Council on Inter-governmental Consultation Procedures on the Guidelines for Multinational Enterprises", C(79) 102 (final), at ¶ 5, reprinted in OECD, *International Investment and Multinational Enterprises: Review of the 1976 Declaration and Decisions* (Paris: OECD, 1979), at pp. 11-12.

[88] "Second Revised Decision of the Council on the Guidelines for Multinational Enterprises", C/MIN(84) 6 (Final), at ¶ 7-10, reprinted in OECD, *International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions* (Paris: OECD, 1984), at pp. 11-13.

[89] "Report By the Committee on International Investment and Multinational Enterprises", C/MIN (84) 5 (Final), at ¶ 26-34, reprinted in the 1984 Review, *ibid.*, at pp. 26-27.

provide that member countries contemplating new legislation or other exercises of jurisdiction should:

i) Have regard to relevant principles of international law;

ii) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, 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.[90]

In addition, the general considerations provide that member countries should endeavour to promote cooperation as an alternative to unilateral action to avoid or minimize conflicting requirements.[91]

With respect to procedure, the practical approaches outlined in the 1984 review of the Declaration recognize that bilateral initiatives will be most effective in the majority of circumstances.[92] Member countries should be prepared to, *inter alia*, develop formal and informal bilateral arrangements for notification and consultation, give prompt and sympathetic consideration to requests for notification and consultation, and inform concerned member countries of proposed legislation that has significant potential for conflict.[93]

In the 1991 review of the 1976 Declaration, a new instrument was added specifically dealing with conflicting requirements.[94] According to the Decision of the Council on Conflicting Requirements, member countries may request the Committee on International Investment and Multinational Enterprises to hold consultations on issues concerning conflicting requirements, and member countries concerned are obliged to cooperate in good faith to resolve such problems.[95] The Decision entrenches the 1984 general considerations and practical approaches and confirms that the Committee will continue to serve as a forum for consideration of the question of conflicting requirements, including the legal principles

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[90] *Id.*, at ¶ 27.

[91] *Id.*, at ¶ 28.

[92] *Id.*, at ¶ 29.

[93] *Id.*, at ¶ 30.

[94] "Decision of the Council on Conflicting Requirements", (Paris: OECD, June 1991).

[95] *Id.*, at ¶ 1.

involved.[96] The Decision further provides that member countries shall assist the Committee in its periodic reviews of experience on matters relating to conflicting requirements.[97]

According to the Committee, the framework has enabled member countries to considerably reduce the risk and seriousness of conflicts resulting from conflicting requirements.[98] It has also enabled member countries to identify problems and possible solutions.[99]

[96] *Id.*, at ¶ 2.

[97] *Id.*, at ¶ 3.

[98] 1991 Review, *supra*, note 1, at p. 58.

[99] *Id.*, at p. 63.

## EXTRATERRITORIALITY IN THE 1990s

Extraterritorial jurisdictional claims can be expected to increase in the future. As one commentator noted, because of the international character of commerce,

> some extraterritorial reach of domestic law is essential if it is to remain effective.... Confronted with transactions and arrangements that are planned internationally, an attempt to control them by a regulatory framework that is rigidly confined within national boundaries is increasingly unrealistic.[100]

As commerce becomes increasingly internationalized, the basis for extraterritorial claims becomes more firmly grounded.[101] The Treaty of Rome recognized, for example, that the creation of a single market comprising formerly separate national markets required a common competition policy. Pressures for harmonized competition and other regulatory policies also arise (although to a lesser degree than in a common market) as countries involved in free trade gradually eliminate barriers to trade between themselves. Hence, Australia and New Zealand decided to substitute competition law for their trade remedy laws, and the three parties to the recently concluded North American Free Trade Agreement (NAFTA) decided to create a Working Group on Trade and Competition.

Although unilateral, bilateral and multilateral methods reduce jurisdictional conflicts, further efforts are required to address areas where difficulties still exist. In this regard, policy makers in the 1990s will be faced with a number of tasks.

### Identifying Areas in Which Extraterritorial Scope May be Required

To the extent that states reduce barriers to trade and investment and markets become more international in scope, the traditional territorial basis for jurisdiction becomes eroded. As markets become more regional (or even global) than national, the logic for claiming jurisdiction over activity occurring outside the national territory becomes more compelling. It is becoming increasingly unrealistic to attempt to control activities that are international in scope with a regulatory regime confined to domestic borders. Since supranational legislation

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[100] Roth, *supra*, note 4, at pp. 266-67.

[101] The internationalization of commerce presents a pragmatic basis for extraterritorial jurisdiction in certain instances. In Professor Roth's view, it also presents a theoretical basis. He suggests basing a theory of extraterritorial jurisdiction on the existence of economic or financial effects within the territory of the forum state. He equates this theory to a modernized "objective territoriality theory". He argues that, in a modern world, the objective principle should not be confined to physical acts and should be extended to economic acts or effects: Roth, *supra*, note 4, at pp. 284-5. Although Roth presents a compelling argument for asserting extraterritorial jurisdiction, he is unable to resolve the extent of the limitations that should be imposed on such jurisdiction and how such limitations could be accomplished.

is unlikely, states will have to accommodate extraterritorial regulation in certain areas if domestic regulation in those areas is to be effective.

The most important areas that require some degree of extraterritoriality are those that are related to the efficient functioning of international markets. The very existence of integrated markets justifies some extraterritorial regulation in areas such as securities, mergers and acquisitions, and commercial litigation. On the other hand, extraterritorial foreign policy measures (such as the U.S. trade sanctions against Cuba) are not integral to the efficient functioning of international markets and must be justified on some other basis.

The first task for policy makers is to identify those areas of regulation that are most closely linked to the efficient functioning of markets. Such areas are likely to be the best base for agreement on extraterritoriality regulation.

**Promoting Policy Convergence**

The root of conflict over extraterritorial disputes is the assertion of jurisdiction over foreign activity that may infringe upon the sovereignty of the state in which the activity occurred and the potential unfairness to persons who have conducted their activities in accordance with the law of that state. The more that substantive laws and regulatory policies differ among states, the greater the likelihood is that persons engaged in activities occurring in or affecting more than one state may confront contradictory laws and policies. As Lord Wilberforce commented in *re Westinghouse Uranium Contract Litigation*, "It is axiomatic that in anti-trust matters the policy of one state may be to defend what is the policy of another state to attack."[102] Similarly, Judge Wilkey commented in *Laker Airways*, "[t]he conflict faced here is not caused by the courts of the two countries. Rather, its sources are the fundamentally opposed national policies toward prohibition of anticompetitive business activity. These policies originate in the legislative and executive decision of the respective countries."[103]

As laws and policies converge, the prospect of conflicts begins to diminish. If for example, State A strongly opposes cartels while State B tolerates them, persons situated in B are likely to face inconsistent legal demands if A sees fit to enforce its antitrust law extraterritorially. If the two antitrust laws are similar, the chance of a person situated in B running afoul of A's law is lessened. Two decades ago, there was a substantial divergence between U.S. antitrust law and the competition laws of its OECD trading partners. The

[102] [1978] A.C. 547, at p. 617.

[103] 731 F.2d 909,945 (D.C. Cir. 1984).

relaxation of U.S. standards under the Reagan Administration and the tightening of standards in other nations have led to a closer convergence in policy. This has lessened the potential for conflict over the public enforcement of antitrust law.

Former U.S. Assistant Attorney General Charles F. Rule recognized the convergence of U.S. and EC legal and policy interests in a commentary to the 1991 *E.C.–U.S. Agreement Regarding the Application of Their Competition Laws*:[104]

> The 1991 agreement between the Commission and the United States has a much different tone than the earlier agreements. First, rather than seeking primarily to protect the sovereign interests of one jurisdiction against encroachments by the antitrust authorities of the other, the agreement ... is more clearly designed to facilitate cooperative, and in some cases coordinated, enforcement by antitrust authorities. The need for such cooperation and coordination ... has become particularly important as a result of the Commission's implementation of its merger control regulation ... and the increasing frequency with which the United States and the Commission now seek to investigate the same transnational merger, acquisition or other conduct.[105]

Rule suggested that the agreement was a step forward from the "negative comity" contained in earlier bilateral agreements concluded by the United States with countries such as Australia and Canada. He described negative comity as that resulting from "conflict avoidance". The earlier Australian and Canadian agreements bear the mark of sometimes bitter disputes over U.S. enforcement policy.

Rule contrasted the 1991 agreement with those agreements, arguing that it formalized the concept of "positive comity" wherein the two jurisdictions collaborate on matters of mutual concern. If the United States believes that anticompetitive behaviour in the EC may adversely affect U.S. interests, it may request the Commission to take action against such behavioiur, and vice versa:

> In sum, this agreement is significant because it manifests an intention by the two most important antitrust jurisdictions in the world to cooperate and even to coordinate their enforcement activities .... The agreement also holds out the promise that when the antitrust authorities of both the United States and the Commission separately decide to investigate or challenge the same conduct or transaction, they will work together to minimize the disruption to international trade that multiple, uncoordinated investigations otherwise might cause.[106]

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[104] *Supra*, note 27.

[105] *Id.*, at pp. 1487-90.

[106] *Id.* at pp. 1489-90.

The conflict-reducing potential of policy convergence should not be overstated.[107] Significant differences between U.S. and EC (and other nations') laws remain; in particular, the United States, by making treble damages available, encourages private parties to act as "private attorneys general". Private parties are free of the policy considerations, the diplomatic communication and the relationships between officials, and the formal or informal understandings that constrain a government from acting without taking foreign interests into consideration. Moreover, as noted earlier, differences in the detail of policy can lead to quite different results even when laws are broadly similar. Nevertheless, it seems axiomatic that to the extent that states' policies converge, the potential for conflict is reduced.

The second task for policy makers is to identify further areas for harmonization or mutual recognition. The 1991 U.S.-EC competition agreement is one example of the effectiveness of such initiatives.

## Identifying Principles and Procedures for Extraterritorial Assertions

Where a jurisdictional conflict is unavoidable, there are two general approaches to resolving it: develop international principles to govern the extraterritorial assertions that cause the conflict, or develop procedural mechanisms to resolve the conflict.

Canada's *amicus curiae* brief in *Hartford Fire Insurance*[108] refers to the application of extraterritorial laws "in a manner consistent with relevant principles of international law". The OECD general considerations provide that member countries contemplating new legislation or other exercises of jurisdiction should "have regard to relevant principles of international law".[109] Clearly, one of the tasks facing policy makers will be to identify these principles. The lack of international consensus on these principles makes this a difficult task. The OECD has dedicated considerable effort to the examination of these principles. However, because of lack of agreement among the member countries, the OECD has not been able to develop a code of governing principles.

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[107] In "The Extremism of American Extraterritorial Jurisdiction", *supra*, note 49, Professor Mann observes that while it is true that in recent years the U.S. legislatures and courts have taken a more reasonable approach to extraterritorial assertions of jurisdiction, the 1989 case of *Consolidated Goldfields* may signal a return to prior excesses. In that case, Minorco, a Luxembourg company, made a take-over bid in England for an English company. About 0.025 percent of the shares of the target company were registered in the name of U.S. residents. An additional 2.5 percent of the shares were registered in the names of English nominees but were beneficially owned by U.S. residents. The plaintiffs brought an action in the United States under section 7 of the *Clayton Act*, which prohibits the acquisition of shares where the effect of such acquisition may be to substantially lessen competition. Not only did this assertion of jurisdiction concern two foreign companies but also, in Mann's view, the court essentially determined that the relevant market was the world market (not the U.S. market) and that competition within that market had been lessened. In his view, it is a clear example of the excessive assertion of jurisdiction.

The extraterritorial reach of U.S. law has also been recently criticized in the June 8, 1992 "Japanese Report on Unfair Trade Practices". A summary of this report is printed in *Inside U.S. Trade*, Special Report, June 12, 1992.

[108] *Supra*, note 5.

[109] *Supra*, note 91.

Policy makers could consider negotiating a non-binding code that establishes a hierarchy of principles. Although there is a lack of consensus in some areas, it is clear that certain principles are more acceptable than others. A hierarchy of principles could provide the international community with a basis on which to build further consensus.

There has already been considerable success with the second approach — developing procedural mechanisms. Examples include the OECD framework and the U.S.-EC antitrust agreement. Given that states have different concerns in the same policy areas (e.g., the different views concerning the discovery and production of documents in common and civil law jurisdictions), procedural solutions will most likely be bilateral (although one can foresee plurilateral and other regional agreements). At the multilateral level, policy makers should ensure that any procedural mechanisms facilitate the negotiation of such agreements.

## Addressing Private Claims

The history of extraterritorial conflict and the gradual, albeit rudimentary, development of mechanisms between states have sensitized governmental enforcement agencies to the need to balance interests when considering whether to exercise jurisdiction over international activity. The much more difficult problem to manage is private litigation.

In this area, the United States is the main concern. State and federal legislation in a number of areas has created remedies for private parties. Such parties are not sensitive to the interests of foreign sovereigns. In fact, far from seeking to maintain good relations with a foreign government, a private plaintiff may find it tactically advantageous to exacerbate relations. A foreign government's opposition to the disclosure of documents, for example, may actually assist a plaintiff in applying for sanctions against a defendant for non-compliance with discovery demands.

Tactical imperatives aside, it is in civil litigation where the U.S. courts have had the greatest difficulty balancing the need to do justice against the interests of a foreign sovereign. Although some U.S. courts have felt prepared to adequately weigh the U.S. and foreign interests, others have not. In *Laker Airways*, for example, Judge Wilkey commented, "Absent an explicit directive from Congress, this court has neither the authority nor the institutional measures to weight the policy and political factors that must be evaluated when resolving competing claims of jurisdiction."[110] Many foreign observers and governments share Judge Wilkey's view. His comment notwithstanding, the balancing of interests is now an accepted approach in U.S. law.[111]

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[110] *Laker Airways v. Sabena, Belgian World Airlines* 731F.2d. 909 at p. 955.

[111] See, for example, the authorities cited at notes 21 to 23, *supra*.

There are two quite different models available to the international community to address the issue of private litigation. First, states could work toward harmonized principles for jurisdiction. As discussed in the previous section, given the history of extraterritorial conflict and divergent national legal systems, one should not underestimate the difficulty of agreeing on principles of jurisdiction. Thus, it may be more realistic in the short term to negotiate mechanisms to regularize the intervention of foreign governments in private litigation so that their interests can be better taken into consideration. Improvements could be made over the present *ad hoc* nature of such interventions.

If states are prepared to accept that the courts of one state can legitimately evaluate the interests of that state and those of a foreign state, a number of questions arise. What kind of evidence should be taken into consideration? How much weight should be accorded to it? Should the executive branch of government have a role in ascertaining or verifying the nature of the foreign interest? Should a court be permitted to draw negative inferences from a lack of executive branch intervention?

An agreement on uniform procedures for articulating sovereign concerns could stipulate a special procedure beyond that of an *amicus curiae* intervention. The agreement could provide, for example, that where a foreign government was particularly concerned about a private action, it could request the government of the state in which the action was pending to consult with a view to agreeing on a joint description of the foreign interest, which the forum government would then communicate to the court. The joint description could be made binding on the court.

In a similar vein, states could negotiate an agreement on uniform procedures for the balancing of interests by courts. This has been done at the governmental enforcement level in the 1991 U.S.–EC antitrust agreement. Article VI of the agreement provides for the following considerations:

> 3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:
>
> (a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;
>
> (b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;
>
> (c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;
>
> (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

(e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and

(f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.[112]

In the United States there is a proposal for dealing with the problems of concurrent jurisdiction and multiple proceedings in civil litigation that is somewhat analogous to this kind of negotiated balancing approach. A subcommittee of the American Bar Association prepared the "Conflict of Jurisdiction Model Act"[113] to address the problem of parallel proceedings and selection of a single forum. Section 3 of the Model Act sets out 14 factors to be considered in the selection of the adjudicating forum.[114] Many of these factors could be adapted to the problem of asserting jurisdiction in the first place.

The main problem with this approach is that many critics consider courts ill-suited to balance domestic and foreign interests. This criticism points to the other alternative. In the second model, controversial jurisdictional determinations could be taken out of the domestic courts and put into an international process. Courts could remain free to take jurisdiction as they saw fit, subject to an obligation to refer the jurisdictional determination to an international body where a foreign government (or party) was of the view that jurisdiction ought not be exercised. Many of the features of the balancing and reasonableness tests

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[112] *Supra*, note 27.

[113] See discussion in L.E. Teitz, "Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings" (1992), 26 Int'l Lawyer 21.

[114] *Sec.3. Factors in Selection of Adjudicating Forum.*

A determination of the adjudicating forum shall be made in consideration of the following factors:

a. the interests of justice among the parties and of worldwide justice;
b. the public policies of the countries having jurisdiction of the dispute, including the interests of the affected courts in having proceedings take place in their respective forums;
c. the place of occurrence, and of any effects, of the transaction or occurrence, and of any effects, of the transaction or occurrence out of which the dispute arose;
d. the nationality of the parties;
e. substantive law likely to be applicable and the relative familiarity of the affected courts with that law;
f. the availability of a remedy and the form most likely to render the most complete relief;
g. the impact of the litigation on the judicial systems of the courts involved, and the likelihood of prompt adjudiciation in the court selected;
h. location of witnesses and availability of compulsory process;
i. location of documents and other evidence and ease or difficulty associated with obtaining, reviewing or transporting such evidence;
j. place of first filing and connection of such place to the dispute;
k. the ability of the designated forum to obtain jurisdiction over the persona and property that are the subject of the proceeding;
l. whether designation of an adjudicating forum is a superior method to parallel proceedings in adjudicating the dispute;
m. the nature and extent of litigation that has proceeded over the dispute and whether a designation of an adjudicating forum will unduly delay or prejudice the adjudication of the rights of the original parties; and
n. a realigned plaintiff's choice of forum should rarely be disturbed.

developed by the U.S. courts could be employed at the international level. The difference would be that rather than a domestic court of one nation being placed in the difficult position of balancing the interests of two nations, an international panel or tribunal could do the balancing. Its determination could then be binding on the national court.

While this last proposal is very ambitious, it is not without precedence in other regulatory areas. Under the Canada–U.S. Free Trade Agreement, binational panels can be created to rule on trade disputes that concern not only the provisions of the Agreement itself, but also the internal domestic laws of the two parties.[115] A similar procedure is entrenched in the recently negotiated NAFTA between Mexico, Canada, and the United States.[116] An international panel ruling on extraterritoriality issues could comprise panelists from each of the two disputing countries. The panelists could be former judges or experts in extraterritoriality issues. They could render their decision based on the governing domestic law as well as on relevant international principles. This would permit a more objective balancing process.

[115] *Canada-U.S. Free Trade Agreement*, chapters Eighteen and Nineteen.

[116] *North American Free Trade Agreement*, chapters Nineteen and Twenty.

## CONCLUSION

It seems clear that the potential for extraterritorial claims and resulting conflicts of jurisdiction will grow rather than decline. Historically, the presumption was that a state would not extend the scope of its jurisdiction beyond its borders. Increasingly, this is not the case. In the contemporary global economic environment, the necessity of extraterritorial regulation in certain instances is beginning to be recognized. The question is not therefore whether extraterritorial jurisdiction should be permitted. Rather, it is where it should be permitted and what constraints should be imposed on the exercise of such jurisdiction.

First, at the multilateral level, policy makers should facilitate the development of international principles. A non-binding code or set of guidelines containing a hierarchy of the different principles for asserting jurisdiction is one approach to meeting this objective. An international "benchmark" will provide a gauge for national practice. This could facilitate the development of consistent practice among states. It is likely that this process will occur in certain regulatory areas before others, but such modest successes can provide the foundation for broader international consensus.

Second, policy makers should continue to negotiate bilateral agreements and other instruments to address specific conflicts issues. Such agreements will promote harmonization and mutual recognition, efforts that will go to the heart of the conflicts problem.

Third, policy makers should elaborate on the existing OECD procedural framework for dealing with conflicting requirements. Procedures for the balancing of interests, for example, could be analogous to these incorporated in the U.N.-EC antitrust agreement. The objective should be to incorporate greater detail in the framework.

Finally, policy makers should begin to address the problems peculiar to private claims. To date, inter-governmental jurisdictional conflict has been the main preoccupation. As discussed in the final section of this paper, policy makers should take steps to address the extraterritoriality problems that arise in private litigation.

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