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FOREWORD

ISSUES IN EXTRATERRITORIALITY

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The American Law Institute adopted the Restatement (Revised) of Foreign Relations a year ago from the time of this writing.¹ And as this publication goes to press, the Restatement too is being published. It is quite appropriate that this symposium on the topic of extraterritoriality appears coincidentally with the Restatement's publication, since much of the discussion of this topic over the last several years occurred in the context of the Restatement's preparation.²

Because many pages have already been written about this topic,³ one may ask why another symposium on extraterritoriality ought to be published. The answer appears in the writings in this symposium and in the nature of international law itself. In the absence of international written agreements, the international law principles of jurisdiction must be established as a matter of customary international law under the usual tests of state practice. Little treaty law exists to delimit state jurisdiction; some state practice exists, but much of it suggests disagreement, sometimes quite contentious, rather than strong consensus. In this context, many of the black-letter jurisdictional rules

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1. The American Law Institute adopted the *Restatement (Revised) of Foreign Relations Law of the United States* on May 14, 1986. 63 A.L.I. Proc. 140 (1987).

2. See, e.g., 58 A.L.I. Proc. 220-304, 312-37 (1982); 59 A.L.I. Proc. 118-75 (1983); 62 A.L.I. Proc. 404-64 (1986); 63 A.L.I. Proc. 90-142 (1987).

3. Behney, *Bibliography on Extraterritoriality*, LAW & CONTEMP. PROBS., Summer 1987, at 303.

of the revised Restatement must be viewed as both tentative and subject to evolution by subsequent state practice. This fact is evidenced in the language of the rules themselves, much of which leaves them open-ended and flexible.⁴ These rules, then, may (and ought to) be continually revisited both at the theoretical and methodological level and at the level of their application to specific economic regulatory areas, such as antitrust and export controls, in an attempt to enlighten state practice. Also, under such a potentially chaotic situation, attention must be given to pragmatic management of extraterritoriality issues by governments. The articles in this symposium address the topic of extraterritoriality on these various levels: theory and methodology, application to specific economic regulatory laws, and management of state practice.

THEORY AND METHODOLOGY

Professor Brilmayer's methodological writing⁵ compares and contrasts problems under American conflict of laws and under extraterritorial application of American laws. She first notes the difference in application of the Restatement (Second) of Conflict of Laws and the Restatement (Revised) of Foreign Relations Law. American conflict of laws deals with conflicts between the law of a state of the United States and that of another state or nation. Conflict of jurisdiction under foreign relations law concerns conflicts between American federal law and the law of another nation. She notes two similar methodological problems under both subjects: (1) domestic choice of law and international conflict of jurisdiction typically involve interpretations of policies and interests underlying a statute that does not itself address the choice or conflict (she refers to this as the silent statute problem); and (2) the competing claims underlying the choice or conflict are based on the laws of another jurisdiction (she refers to this as the narrow nationalism problem), so the court must determine to what extent, if any, the competing claims of the other jurisdiction ought to be taken into account. Both problems, she notes, pose exceptional difficulties for the judiciary. She attributes much of the extraterritoriality problem to the fact that judges are interpreting silent statutes according to what they think the legislature would have wanted had it thought about the specific question, and then applying principles of policy, justice, or international law. Once construed, however, it is harder to adjust the "statutory" interpretation than it is for judges to adjust, for example, the common law. Also, in construing statutes, the range of foreign interests that the judiciary deems itself capable of taking into account is much narrower than the interests the legislature might very well think important. In the last part of her article, Professor Brilmayer discusses why the American Constitution has played a significant role in domestic conflict of laws and

4. See, e.g., *Restatement (Revised) of Foreign Relations Law of the United States* §§ 402-403, 414 (1986).

5. Brilmayer, *Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 11.

suggests reasons why it has played almost no role at all in the debates over conflict of jurisdiction. She concludes by suggesting that the fifth amendment due process clause ought to be viewed as creating some limitation on federal prescriptive jurisdiction in the international context.

Dissatisfied with the Supreme Court's handling of interstate jurisdictional and domestic choice of law disputes, Professor Juenger⁶ finds no solace in Professor Brilmayer's suggestion that more attention ought to be paid to the due process clause. He finds conflict of jurisdiction inevitable, given the overlapping principles of prescriptive jurisdiction, expansive exercise by legislatures of prescriptive jurisdiction, and the difficulty of judicial application of principles of comity or reasonableness. The solution, he argues, lies not in the judicial branch, but in the legislative and executive branches of the government. Their tools include softer approaches, such as exchange of information, consultation, issuance of guidelines for application of substantive laws, and efforts toward the convergence of substantive policies.

Dr. Meessen, a special consultant on international economic law for the Restatement (Revised) on Foreign Relations Law, presents interesting observations about the jurisdictional principles adopted in Part IV of the Restatement.⁷ He begins by noting that the American Law Institute could not have attempted to investigate state practice in every field of law where conflicts of jurisdiction have arisen. Lacking this empirical basis, the jurisdictional rules must remain somewhat hypothetical and tentative. He, like many others during the debates at the American Law Institute proceedings,⁸ questions the helpfulness of the tripartite division of jurisdiction among prescription, adjudication, and enforcement.

As Dr. Meessen observes, the delineation of connecting factors in section 402, such as territoriality and nationality, permitting a state to exercise prescriptive jurisdiction, is quite broad. The reasonableness principle in section 403, stated as a rule of international law, is intended to serve as an additional part of the prescriptive jurisdictional test to delimit the scope of section 402. He finds that this principle of reasonableness lacks rigor and that reasonableness under this principle will inevitably lack uniformity, meaning, for example, American or German or French reasonableness when applied in the United States, Germany, or France, respectively. Nevertheless, because the reasonableness principle has been stated as a rule of international law, it does provide the basis for international law remedies.

Finally, he observes that the American Law Institute provided in section 403(3) that where more than one state has a reasonable basis for prescriptive jurisdiction, and their prescriptions conflict, each state must, under

6. Juenger, *Constitutional Control of Extraterritoriality: A Comment on Professor Brilmayer's Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 39.

7. Meessen, *Conflicts of Jurisdiction Under the New Restatement*, LAW & CONTEMP. PROBS., Summer 1987, at 47.

8. See 59 A.L.I. Proc. 220-58, 286-89 (1983).

international law, balance its interest in exercising jurisdiction against those interests of the conflicting jurisdiction; however, section 403(3) concludes with the "soft" law directive that the state with the lesser interest "should" defer to the state with the greater interest. Dr. Meessen reiterates his earlier conclusion⁹ that, at least in the field of antitrust law, the process of both balancing interests and deferring to the state with the greater interests is supported by state practice. For other fields, the black-letter text suggesting deferral remains an hypothesis without greater evidence of state practice but, Dr. Meessen observes, it is headed in the right direction. Because of the shortcomings of jurisdictional rules applied by national courts, Dr. Meessen urges development of both treaty law and international adjudication of jurisdictional conflicts.

Probably the most contentious exercise of jurisdiction by the United States has been its claim to regulate foreign subsidiaries of U.S. parent corporations. Dr. Meessen notes that European nations will criticize section 414 of the revised Restatement for approving some jurisdiction over foreign subsidiaries. Although Dr. Meessen finds section 414 replete with phrases connoting unease—such as "not ordinarily," "limited jurisdiction," and "exceptional cases"—a student note¹⁰ concludes that the narrow basis for jurisdiction outlined in section 414 is a prudent and workable compromise between the unreconcilable claims of absolutely no jurisdiction (because the subsidiary is a creature of the local jurisdiction) and extensive jurisdiction (because the subsidiary is a part of a single international economic enterprise).

As prescribed in Professor Wood's comment,¹¹ one approach to jurisdictional conflict resolution is the consequential approach: An administrator or a court waits to see whether the existence of a U.S. prescriptive rule in conflict with that of another jurisdiction will as a practical matter cause an actual conflict. She notes that enforcement jurisdiction clashes are typically resolved by U.S. courts in this consequential way, particularly in the context of refusals to comply with U.S. discovery requests. A student note¹² extensively evaluates the methodology employed by U.S. courts to determine when production should be ordered in cases involving conflict between U.S. discovery rules and foreign blocking statutes. Observing what judges actually do, rather than what they say they are doing when employing the balancing-of-interest method of conflict resolution, this note proposes the following methodology for resolving discovery conflicts: A court should issue an order for discovery upon a finding that the requested information is directly relevant *and* upon a further finding of *any one* of the following: (1) that the case involves public rather than private law; (2) that the

9. Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 AM. J. INT'L L. 783 (1984).

10. Note, *Extraterritorial Subsidiary Jurisdiction*, LAW & CONTEMP. PROBS., Summer 1987, at 71.

11. Wood, *Conflicts of Jurisdiction on Antitrust Law: A Comment on Ordover and Atwood*, LAW & CONTEMP. PROBS., Summer 1987, at 179.

12. Note, *Beyond the Rhetoric of Comparative Interest Balancing: An Alternative Approach to Extraterritorial Discovery Conflicts*, LAW & CONTEMP. PROBS. Summer 1987, at 95.

blocking statute is not an actual barrier to production; or (3) that no reasonable good faith effort to produce the documents was made. In particular, factors (2) and (3) of this methodology emphasize the consequential approach noted by Professor Wood. Moreover, the first factor, that the case involves public law, gives explicit recognition to the fact that judges typically find that U.S. interests evidenced by public laws compel the court to order the production. Importantly, this note supports critics of the balancing-of-interest approach to conflicts resolution, who observe that this approach provides no judicially manageable standards for assigning weight to competing foreign interests.

SPECIFIC ECONOMIC REGULATORY LAWS

As is often the case, when jurisdictional principles based on connecting factors and reasonableness are actually applied to substantive areas, they prove inadequate to their task. Nowhere is this clearer than in the area of export controls. Professor Abbott¹³ convincingly illustrates why the positivistic approach to the problems posed by extraterritorial trade controls has failed: Sections 402 and 403 of the revised Restatement invoke rules that are by no means clear, that are unlikely to receive an authoritative interpretation, and that are by no means unanimously accepted as binding; moreover, they do not help us to understand the sources of the dispute or of its unusual intensity or to think about ways of actually resolving it. Accordingly, Professor Abbott rejects this positivistic approach and applies that of modern international relations theory to identify the structural problems of the international system which are the sources of the dispute. He identifies one structural problem as the achievement of the necessary international cooperation among self-interested states in the production of collective goods. Cooperation is particularly difficult to achieve because the United States sees itself as the leader in producing essential international collective goods (for example, weakening the Soviet Union or deterring aggression or terrorism) through its export control laws and views its goals weakened by the free-riding of its allies. Europe, however, often expresses preferences for collective goods different from, and sometimes opposed to, those of the United States.

Professor Abbott identifies the second structural problem as the gap between the way we define the state—statically—and the highly mobile nature of the state's resources. The United States has tried to bridge this gap by asserting, through its export control laws, a limited right to control certain resources that are functionally associated with it, even though they are physically outside its boundaries. Professor Abbott summarizes that in both its control over foreign subsidiaries and reexport of goods and technology, the United States is claiming what it sees as a right of unilateral action to

13. Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Trade Controls*, LAW & CONTEMP. PROBS., Summer 1987, at 117.

control resources functionally associated with it for the production of certain international collective goods, where cooperation is difficult to achieve, and free-riding is evident. Seen in this light, Professor Abbott makes some favorable observations about the U.S. position on extraterritorial trade controls and derives a thoughtful summary of reasonable limitations on these controls, which he urges ought to be pursued through negotiation by the United States Government.

Although Dr. Meessen has argued that state practice in the field of antitrust provides support for both the principle of reasonableness and the balancing of interests contained in section 403 of the revised Restatement,¹⁴ writers in this symposium would like to proceed beyond these general rules to more specific substantive rules addressing the problem of extraterritoriality in the field of antitrust. Mr. Atwood¹⁵ takes one example, that of the export cartel, and shows how such cartels still defy clear regulatory answers under substantive antitrust rules. Although he does not argue for more extensive use of export cartels as a trade policy, he does argue, pragmatically, that because each nation tolerates its own export cartels (accepting the view that it ought to optimize the terms of its export trade, and not simply optimize the volume of its export trade), antitrust policy should be modified to eliminate regulation of the export cartels of other countries if: (1) the export cartel is national rather than international; (2) the cartel is publicly registered under some statutory program; and (3) the cartel's collaborative behavior is strictly confined to its own national territory.

Dr. Ordover¹⁶ broadly summarizes the extent to which U.S. antitrust policy should tolerate the external effects of industrial policies (including export cartels) followed by other nations. In general, Dr. Ordover argues that when a nation's industrial policy is designed to cure market failure or to pursue some socioeconomic objective (for example, enhancement of research and development), the United States should yield primacy to these policies. When the industrial policy is designed, however, to transfer firms' profits or consumer surplus from abroad to the regulating country, then the United States should not yield to these policies. In applying this general approach, he reaches several interesting conclusions: (1) when considering potential violations of section 2 of the Sherman Act, it is most plausible to assume that all firms, including those which are under the control of foreign governments, behave as profit-maximizing entities; (2) only a limited foreign sovereign compulsion defense should be available to foreign cartels comprised of non-government entities, which may foreseeably and significantly elevate prices in the United States; (3) economic theory suggests (i) the abolition of the foreign sovereign compulsion defense for cartels constituting government-controlled

14. Meessen, *supra* note 9.

15. Atwood, *Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels*, LAW & CONTEMP. PROBS., Summer 1987, at 153.

16. Ordover, *Conflicts of Jurisdiction: Antitrust and Industrial Policy*, LAW AND CONTEMP. PROBS., Summer 1987, at 165.

entities, and (ii) that sovereign immunity should be viewed narrowly under section 1 of the Sherman Act, treating sovereign acts as primarily commercial in nature, since the type of conduct reached by section 1 cannot be justified as legitimate industrial policy; and (4) the balancing test is likely to remain largely unworkable until viewpoints converge among nations concerning the legitimate use of industrial policies. In his second conclusion, Dr. Ordover disagrees with Mr. Atwood's proposal concerning export cartels.

Professor Wood's comment¹⁷ critiques the suggestions by both Mr. Atwood and Professor Ordover. She finds Mr. Atwood's suggestion too mechanistic, unsupported by any economic justification, and inconsistent with the congressional policy indicated in the Foreign Trade Antitrust Improvements Act of 1982, to permit each importing country to regulate export cartels having significant economic effects within its jurisdiction. She finds Ordover's approach particularly interesting, since he persuasively argues that the welfare effects and externalities of different kinds of industrial policies will vary, and that the regulating country's legitimate interests in overriding these policies should vary depending upon what the particular industrial policy is trying to accomplish. She concludes, however, that Dr. Ordover's policy approach is unworkable in practice because it is difficult to determine in many cases the motivations behind specific industrial policies; and because it is sufficiently inconsistent with the understanding of the foreign sovereign compulsion defense, it would lead to greater tensions between competing nations than the present system of conflict resolution.

Professors Tower and Willett's comment¹⁸ emphasizes the problem of implementing adequate enforcement remedies in international antitrust cases. In particular, they note the difficulty in countering prices that are too high because of anticompetitive behavior outside the United States. For example, forbidding the import of products produced by a foreign export cartel may only add to the costs of the U.S. economy of the original restrictions in supply. The best response may be to do nothing, to bribe or to threaten retaliation, or some combination of the latter two, in order to induce changes in the behavior abroad. They conclude that the best avenue for achieving competition goals in international commerce is government-to-government negotiation. They consider Professor Abbott's analysis of extraterritorial trade controls an excellent illustration of the need to consider seriously enforcement issues (recalling that Europe ultimately proved that it had the physical power to prevent the enforcement of U.S. export control laws) and to construct sensible criteria for negotiating government-to-government agreement on the reach of such controls.

17. Wood, *supra* note 11.

18. Tower & Willett, *Enforceability and the Resolution of International Jurisdictional Conflicts: Comments on Abbott, Atwood, and Ordover*, LAW & CONTEMP. PROBS., Summer 1987, at 189.

A student note¹⁹ lends support to Professors Tower, Willett, and Abbott's conclusions about the limits on effective unilateral action and the necessity for the government to manage extraterritorial conflicts and to seek negotiated resolutions. It describes the manner in which unilateral self-help through the enactment of blocking statutes has not only heightened conflicts, but has often hampered the antitrust defense of the blocking country's own nationals. It also critiques suggested unilateral measures that might be taken by the United States, such as legislative enactment of the principle of reasonableness and balancing of interests contained in section 403(2) and (3) of the revised Restatement, and the elimination of treble damages in certain international antitrust actions. The note suggests that such unilateral actions are unlikely to coax U.S. allies into repealing their blocking statutes.

One of the more interesting activities to observe in the next several years will be the reaction of the United States Securities and Exchange Commission (SEC), and similar regulators in other markets, to the internationalization of the securities markets. Professor Austin from Australia,²⁰ and Mr. Connelly from Canada,²¹ make interesting observations about what considerations the SEC should take into account in regulating foreign issuers in the U.S. market, U.S. issuers in foreign markets, and multi-jurisdictional, or simultaneous, securities offerings. Professor Austin notes first that internationalization itself is not a phenomenon to be regulated. Rather, it creates new issues to be considered in the context of the usual questions to be considered by the SEC: Market efficiency and investor confidence and protection in the United States. Both writers explore questions relating to foreign issuers operating in U.S. markets. Professor Austin examines the proposition that foreign issuers ought to be subject to less strenuous requirements than U.S. issuers. He concludes that, against the backdrop of the usual issues addressed by the SEC, this question of different treatment is the incorrect one. Rather, the correct question is whether certain ingredients of current U.S. domestic disclosure policies are necessary for U.S. investor protection, whether applied to foreign or U.S. issuers. Both writers address the continuous disclosure requirements imposed by the SEC on issuers of securities in the U.S. markets. The distinct disclosure requirements of the SEC, along with U.S. civil liability provisions for material misstatements, present substantial barriers to entry into the U.S. market.

Professor Austin also addresses to what extent the SEC should administer the registration requirements of the 1933 Act to reach offers and sales of the securities of U.S. issuers in foreign capital markets. He critiques the SEC's administrative position that the 1933 Act will not apply where the offering is made under circumstances reasonably designed to preclude distribution or

19. Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, LAW & CONTEMP. PROBS., Summer 1987, at 197.

20. Austin, *Multinational Securities Offerings: Regulatory Principles and the Internationalization of Securities Markets*, LAW & CONTEMP. PROBS., Summer 1987, at 221.

21. Connelly, *Multinational Securities Offerings—A Canadian Perspective*, LAW & CONTEMP. PROBS., Summer 1987, at 251.

redistribution of the securities within, or to nationals of, the United States (often referred to as the "coming to rest abroad" principle). He suggests that the SEC should follow a more balanced approach whereby U.S. investors are permitted to purchase securities offered by U.S. issuers in other well-regulated foreign capital markets.

MANAGEMENT OF STATE PRACTICE

Several of the articles in this symposium possess a common theme: Theoretical or methodological or black-letter statements of principles of jurisdiction advance somewhat the issues posed by extraterritoriality, but often they are beside the point. If this theme is not yet clear to the reader, it ought to become clear by observing the comments made by the writers in the last two papers of this symposium. Dr. Hoechner's article²² presents a Swiss perspective on conflicts of jurisdiction, which he demonstrates is quite different from that of the United States Government. Dr. Hoechner largely attributes the differences not only to disagreement about black-letter principles of prescriptive jurisdiction under international law, but more importantly to differences in the legal systems of the two countries. Some of these differences include the manner by which U.S. courts obtain long-arm jurisdiction over foreign persons, their substantive damages awards, their extensive discovery procedures and, separately, the extensive activities of U.S. regulatory agencies.

The discussions by Dr. Hoechner and by Mr. Small of the United States Department of State,²³ embellished by the more specific subject matter discussions of the preceding articles, illustrate that the gaps in the theoretical debate, the legal systems of the allies, and the substantive policies are so substantial that progress may now be best achieved by emphasizing the management role of governments. Dr. Hoechner provides a useful summary of ways by which the Swiss and U.S. governments have recently managed enforcement problems in the extraterritorial application of U.S. laws. Mr. Small provides a complete overview of the management approaches of the Executive Branch, led by the State Department, in every area of extraterritoriality conflict.

Because of the United States Government's heightened awareness of the need to manage and avoid conflicts of jurisdiction, the intensity and emotionalism of the debate have lessened. None of these articles suggests, however, that we have made much progress in eliminating the sources of the conflicts. To the contrary, as observed particularly by Professor Abbott and Mr. Small, the continuing existence of the sources of our extraterritoriality conflicts is inevitable. Some might venture to suggest that these conflicts will become an even broader problem as international economic relations become

22. Hoechner, *A Swiss Perspective on Conflicts of Jurisdiction*, LAW & CONTEMP. PROBS., Summer 1987, at 311.

23. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, LAW & CONTEMP. PROBS., Summer 1987, at 283.

predictably more intertwined. Governments ought, then, in the meantime, to take advantage of this calmer period to heed the suggestions of writers in this symposium for improving policies reflected in economic regulatory laws, and for converging these policies through international negotiations.