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Evolutionary Trends in the United States Application of Extraterritorial Jurisdiction

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ABSTRACT

This article examines developments in the United States application of extra-territorial jurisdiction. Substantial increases in international trade, due to an increase

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in participants that resulted from technological developments in transportation and communication, has expanded the world market and the ability to trade between borders. The U.S. is a major player in this expanding market; therefore, the myriad of disputes that arise often involve the U.S. and as a result, it extends jurisdiction extraterritorially. Thus, this Article discusses U.S. application of the extraterritorial jurisdiction doctrine.

The U.S. policy and assertions of extraterritorial jurisdiction may be attributed to its desire to protect its nationals and to remain a major force in the world market. This desire is the impetus that drives the coverage of this topic. The U.S. position in the international arena is tied to the critical, sometimes blatant, role the U.S. assumes by extending jurisdiction extraterritorially. The U.S. strong involvement in the world economy and the prevalent use of extraterritorial jurisdiction has buttressed its position as a major world power. Assertion of extraterritorial jurisdiction covers a broad range of conduct, which often occurs outside the U.S. borders and may have substantial and direct effects on the economy.

This article is not all inclusive; rather, it evaluates trends in four pervasive areas. Initially, a brief introduction and overview of early developments in extraterritorial jurisdiction and U.S. policy are discussed. A look at the past is always helpful in order to evaluate the present and possibly project future trends.[1] Next, the first trend, sovereign immunity and the act of state doctrines are reviewed.[2] Second, several U.S. rules allowing assertions of jurisdiction, and other aids that may be interpreted as jurisdictional in nature are discussed. This second trend is an analysis of whether the use of certain rules by the U.S. unilaterally extends extraterritorial jurisdiction in untraditional forms. For example, the increase in the use of "most favored nation status" allocations and sanctions encourage foreign countries to adhere to U.S. policy or incur the punitive effects that result if they are denied "MFN" status.[3]

Next blocking statutes, which have been adopted by various countries, their possible impact on U.S. policy, and multilateral treaties are reviewed to show nations' desires to harmonize rules in specific areas.[4] Also evidence of U.S. courts' judicial restraint is discussed.[5]

Finally, this Article concludes that even though the U.S. cooperates in harmonizing efforts, its policy is sometimes modified in an attempt to protect its nationals and transplant U.S. economic, commercial, and political policy to other nations.

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1. *See infra* notes 7-25 and accompanying text.
2. *See infra* notes 26-99 and accompanying text.
3. *See infra* notes 100-45 and accompanying text.
4. *See infra* notes 146-96 and accompanying text.
5. *See infra* notes 197-217 and accompanying text.

I. INTRODUCTION AND OVERVIEW

The United States (U.S.) application of extraterritorial jurisdiction has expanded very rapidly over the last several years.[6] As a result, there is no definitive answer to the query, what is the U.S. approach to extraterritorial jurisdiction? This Article, even though not all inclusive, attempts to track the development of the U.S. approach, by exploring a number of significant trends in the shift in U.S. policy.

After reading this Article, one will gain a working knowledge of the historical, current, and possible future trends in the ever expanding extraterritorial jurisdiction. This paper will serve as a guide to the above query and allow one to predict which acts are more likely to warrant an assertion of jurisdiction by U.S. courts.

Several avenues exist to establish whether U.S. courts may assert jurisdiction over a certain matter. According to Justice Holmes, "The foundation of jurisdiction is physical power."[7]

U.S. courts assert jurisdiction over foreign defendants using basically the same principles applied to U.S. citizens. Many of the principles used to establish jurisdiction over foreign defendants are based on contacts set forth in *International Shoe v. Washington*[8] and its progeny. *Shoe* articulated the type and degree of contacts necessary to establish jurisdiction and comply with due process.[9] Thus, the minimum contacts test adds a degree of predictability to the legal system, which in turn allows defendants to structure their primary conduct with some minimum assurance of when that conduct will or will not render them liable to suit,[10] in U.S. courts. Normally, jurisdiction based on appearance, domicile or consent is met with little or no resistance. Physical presence in the state plus personal service[11] or certain acts or contacts with the state[12] form additional bases for jurisdiction.

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6. 15 U.S.C. § 78c(a)(17) (1934) (amended 1996); *see infra* notes 11, 43, 55, 108 and accompanying text; ITT v. Cornfield, 619 F.2d 909, 918 (1980) (holding that jurisdiction also existed in respect to the trust's purchase of eurodollar convertible debentures from a Netherlands Antilles subsidiary of an American company; stating that it should be evident by now that the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational securities cases is not necessarily dispositive" in future cases . . ., but rather that the presence of both these factors points strongly toward applying the anti-fraud provisions of our securities laws).

7. McDonald v. Mabee, 243 U.S. 90, 91 (1917) (holding that a judgment invalid for want of service amounting to due process is as ineffective in the state as it is outside of it).

8. International Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that a court may assert jurisdiction when a defendant has certain minimum contacts with a territory such that maintenance of the jurisdiction does not offend traditional notions of fair play and substantial justice).

9. U.S. CONST. amend. XIV.

10. *See International Shoe Co.*, 326 U.S. at 319 (explaining fair notice based on contacts that warrant assertion of jurisdiction).

11. *See* Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 267 (5th Cir. 1985) (stating bases for asserting jurisdiction if there is physical presence and service of process—general jurisdiction based on transitory presence within territory).

12. Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102 (1987) (finding certain acts or contact warrant jurisdiction, purposeful availment and reasonableness in international cases. The court used the stream of commerce analysis and held that jurisdiction did not comport with traditional notions of fair play).

Asahi Metal Ind. v. Superior Ct. of Cal.[13] proposed that the federal interest in foreign relations is best served by a careful inquiry into the reasonableness of the assertion and the serious burden on the foreign defendant to defend a suit.[14] "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.[15] The cornerstones to an international jurisdictional analysis are purposeful availment and "reasonableness."[16]

State and federal statutes allow U.S. courts to assert jurisdiction over foreign defendants if the assertion is reasonably based on the foreigner's overt action, "purposeful availment." States' authority, through their "long arm statutes," has been extended by the federal government; therefore, states may now use national contacts in the jurisdiction equation to determine if jurisdiction exists.[17]

The U.S. asserts extraterritorial jurisdiction in several areas; nevertheless, much of this article is prefaced around cases resulting from antitrust violations. Parts of the tests formulated to settle antitrust disputes have been, on occasion, easily transferred to other legal disputes involving the extraterritorial jurisdiction question, which lacked specific mandates that cover that particular extraterritorial issue. The principles articulated in *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Assoc.*[18] can be transferred to most extraterritorial jurisdictional analyses, and provide the needed predictability in this expanding area.

There are many approaches to the jurisdictional analysis, which usually comprise combinations and extensions of traditional and nontraditional principles of jurisdiction. States have traditionally sought to assert jurisdiction on certain bases or principles. As usually identified these include [but are not limited to]:

1. The Territorial Principle - A state may exercise jurisdiction with respect to an act occurring in whole or in part in its territory.
2. The Nationality Principle - A state may exercise jurisdiction with respect to its own national, wherever he may be.
3. The Protective Principle - A state may exercise jurisdiction with respect to certain types of acts wherever, and by whomever, committed where the conduct substantially affects certain vital state interests, such as its security, its property or the integrity of its governmental process.

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13. *Asahi*, 480 U.S. at 102.

14. *Asahi*, 480 U.S. at 103.

15. *Asahi*, 480 U.S. at 115 (citing United States v. First Nat'l Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

16. *Asahi*, 480 U.S. at 104, 115.

17. *See* Paulson Investment Co. v. Norbay Securities Inc., 603 F. Supp. 615, 618 (D. Ore. 1984); *see also* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977) (explaining that the Lanham Act possibly provided jurisdiction for alien defendant's foreign activity).

18. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Assoc., 549 F.2d 597 (9th Cir. 1976) [hereinafter *Timberlane I*].

4. The Universality Principles - A state may exercise jurisdiction with respect to certain specific universally condemned crimes, principally piracy, wherever and by whomever committed, without regard to the connection of the conduct with that state.
5. The Passive Personality Principle - A state may exercise jurisdiction with respect to any act committed outside its territory by a foreigner which substantially affects the person or property of a citizen.[19]

Early U.S. jurisdiction was confined to the territoriality principle.[20] As the trade of goods increased, as a result of globalization, the need to extend jurisdiction has become more apparent.[21] The Commerce Clause[22] of the Constitution provides a vehicle by which the courts may assert jurisdiction for activity that directly "affects" U.S. commerce.

Historically, U.S. courts have recognized that "[i]nternational law is part of United States law."[23] As a result of trade expansion, protection of national interest, and the effects of certain business activity on the U.S., extraterritoriality has been extended to include the conduct of foreign nationals. Thus, U.S. law is applied to adjudicate disputes that arise as a result of violations of that law or disputes between private parties. The courts seem to view this as a natural extension since the U.S. courts view international law as U.S. law.[24] Moreover, in many instances, U.S. courts do not differentiate between the scope of U.S. law and international law once the court decides to assert jurisdiction. "One nation's assessment of its legal necessity

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19. S. Houston Lay & Howard J. Taubenfeld, *The Law Relating to The Activities of Man in Space* (1970); *see also* Don Wallace Jr., *Extraterritorial Jurisdiction*, 15 LAW & POL'Y INT'L BUS. 1099, 1099-1107 (1983) (discussing three bases of jurisdiction, territoriality, nationality, and security).

20. *See* Rose v. Himely, 8 U.S. 241, 279 (1808) (holding that all sovereignty is strictly local and cannot be exercised beyond the territorial limits).

21. *See* Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984); *see also* Foreign Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (1994) (stating that it is the intention of Congress to apply the Sherman Act extraterritorially); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Continental Grain Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 410 (8th Cir. 1974); AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. § 621(1967) (amended 1996) [hereinafter, ADEA] (the ADEA applies to U.S. citizens employed in a foreign work-place by an employer. Section 623 (f)(1) allows a "foreign law exception); Mahoney v. RFE/RL, Inc., 47 F.3d 447, 448 (1995) (providing that if an American corporation operating in a foreign country would have to "violate the law" of that country in order to comply with the ADEA, the Act excuses such a corporation from complying with ADEA).

22. U.S. CONST. art. I, § 8, cl. 8 (stating that Congress has the power to regulate commerce with foreign nations and among the states).

23. The Paquete Habana. The Lola., 175 U.S. 677, 700 (1900) (stating that international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination).

24. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (Justice Harlan's noting that the act of state doctrine has constitutional underpinnings); *see also* Zenith Radio Corp. v. Matsushita Elect. Indus. Co., 494 F. Supp. 1161, 1178 (E.D. Pa. 1980) (noting that international law must give way when it conflicts with or is superseded by federal statute).

often runs up against another nation's conception of its national sovereignty."[25] The U.S. courts assertions of jurisdiction often run afoul of other sovereigns' conception of the U.S. jurisdictional limitations. Therefore, the necessity to assert jurisdiction extraterritorially extends general principles of U.S. law to cover international disputes affecting the U.S. This paper addresses the extension of several principles, and highlights the overlapping and combined use of these principles by the U.S. to establish and assert jurisdiction according to U.S. standards.

II. SOVEREIGN IMMUNITY AND THE ACT OF STATE DOCTRINES

A. Sovereign Immunity

Sovereign immunity is a doctrine of international law where domestic courts must refrain from asserting jurisdiction over foreign sovereigns; nevertheless, in instances where propriety of asserting jurisdiction outweighs possibility of harmful impact upon foreign relations, as articulated in the statute, the U.S. allows jurisdiction.[26] "In the age of globalization, borders still count. Despite the growth of global markets and international communications, the world is still made up of sovereign, independent countries each with its own legal and political system."[27]

Therefore, the Foreign Sovereign Immunity Act[28] and the act of state doctrine[29] continually trigger a source of conflict and legal discussion. There is an inherent overlap in the FSIA and the act of state doctrine. Both protect sovereigns from U.S. jurisdiction. Both doctrines are outgrowths of the comity doctrine,[30] which holds sovereigns as equals.

Comity in the legal sense is neither a matter of absolute obligation on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard both to international duty and convenience

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25. Kenneth Dam, *Extraterritorial and Conflicts of Jurisdiction*, 77 AM. SOC'Y INT'L L. PROC. 370, 371 (1983) (discussing conflicts over expanding U.S. extraterritorial jurisdiction and the use of sanctions); *see also* U.S. CONST. art. III (extending jurisdiction to U.S. courts for cases between citizens and foreign states).

26. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-1611, Pub. L. 94-583, 90 Stat. 2892 (1982) [hereinafter FSIA] (allowing foreign plaintiffs to sue foreign sovereigns in U.S. courts).

27. JESWALD W. SALACUSE, MAKING GLOBAL DEALS:WHAT EVERY EXECUTIVE NEEDS TO KNOW ABOUT NEGOTIATING ABROAD 103 (1991) (covering what every executive should know about negotiating abroad, including dealing with foreign governments and laws).

28. 28 U.S.C. §§ 1330, 1602-1611 (1982) (outlining actions that allow U.S. courts to assert jurisdiction, restrictive theory).

29. *See* Schooner Exchange v. McFaddon, 11 U.S. 116, 131-37 (1812) (discussing and adopting the absolute and universal theory of sovereign immunity; sovereigns are equal. A sovereign has the duty, not to submit his rights to the decision of a co-sovereign. He is the sole arbiter of his own rights).

30. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (defining the doctrine by stating that comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard both to international duty and convenience and to the rights of its laws).

and to the rights of its own citizens or of other persons who are under the protection of its laws.[31]

Thus, the U.S. recognizes sovereign acts and gives deference in several instances.[32] Sovereign immunity for foreign sovereigns like the act of state doctrine "has its roots, not in the Constitution, but in the notion of comity between independent sovereigns."[33] Sovereign immunity result from the internationally accepted territoriality principle, which allows sovereigns to respect mandates of other sovereigns. "Sovereigns are equal. It is the duty of a sovereign, not to submit his rights to the decision of a co-sovereign. He is the sole arbiter of his rights. He acknowledges no superior, but God alone, to his equals, he [is] shown respect, but not submission."[34] The U.S. Constitution establishes standing for U.S. nationals to sue foreign states, with the intention that "judicial power shall extend to all cases . . . between a [s]tate, or the [c]itizens thereof, and of [f]oreign [s]tates, citizens or [s]ubjects."[35]

Sovereign immunity allows, within certain specified situations, the sovereign to avoid U.S. jurisdiction. In *Puente v. Spanish Nat. State*,[36] the court dismissed plaintiff's suit against the sovereign for recovery of monies due as a result of professional services rendered. The Court denied plaintiff's motion to direct the clerk to enter default judgment for the plaintiff. The Court stated that "it ha[d] no jurisdiction to adjudicate a claim against a friendly foreign state."[37] More specifically, *Schooner Exchange v. McFaddon*[38] recognized the balance between judiciary powers and the executive powers in judicial matters that may affect foreign affairs. The Court said the decision to revoke or limit the immunity of foreign states lay with the political branch.[39]

Schooner[40] involved an armed public vessel claimed by the French government. *Schooner* adopted the absolute and universal immunity principle, and stated that "[h]owever unjust a confiscation may be, a judicial condemnation closes the judicial eye upon its enormity. . . . The simple fact in this case is, that an individual is seeking, in the ordinary course of justice, redress against the act of a foreign sovereign. But the rights of a foreign sovereign cannot be submitted to a judicial tribunal."[41]

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31. *Hilton*, 159 U.S. at 163-64.

32. *See e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (following the restrictive theory of sovereign immunity—activity was not commercial; the court declined jurisdiction).

33. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438 (1964).

34. Schooner Exchange v. McFaddon, 11 U.S. 116, 132 (1812) (concluding that sovereign immunity is absolute).

35. U.S. CONST. art 3, § 2 cl. 1.

36. Puente v. Spanish Nat'l State, 116 F.2d 43 (2d Cir. 1940).

37. *Puente*, 116 F.2d at 44.

38. *Schooner*, 11 U.S. at 116.

39. *Puente*, 116 F.2d at 90-91.

40. *Schooner*, 11 U.S. at 116.

41. *Schooner*, 11 U.S. at 132.

This absolute theory reigned in the U.S. until 1976.[42] The court continued with this absolute theory, and said "[t]he immunity of an independent foreign sovereign in our courts is well established."[43] *Molina v. Comision Reguladora Del Mercado De Henequen*[44] involved an imperfect sovereign. The State of Yucatan tried to assert the Sovereign immunity defense, but the court held that "the present suit is not against the State of Yucatan, but against a business corporation in which that state may be more or less interested."[45] In other words, the court said members of a federal union do not fall within the sovereign immunity doctrine; the members make up the whole and are represented by one recognized head. "[E]xcept in the case of immunity arising from sovereignty, an action will lie against a foreign government not completely sovereign."[46] The court merely clarified that the sovereign is the whole, not the parts.

The court in *Schooner* articulated why recognition of absolute immunity was necessary.

> [A] nation would justly be considered as violating its faith . . . which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world. This full and absolute territorial jurisdiction being like the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. The sovereign being in no respect amendable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[47]

As international commerce increased, U.S. policy began to change.

> The absolute theory of immunity continued to prevail in the U.S. even though the Tate Letter[48] laid the foundation for the adoption of the restrictive

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42. *See infra* notes 46, 49, 51 and accompanying text.

43. Molina v. Comision Reguladora Del Mercado De Henequen, 91 N.J.L. 382, 386 (1918) (citing Schooner Exchange v. McFaddon, 11 U.S. 116, 136-39 (1812)).

44. 91 N.J.L. 382.

45. *Molina*, 91 N.J.L. at 401.

46. *Molina*, 91 N.J.L. at 392.

47. *Schooner*, 11 U.S. at 137.

48. Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, Letter from Jack B. Tate, Acting Legal Advisor, to the Acting Attorney General, May 19, 1952, 26 DEPT. ST. BULL., June 23, 1952, at 984-85 (outlining reasons why the U.S. should adopt the restrictive theory of sovereign immunity to allow

> theory of sovereign immunity in 1952. In his letter, Tate highlighted reasons why the Department felt restriction were necessary for sovereign acts that were not traditionally performed by the sovereign. In his effort to justify the change, Tate outlined the doctrine's history and discussed other countries that applied the restrictive versus the absolute view of sovereign immunity. Most importantly he said,
>
> [T]he Department feels that the widespread and increasing practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity. It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.[49]

This letter, and the decision set forth in *Banco Nacional de Cuba v. Sabbatino*[50] led to the codification of the FSIA of 1976.[51] The consensus was that the act of state "preclude[d] the courts of this country from inquiring into the validity of public acts [that] a recognized sovereign power committed within its own territory."[52] The request to assert jurisdiction was premised on an alleged violation of international law due to expropriation (of capital stocks). The *Sabbatino* Court said it would not sit in judgment on the validity of a foreign act of state under foreign law, for such an inquiry would not only be exceedingly difficult but, if wrongly made, would be likely highly offensive to the State in question.[53] Here the court re-examined the concepts under international law, which are used to determine when a government "taking" contravenes international law. Normally, if the taking is not for a public purpose, i.e., if it is discriminatory or is without provision for prompt, adequate, effective compensation, it is deemed improper. Nevertheless, the court held that the

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persons doing business with sovereign to have their rights determined by the courts).

49. *Id.*

50. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (holding that the judicial branch will not examine the validity of a taking of property within its own territory by a foreign sovereign, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreements).

51. FSIA, 28 U.S.C.A. §§ 1602- 1611, Pub. L .94-583, 90 Stat. 2892 (1982).

52. *Sabbatino*, 376 U.S. at 400.

53. *See Sabbatino*, 376 U.S. at 415 n. 17.

act of state doctrine was applicable even in the face of a violation of international law.[54]

The FSIA provides that foreign sovereigns and their instrumentalities are immune from suit in U.S. courts unless the conduct complained of falls within various specified exceptions set forth in the statute. These exceptions entail; commercial activity and waiver by a sovereign,[55] property taken in violations of international law, rights in property by succession or gift or right is in the U.S.; and money damages for personal injury or death, or damages to or loss of property non-commercial tort.[56]

These exceptions are the sole bases for U.S. courts to assume jurisdiction over foreign states; otherwise, they are immune. The presumption is that the sovereign is immune from suit, unless he explicitly waives his right. Further, the FSIA outlines service of process rules.[57] In actions against foreign states, "the district court shall have original [and] personal jurisdiction over a foreign state shall exist as to every claim for relief . . . [and] an appearance by a foreign sovereign does not confer person jurisdiction with respect to any claim not arising out of any transaction or occurrence enumerated in Sections 1605-07 of this title."[58] The FSIA merges concepts of personal and subject matter jurisdiction so that the court has personal jurisdiction in any case where the Act authorizes subject matter jurisdiction, so long as both—proper service and the requisites of due process are satisfied.[59] If a dispute falls within the exceptions set forth in the statute, U.S. courts assume jurisdiction. The commercial exception is continually a major point of contention under the FSIA and the act of state doctrine.

For example when the Mexican government nationalized a privately owned Mexican bank, plaintiffs (U.S. citizens) with certificates of deposits in this bank sought relief. The exchange control regulations mandated that all deposits be repaid in Mexican pesos; thus, the plaintiffs argued for the applicability of the commercial activity exception.[60] The court said two questions must be addressed to find com-

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54. *See Sabbatino*, 376 U.S. at 415 n.17; *but see* Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e)(2) (1976) (Hickenlooper Amendment) (providing that confiscation or taking in violation of international law is within U.S. courts' jurisdiction.).

55. *See infra* notes 57-72 and accompanying text (discussing several exceptions and the deference the U.S. extends to sovereigns).

56. 28 U.S.C. §§ 1602-1611 (1982); *see* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989); *see also* Carnival Cruise Lines, Inc. v. Oy Wartsila A.B., 159 B.R. 984 (1993) (holding that the Finnish Corporation was a foreign state, 80% government owned, under FSIA—thus immune).

57. 28 U.S.C. § 1608 (1982); *see* FED. R. CIV. P. 4(j)(1) (1993).

58. 28 U.S.C. § 1330(a)-(c).

59. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 607-14 (1992) (describing which sovereign acts fall within statutory exceptions and warrant extending jurisdiction; when the sovereign acts, not as regulator of a market, but in a manner of private player within it, the foreign sovereign's actions are commercial within the meaning of the FSIA).

60. *See* Callejo v. Bancomer, 764 F.2d 1101, 1109 (5th Cir. 1985) (stating that court is barred from in-court inquiry into validity of acts of foreign states performed in their own territory).

mercial activity: Was the suit based upon a commercial activity by Bancomer?[61] And if so, did the commercial activity have the requisite nexus with the United States?[62] This court, unlike the District Court, held that the action was not based upon the promulgation of a sovereign act by Mexico, but upon Bancomer's activities. Thus, Bancomer was not entitled to sovereign immunity under the FSIA.[63] The court held that the act of state doctrine applied but that the doctrine of sovereign immunity did not. The court also held that the case was based on commercial acts that directly affected the United States, and that it implicated sovereign acts taken by Mexico to reserve its foreign exchange reserves.[64]

At first glance, these holdings may seem inconsistent, but they reflect an underlying unity. Both the United States and Mexico had ties to the deposits and, therefore, both countries possessed a common interest in the deposits. The interest of the United States justified its exercise of jurisdiction under the FSIA to hear claims regarding a breach of the terms of the deposits.

Likewise, Mexico's interest justified its application of the exchange control decrees. The court expressed no opinion as to which of the interests was greater, but said the act of state doctrine reserved that question for the political branches. This also reflects the view that, where competing sovereign interests are at stake, the delicate task of resolving disputes is best handled through diplomatic channels.[65] The *Callejo* [66] court, therefore, affirmed the district court's judgment dismissing the case. This analysis is often followed by U.S. Courts.

More recently, in *Weltover, Inc. v. Republic of Argentina*,[67] plaintiff's were holders of registered bonds adversely affected when Argentina extended time of payment in an effort to stabilize its currency. In order to determine the applicability of the commercial exception, the court looked to the nature rather than to the purpose of the act. The court determined whether they were the type of actions by which a private party engages in trade and traffic or commerce rather than whether the foreign government is acting with a profit motive or with the aim of fulfilling uniquely sovereign objectives.[68] The court concluded that Argentina's acts were commercial. Therefore, the court performed an analysis of the "direct effects"[69] on the U.S. economy. The court found *Shoe's* minimum contacts requirement as well as the

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61. *Callejo*, 764 F.2d at 1126.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Callejo*, 764 F.2d at 1101.
67. *See* Weltover, Inc. v. Republic of Argentina, 504 U.S. 607 (1992).
68. *Weltover*, 504 U.S. at 619.
69. *See id.*, 504 U.S. at 619 (holding that an effect is direct if it follows as an immediate consequence of the defendant's activity).

mandates for effects on U.S. commerce, which were set forth in Alcoa. Therefore, the case fell within the scope of the FSIA.[70]

Interestingly, in this case one observes the court's recognition that Argentina's acts were too attenuated to affect New York as a world financial center, but nonetheless the acts had a direct effect on the U.S. commerce as a whole. This observation is analogous to the court's allowing the states to use national contacts to assert long arm jurisdiction if the "minimum contacts" test is satisfied.

The sovereign may waive his immunity.[71] Special provisions may exist depending on the circumstances surrounding the waiver. Like the commercial exception, waiver by a sovereign is not always clear. U.S. courts have insisted that the waiver be explicit, and not implied. For example, in *Republic of Iraq v. First National City Trust Co.*,[72] Iraq appeared to have waived its immunity by specially appearing to oppose defendant's application to transfer jurisdiction to another court. Defendant's motion was denied. The Court said that the waiver was not for all purposes but operated only to subject the Republic of Iraq to the jurisdiction for purposes of determining its claim against defendant.[73] On the contrary, in *National City Bank of New York v. Republic of China*,[74] the sovereign also waived its immunity, yet moved to prevent the defendant's counterclaim. The Court denied China's request, reasoning that such an action would allow China to recover and deny the defendant relief; this would not serve the ends of justice.[75] More recently, when a foreign government did not respond substantively to any averments or pose any defenses, the foreign sovereign's action did not constitute an implied waiver of the sovereign immunity defense.[76] These cases illustrate the deference U.S. courts extend to sovereigns even in a waiver situation. By insisting that the waiver be explicit, U.S. courts are exercising the utmost caution to avoid intruding on another sovereign's rights. Many of these principles overlap, especially the FSIA and the act of state doctrine.

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70. *Weltover*, 504 U.S. at 619; *see also* FSIA *supra* note 26.

71. *See* Republic of Iraq v. First Nat'l City Trust Co., 207 F. Supp. 588, 590 (S.D.N.Y. 1962) (holding that Iraq did not waive sovereign immunity with respect to proceedings in state court by appearing specially to oppose jurisdictional transfer order).

72. *First Nat'l City*, 207 F. Supp. at 590.

73. *Id.*

74. Nat'l City Bank of New York v. Republic of China, 348 U.S. 356, (1955) (holding that if a foreign government invokes our law, it cannot resist claims against it as a result of the action).

75. *Nat'l City Bank*, 348 U.S. at 361.

76. *See* Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990) (finding that the strong presumption must be overcome to rebut the independent status of foreign agencies).

B. The Act of State Doctrine

The act of state doctrine precludes American courts from inquiring into the validity or legality of acts done by a foreign sovereign within its own territory.[77]

The act of state doctrine like the sovereign immunity doctrine is also rooted in principles of international comity, and involves a balancing of U.S. interest in providing a forum for injured parties against the interest in maintaining amicable relations with other nations by respecting their sovereign acts. However, the balance struck concerning each doctrine varies.[78] Historically, the U.S. courts recognized the rights of sovereign nations. "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[79] Thus, the territoriality principle prevents U.S. courts from adjudicating actions that are accomplished within the sovereign's territory. The act of state doctrine has been developed primarily through case law, and unlike the FSIA has not been codified.

Nevertheless, there are at least five exceptions to the act of state doctrine: Bernstein exception,[80] Commercial exception,[81] International law or Treaty exception,[82] Hickenlooper exception,[83] and the Situs rule.[84] This is the general rule in the U.S.; nonetheless, U.S. courts have the power, and ordinarily the obligation, to decide cases and controversies[85] properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid. This rule became evident when the court deferred to the Mexican government because the act was executed within Mexico.[86] This case illustrates the interplay between sovereign immunity and the act of state doctrine.

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77. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); *see* Underhill v. Hernandez, 168 U.S. 250, 251-52 (1897) (setting forth requirements for exemption: the act must take place within sovereign's territory and the act must be a bona fide government act).

78. Callejo v. Bancomer S.A., 764 F.2d 1101, 1125 (5th Cir. 1985).

79. *Underhill*, 168 U.S. at 252.

80. Bernstein v. N.V. Nederlansche-AmerikaascheStoomvaart-Mmaatshappij, 210 F.2d 375 (2d Cir. 1954) (providing that if executive branch advises against applying AOS, the courts may decline jurisdiction).

81. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 282, 695 (1976) (discussing commercial activity exception).

82. Kalamazoo Spice Extraction v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984) (discussing exception when clear violations of international law).

83. Empresa Cubana Exportadora, Inc. v. Lamborn & Co., 652 F.2d 231 (2d Cir. 1981) (discussing Hickenlooper Amendment, which requires U.S. courts to adjudicate sovereign's takings if speedy compensation is not provided).

84. *Empresa Cubana*, 652 F.2d at 231.

85. U.S. CONST. art. III, § 2 cl. 1.

86. *See Callejo*, 764 F.2d at 1101 (explaining that the proper test for determining situs is where the incident of the debt, as whole, place it).

Actually, exceptions to the doctrine were implemented in order to protect U.S. citizens who trade with sovereigns or their instrumentalities. Each doctrine covers a specific area, which was a major point of contention for U.S. companies doing business with foreign companies, sovereigns, or their instrumentalities.

The *Bernstein* exception, was alluded to as early as 1890 when the court, in *In Re Baiz*[87] recognized the executive branch's authority to certify whether an individual was a public minister. The alleged Consul General of Guatemala asserted that the district court did not have jurisdiction based on his status. The court said, "we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the state department that a party is or is not a priviledged person. . . ."[88]

Even though this case dealt specifically with recognition of a person representing a sovereign, the same logic is apparent in deciding when an "act" is recognized as a result of the state's action. Therefore, the court has jurisdiction if the State Department certifies that it will not affect American Foreign policy.

This doctrine was specifically developed in *Bernstein v. N.Y. Nederlandsche-Amerekaansche Stoomvaart-maatshappij*.[89] If the Department of State declares that the act of state doctrine should not be applied, then deference must be afforded by the courts.[90] "The history of the doctrine indicates that its function is not to effect unquestioning judicial deference to the executive, but to achieve a result under which diplomatic rather than judicial channels are used in the disposition of controversies between sovereigns."[91]

Second, the commercial exception espouses the view that as more sovereigns engage in commercial activity, the concept of the act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.[92] The commercial exception resulted from decisions by the courts which allowed sovereigns to escape jurisdiction

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87. In Re Baiz, 135 U.S. 403 (1890) (concluding that the court would not sit in judgment upon the decision of the execution in reference to the public character of a person claiming to be a foreign minister and, therefore, the court has a right to accept the certificate of the state department that a person is or is not a privileged person).

88. *Baiz*, 135 U.S. at 432. *See* Schooner Exchange v. McFaddon, 11 U.S. 116 (1812) (stating that immunity of foreign state lay with political branch).

89. Bernstein v. N.Y. Nederlandsche-AmerkaanscheStoomvaart-Mmaatshappij, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam), *modified*, 173 F.2d 71, 75 (2d Cir. 1949).

90. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 764 (1972).

91. Robert Delson, *The Act of State Doctrine—Judicial Deference or Abstention?* 66 AM. J. INT'L. 83, 83 (1972).

92. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (plurality opinion) (realizing the exception set forth in the FSIA); *see also* Victor Friedman & Leslie Blau, *Formulating a Commercial Exception to The Act of State Doctrine,* Alfred Dunhill of London Inc. v. Republic of Cuba, 50 ST. JOHNS L. REV. 666, 678-79 (1976) (stating that "*Dunhill* case probably did not present the best possible factual setting for the development of the Commercial exception"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (holding that judicial branch will not examine sovereign takings when executed within its own territory).

even though they were not executing acts associated with their sovereignty. Thus the state department concluded that in the commercial area, the need for merchants to have their rights determined in court outweighs any injury to foreign policy.[93]

Third, the international law or treaty exception does not prescribe use of the doctrine of act of state nor does it forbid application of the doctrine even if the act of state in question was a violation of international law. If an act violates international law or treaty, the act of state does not apply.[94] If the sovereign breaches international law, then the U.S. courts do not allow the sovereign to escape jurisdiction.[95]

Fourth, the Hickenlooper Amendment[96] gives U.S. courts jurisdiction over confiscations or "takings" by sovereigns in violation of international law, with two exceptions:

> (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.[97]

Therefore, U.S. courts allow plaintiffs to pursue actions as a result of illegal takings. Sovereigns can not assert sovereign immunity when the act complained of is clearly beyond its scope as a sovereign. This exception allows the court to pierce the sovereign's veil and allows the aggrieved to have his day in court.

Last, the situs exception allows courts to refuse to give effect to foreign acts of state that affect property whose situs is in the U.S. Courts give effect to acts under the act of state only insofar as they come to complete fruition within the sovereign's territory, foreign country. Under the act of state doctrine, when a foreign government performs an act of state which is an accomplished act, that is, when it has parties and

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93. *Dunhill*, 425 U.S. at 706.

94. *See Sabbatino*, 376 U.S. at 398; Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Ethiopia, 729 F.2d 422, 425 (6th Cir. 1984) (holding that the Act of State doctrine did not preclude court from adjudicating American corporation's claim against Ethiopian government based on its expropriation of corporation's interest, in light of the standards set out in the treaty between U.S. and Ethiopia, which only allows two types of taking; property to be taken for a public purpose or property taken must be with just and expedient compensation); Faysound Ltd. v. Falcon Jet Corp. & Walter Fuller Aircraft Sales, Inc., 940 F.2d 399, 341 (8th Cir. 1991) (rejecting the Act-of-State defense).

95. Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Ethiopia, 729 F.2d 422, 425-26 (6th Cir. 1984).

96. Foreign Assistance Act of 1961, § 620(e)(2), *as amended* 22 U.S.C.A. § 2370(e)(2) (1976) (Hickenlooper Amendment).

97. 22 U.S.C.A. § 2370(e)(2); *see* Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 961 (S.D.N.Y. 1965), *affirmed* 383 F.2d 166, 171 (1966).

res before it and acts in such a manner as to change relationship between parties touching the res, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity.[98]

The jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. The U.S. once viewed the doctrine as "an expression of international law, vesting upon 'the highest consideration' of international comity and expediency.

We have more recently described it, however, as a consequence of domestic separation of powers, reflecting the strong sense of the judicial branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs."[99] Nevertheless, these exceptions send a clear message to sovereigns engaging in international trade, by highlighting instances that will subject sovereigns to U.S. jurisdiction.

III. EXTENSION OF U.S. LAW AND OTHER METHODS USED TO EFFECT POLICY COMPLIANCE

A. *Extension of U.S. Law*

The "pull and drag" of economic and political issues force the U.S. to expand its jurisdictional span beyond the traditionally recognized areas. The Constitution gives Congress the authority to "regulate commerce with foreign nations"[100] and gives [C]ongress the power "to promote the [p]rogress of [s]cience and useful [a]cts, by securing for limited [t]imes to [a]uthor's [a]nd [i]nventors the [e]xclusive rights to their respective [o]rigins and [d]iscoveries."[101] Additionally, The Trade Act of 1974,[102] and The Omnibus Trade And Competitiveness Act of 1988[103] provide the U.S. Trade Representative with the authority to protect U.S. commerce from various unfair trade practices, which affect U.S. commerce. The unilateral trade retaliation provision was originally introduced as part of the Trade Act of 1974 to fight against "unfair" foreign trade practices.[104]

If the U.S. Trade Representative determines that an act, policy, or practice of a foreign country . . . violates, or is inconsistent with, the provisions of, or otherwise

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98. Tabacelera v. Standard Cigar Co., 392 F.2d 706, 715 (5th Cir. 1968).

99. Kirkpatrick & Co., Inc. v. Environmental Tectonic Corporation, Int'l, 493 U.S. 400, 404 (1990) (citing Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918) and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)).

100. U.S. CONST. art. 1, § 8, cl. 3.

101. *Id.*

102. The Trade Act of 1974, Pub. L. No. 93-618 tit. III, § 302, 88 Stat. 2041 (1975) (codified 19 U.S.C.S. 24112 (1979), 102 Stat. 1107 (1988)) (providing that the U.S. Trade Representative has the authority to suspend trade benefits and impose duties).

103. The Omnibus Trade And Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

104. Fusua Nara, *A Shift Toward Protectonism Under § 301 of the 1974 Trade Act: Programs of Unilateral Trade Retaliation Under International Law*, 19 HOFSTRA L. REV. 229, 230 (1990).

denies benefits to the United States under, any trade agreement, or. . . . is unjustifiable and burdens or restricts United States commerce; the Trade Representative shall take action authorized and subject to the specific direction, if any, of the President, regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take. . . . to enforce such rights or to obtain the elimination of such act, policy, or practice."[105]

This somewhat unfettered power given to the United States Trade Representative has been highly criticized. The U.S. is increasingly exercising its "§ 301 power," and has used it in numerous instances against several major trading partners, but not without reprisals.[106]

The Sherman Act[107] allows U.S. courts to assert jurisdiction over activity in restraint of trade. In *American Banana v. United Fruit Co.*,[108] the restraint of trade question was pivotal. Even though the Court alluded to the possibility that U.S. jurisdiction may extend to conduct in other nations, it nevertheless held to the territoriality principle, i.e., that the activity was beyond the scope of U.S. jurisdiction. This case involved an elaborate scheme to prevent competition and control the banana market by purchasing competitors businesses, regulating amount of purchase, and setting prices. The acts were done outside the U.S. territory but within the territories of other sovereigns (Panama, Columbia, and Costa Rica). The Court reasoned that Congress did not intend to extend jurisdiction outside the U.S.[109] Specifically, the Court said "[g]iving to this complaint ever reasonable latitude of interpretation we are of the opinion that it alleges no case under the Act of Congress. . . ."[110]

This view has gone through tremendous change. In 1945, the Court developed the "intended effects" test and extended U.S. jurisdiction to include action occurring outside the U.S. but manifesting effects within.[111] *United States v. Aluminum Co. of America*[112] dealt with conduct abroad that substantially and foreseeably "effected"

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105. 19 U.S.C. § 2411(b)(i),(ii) (1988).

106. Nara, *supra* note 104 at 230; LAWRENCE COLLINS, BLOCKING AND CLAWBACK STATUTES, THE UNITED KINGDOM APPROACH 452 (1986).

107. 15 U.S.C. § 1 (1890) (as amended 15 U.S.C. § 1 (1964)).

108. 213 U.S. 347 (1909).

109. *American Banana*, 213 U.S. at 354-55 (explaining that the "intended effects" test is a legitimate basis of jurisdiction to regulate economic conduct abroad when the defendant intends market effects, which in fact must occur, result in substantial, direct, and foreseeable effects on U.S. domestic or foreign commerce).

110. *American Banana*, 213 U.S. at 359.

111. *See* United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 416 (2d Cir. 1945) (explaining that the intended effects test is a legitimate basis of jurisdiction to regulate economic conduct abroad when the defendant intends market effects, which result in substantial, direct and foreseeable effects on U.S. domestic or foreign commerce and must occur in fact); *see also* Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1287 (3d Cir. 1979) (iterating the "substantial effects" test and reliance on matters of foreign policy, reciprocity, and limitations of judicial power).

112. *Alcoa*, 148 F.2d at 416.

U.S. commerce. Specifically, aluminum producers were price fixing, intending to affect the U.S. market. Contrary to *American Banana*, the Court here asserted that courts have jurisdiction (Sherman Act) over foreign defendants whose conduct has "effects" on U.S. commerce.[113]

As a first step in its efforts to ascertain if jurisdiction exists, U.S. courts balance the comity principles. In other words, "this comity analysis is a balancing process to determine whether the interests of the United States are sufficiently strong, when balanced against those of other nations involved, to justify the extension of extraterritorial jurisdiction."[114] The Court, in a later decision, extended *Alcoa* by eliminating the need to prove intent. The Court said the mere existence of a conspiracy provides sufficient evidence that the foreign actor intended to affect U.S. Commerce.[115]

In the seminal case on extraterritorial jurisdiction, the court adopted the tripartite test, "rule of reason,"[116] to determine extraterritorial jurisdiction in actions dealing with antitrust violations.

> [T]he antitrust 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 antitrust laws. Third,. . .whether the interest 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.[117]

The court concluded that in order to determine the third part of the test, several elements must be examined. These include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties, and the locations or principal places of business of corporations; the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States compared with those elsewhere; the extent to which an intent exist to purposely harm or affect American commerce; the foreseeability of such effect, and the relative importance to the violations charged of conduct with conduct abroad.[118] This analysis allows a court to identify the potential degree of conflict with another

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113. *Alcoa*, 148 F.2d at 430, 448.

114. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F.Supp. 1161, 1179 (E.D. Pa. 1980).

115. United States v. Glaxo Group Ltd. 328 F. Supp. 709, 711-12 (D.C. Cir.) (1971).

116. *See* Timberlane Lumber Co. v. Bank of America (*Timberlane I*), 549 F.2d 597, 615 (9th Cir. 1976); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401, 403(1) (1987) (providing that nation with basis for jurisdiction should exercise restraint when such exercise is unreasonable).

117. *Timberlane I*, 549 F.2d at 613.

118. *Id.*

sovereign. These questions are frequently analyzed by U.S. courts to avoid encroaching on other sovereign's authority.

Ultimately, courts in the U.S. should refuse to assert jurisdiction unless there is a cognizable "effect" on U.S. commerce in that particular instance. In addition to "effects," U.S. courts look to the "limitations customarily observed by nations upon the exercise of their power, limitations which generally correspond to those fixed by the Conflicts of Laws."[119] These situations and criteria highlight the case by case approach used by U.S. courts to determine the degree of conflict and the practicability of asserting jurisdiction. This method has been criticized, and rightly so, because different circuits view certain factors differently. The outcome is, therefore, difficult to predict despite the availability of criteria to decide such issues.

In 1984, the court in *Timberlane Lumber Co. v. Bank of America National Trust And Savings*[120] (*Timberlane II*) used the tripartite test set forth in *Timberlane I* and denied an assertion of extraterritorial jurisdiction. This denial was specifically based on the third part of the test. In order to ascertain whether it should assert jurisdiction, the court looked closely at this question: "As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it."[121]

The court went through an in-depth analysis of the seven factors articulated in *Timberlane I* and concluded that the undisputed facts required a non-assertion of jurisdiction. Of the seven factors, factors one and five weighed against asserting jurisdiction. Specifically, the court said factor number one—the degree of conflict with foreign law or policy—was alone enough to decline jurisdiction. Likewise, the court said factor five—the extent to which there is explicit purpose to harm or affect U.S. commerce—was not pervasive because the defendant's efforts were consistent with Honduran customs and practices.

If strictly followed, this analysis would restrict U.S. assertions of jurisdiction to cases which blatantly infringe on U.S. law and policy. In *Timberlane II*, "the potential for conflict with Honduran policy was great; the effect on U.S. commerce was minimal and the majority of the conduct and impact thereof took place in Honduras."[122] Thus, in *Timberlane II* the court refused to assert jurisdiction based on *Timberlane I's* comity analysis, part three of the test.

The deference afforded Honduras must be adopted by the U.S. to provide more predictability in this area. Limiting assertions of jurisdiction to violations noted as strictly blatant breaches of widely accepted international law would more than likely gain international approval. This limitation would allow for predictability, and foster

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119. *Alcoa*, 148 F.2d at 443.

120. Timberlane Lumber Co. v. Bank of America Nat'l Trust and Sav. (*Timberlane II*), 749 F.2d 1378, 1383-86 (9th Cir. 1984); *see* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (considering factors of comity, foreign policy and limitation of judicial power).

121. *Timberlane II*, 749 F.2d at 1378.

122. *Id.* at 1386.

cooperation with and facilitate respect among nations. Adhering to established international policy and refusing to assert jurisdiction if the issue is outside customarily prescribed international policy is a trend the U.S. must employ on a consistent basis to avoid retaliation.

Unfortunately, U.S. assertion of jurisdiction is often viewed as a blatant disregard, at times, for foreign sovereign's sovereignty. In a tax case, the defendant argued that the Tax Equity and Fiscal Responsibility Act (TEFRA) does not allow worldwide inspection of foreign corporations based on the agency's administrative summons authority. The U.S. Tax Court, nevertheless, extended U.S. jurisdiction by allowing the Internal Revenue Service to audit portions of bank records, in Hong Kong, used to calculate worldwide gross income. The court realized that comity and international law should be considered, but said the TEFRA supplements the Commissioner's administrative power to cover those situations where a procedure is necessary to ensure timely production of documents held abroad.[123] The TEFRA clearly fell outside U.S. borders and the impact on U.S. commerce seems de minimis. This case illustrates the U.S. zeal, protectionistic, and imperialistic approach to extraterritorial jurisdiction.[124]

B. Other Methods Used To Effect Policy Compliance

Most U.S. foreign policy and jurisdiction have economic overtones. Many years prior to the North American Free Trade Agreement,[125] an economic issue developed between the U.S. and Mexico and had a great impact on U.S. Mexican relations. At the beginning of the 1970's, the United States experienced its first postwar economic crisis. Among the measures to counteract the crisis,. . .a special import duty [was imposed] which seriously affected Mexican exports. The Mexican government decided to regulate foreign investment, particularly targeting U.S. firms; and the United States, for its part, multiplied non-tariff restrictions on Mexican products. Migratory workers became viewed as a problem in the United States, and the issue of drug trafficking took on political overtones and became an instrument of pressure."[126]

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123. The Hong Kong & Shanghai Banking Corp. v. Commissioner, 85 T.C. 701 (1985).

124. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78J(b) (jurisdiction may be found even in the absence of domestic impact or domestic securities or plaintiff); *see* 28 U.S.C. §§ 1602-1611 (allowing foreign plaintiffs to sue foreign sovereigns in U.S. courts); *see also supra* note 25 and accompanying text (discussing sanctions); *supra* note 119 and accompanying text (discussing limitations customarily observed by nations upon the exercise of their power; nevertheless, the court concluded that U.S. courts have jurisdiction over foreign defendants whose conduct has "effects" on U.S. commerce).

125. North American Free Trade Agreement, art. 1106(1)(c), 32 I.L.M. 289, Dec. 17, 1992 [hereinafter NAFTA] (stating that "A party may not require another party to purchase, use, or give better treatment to goods or services provided by producers in its territory, or to purchase goods or services from individuals in its territory").

126. GUADALUPE GONZALES, THE FOUNDATIONS OF MEXICO'S FOREIGN POLICY: OLD ATTITUDES AND NEW REALITIES, *reprinted in* FOREIGN POLICY IN U.S.-MEXICO RELATIONS 21, 22-33 (Rosario Green & Peter H. Smith, eds. 1989) (papers prepared for the Bilateral Committee on the Future of United States-Mexican Relations, Pub-

The approach used against Mexico in the 1970's was the precursor to U.S. conduct today, in the area of retaliatory measures used to implement U.S. policy or to protect the U.S. economy. The U.S. uses a number of methods to influence its policy decisions: Threats of unilateral sanctions; allocations of most favored nation status to non-GATT countries, removal or threats of removal of said sanctions, trade regulations that adversely affect the countries they are directed toward and executive branch intervention, among other things.

The General Agreement on Tariffs And Trade,[127] imposes a duty on all parties to afford any reduction in tariffs to all others. The most favored nation[128] (hereinafter MFN) principles impose a duty on all parties to the GATT to treat all parties equally regarding tariffs and duties, any reduction given to one must be afforded all others. Non-GATT parties also seek this status to obtain preferential treatment. The U.S. often threatens to suspend MFN status if the country does not adhere to U.S. policy.

The U.S. threatens and imposes sanctions on many countries in order to impose U.S. domestic and foreign policy, trade and political views. The conflicts in Poland in the 1980's (Poland sanction cases) and the U.S. unilateral attempt to prevent a French country from trading with China,[129] are examples of the U.S. use of threats to alter conduct. The U.S. also threatened the Japanese semiconductor industry with an investigation of trade violations. As a result, Japan agreed to increase market shares.[130]

These instances represent and illustrate U.S. attempts to discourage activity that is contrary to its policy. The U.S. has several statutes which specifically allow the U.S. to sanction sovereigns in order to encourage compliance with U.S. policy.

The Export Administration Act[131] and § 301 of The Trade Act of 1988, [132] sets forth mandatory action that must be taken by the U.S. Trade Representative in cases that deal with barriers and restrictions to U.S. trade and allows sanctions purportedly in the interest of national security and foreign policy concerns. Prior to 1988, the President had authority, among other things, to impose duties or export restrictions

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lished by: Center for U.S-Mex. Studies, Univ. of Cal. San Diego).

127. General Agreement on Tariffs And Trade, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 194 Oct. 30, 1947, 61 Stat. A3 [hereinafter GATT]; *see infra* notes 133, 152 and accompanying text (discussing "MFN" status and sanctions).

128. *See* GATT, *supra* note 127.

129. *See* Dam, *supra* note 25, at 374 (discussing Poland sanction cases, including limitations on export of U.S. oil and gas equipment and technology transfer to the U.S.S.R.); *see also infra* notes 132-33 and accompanying text (discussing U.S. Trade Representative's authority to use sanctions against countries that are engaged in unfair trade practices).

130. *See* Patricia I. Hansen, *Defining Unreasonableness in Int'l Trade: Section 301 of The Trade Act of 1984*, 96 YALE L.J. 1122, 1142-43, n.100 (1987) (explaining the conflict between U.S. and Japan about the unreasonable restrictions on U.S. semiconductor manufacturers and the lack of a reciprocal market share for U.S. manufacturers in relationship to § 301 provisions).

131. Export Administration Act, 50 U.S.C., app. §§ 2401-20 (1982 & Supp. IV, 1986); *see* Omnibus Trade and Competition Act, Pub. L. No. 100-418, §§ 1301-02, 102 Stat. 1164 (codified as 19 U.S.C. §§ 2411-20 (1988) or "Super 301") [hereinafter Trade Act of 1988].

132. Trade Act of 1988, 19 U.S.C. §§ 2411-20.

on the goods of such foreign country or instrumentality for such time as he determined appropriate.[133]

Presently, the United States Trade Representative holds the authority to threaten, and impose trade sanctions against countries that engage in certain unfair international trade practices.[134] Additionally, the U.S. "use[s] § 301 against practices that do not violate any international agreements, principally when a foreign country increases its level of protection, when it takes inappropriate advantage of loopholes or ambiguities in existing trade agreements, or when [as with many developing countries] it maintains a high level of protection relative to the United States yet is the beneficiary of import trade preferences."[135]

The United States has increasingly resorted to economic sanctions as a major tool to influence its foreign policy. Recent targets include Panama, South Africa, Nicaragua, Libya, the Soviet Union, Poland, and Iran.[136] As conflicts develop around the world, the U.S. finds it harder to resist the temptation to step in as an intermediary, whether invited or not.[137]

This paper discusses a few of the measures used to bring about compliance. "The spectrum ranges from . . . covert actions, to economic sanctions, and finally to diplomatic measures, such as expulsion of some of the target countries' diplomatic personnel, recall of the ambassador, or suspension of cultural exchanges."[138] Even though the spectrum is broad, the U.S. usually threatens and sanctions other countries for certain activity.

The unilateral use of sanctions as a tool by the U.S. to enforce its policy is growing rapidly. The U.S. already regulates trade more often than most nations.[139] The Export Act creates a new category of U.S. sanctions against non-U.S. firms committing no violations of U.S. law. This Act was designed to circumvent possible adversarial use that would impede national security and foreign policy. "The United States has in recent years made considerable use of trade sanctions as a foreign policy

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133. *See* 19 U.S.C. § 2411 (1982 & Supp. 1987) (providing authority to the U.S. Trade Representative to sanction sovereigns that restrict U.S. trade).

134. 19 U.S.C. § 2411.

135. Alan O. Sykes, *Constructive Universal Threats in International Commercial Relations: The Limit Case for Sec 301*, 23 LAW & POL'Y INT'L BUS, 263, 263 (1992); *see* 19 U.S.C. §§ 2411-2420 (1988).

136. Barry E. Carter, *International Economic Sanctions: Improving The Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1162 (1987).

137. *See supra* notes 21, 25 & 96 and accompanying text; Trade Act of 1988, 19 U.S.C. § 2420 (requiring the U.S. Trade Representative to identify and analyze acts, policies or practices of each foreign county which constitutes barriers to U.S. exports).

138. *See* Carter, *supra* note 136, at 1168 (citing W. Christopher, *Diplomacy: The Neglected Imperative 1981: Maynes, Logic, Bribes, and Threats*, 60 FOREIGN POL'Y 111 (1985)); *see also* Nara, *supra* note 95, at 229 (detailing Section 301 prior to and after 1988).

139. *See* D. ROSTENTHAL & W. KNIGHTON, NATIONAL LAWS ANS INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY 53 (1982) (noting that the Omnibus Trade And Competition Act of 1988 makes significant changes in the Export Administration Act); *see also* Erick Hirschhorn & Joseph Tasker, Jr., *Export Controls: Toward A Rational System for Everyone Except Toshiba, With All Deliberate Speed*, 20 LAW & POLICY INT'L BUS. 369 (1989).

enforcement tool, leading to limitations on exports to countries adhering to courses of action inconsistent with U.S. policy."[140]

As suggested in the abstract, the use of sanctions by the U.S. "assume[s] a punitive nature by representing the penalty attached to transgression and breach of international [and U.S.] law in the form of punitive actions initiated . . . against one or more states for violati[ons]."[141] Many countries often agree to stop their behavior because to do otherwise would not be economically practical.[142] Obviously, the U.S. holds an advantageous bargaining position because of its dominant position in the world market. As a result, non-GATT members seeking "most favored nation" status and even GATT members that are considered economically inferior to the U.S. may succumb to threats for economic survival.

For example, "The United States warned Serbia . . . that unless it cooperates fully in the prosecution of Serb officers and officials responsible for committing war crimes in Bosnia, Washington will not vote in the U.N. Security Council to ease or lift the SANCTIONS that have devastated Serbia's economy."[143] Thus, the U.S. influences, either through negotiation or coercion, the acts of other sovereigns. As a result "[t]he U.S. use of threats of sanctions has led many of the countries to acquiesce to U.S. demands; thus, retaliation [by other sovereigns] is infrequent."[144] Nevertheless, there is no consensus on the use of sanctions in the international community because many times sovereigns are expected to spend their time and money to support, oftentimes, ill-conceived enforcement actions. "It is entirely possible that sanctions could be effective in terms of breaking commercial relations, imposing economic costs, and fulfilling a punitive role, yet be ultimately unsuccessful in achieving their political objectives."[145] Sovereigns are, therefore, reluctant to enforce sanctions set forth by the U.S., either because they affect their economy or they are do not agree with U.S. policy in the area.

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140. Hirschhorn, et. al, *supra* note 139, at 369.

141. *See* Christopher C. Joyner, *Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq*, 32 VA. J. INT'L L. 1 (1991) (quoting M.S. DAOUDI & M.S. DAJANI, ECONOMIC SANCTIONS 8 (1983)); *see also* Earth Island Institute v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991) (validating U.S. embargo of Mexican tuna as a result of application of the Marine Mammal Protection Act; Mexico violated the "dolphin kill quota")

142. *See* William Booth, *Embargo Leaves Haiti's Economy Down But Not Out*, WASH. POST, Aug. 10, 1994 at A14 (discussing the nearly total U.S. embargo—destroying Haiti's formal economy); *see also* Ann Devroy & T.T. Reid, *U.S. Awaits Word on N. Korea's Intentions—Pyongyang Extends Visas of Nuclear Inspectors, Sets Date For Summit with S. Korea*, WASH. POST, June 22, 1994 at A15 (discussing shelving of international sanctions in exchange for assurances to freeze nuclear program).

143. David B. Ottaway, *U.S. Warns Serbia on War Trials*, WASH. POST, Jan 17, 1994 at A19.

144. Sykes, *supra* note 135.

145. Christopher C. Joyner, *The Transnational Boycotts Economic Coercion in International Law: Policy, Place and Practice*, 17 VAND. J. TRANSNAT'L L. 205, 205-86 (1984).

IV. INTERNATIONAL BLOCKING STATUTES

International cooperation and trade has taken on an expanded existence. Developing countries arrived on the scene, developing nations and their subjects, who are increasingly engaging in international business. The U.S. has been criticized for its pervasive role in the extraterritorial application of its jurisdiction to cover disputes beyond its borders. As a result of this U.S. aggressiveness, several countries, including, but not limited to, Australia, Canada, Britain, and France, have considered and passed retaliatory legislation, or "blocking statutes." These laws counter sovereigns' efforts to extend jurisdiction beyond their borders and protect rights that said country prescribes as inherent, e.g., Switzerland's banking and secrecy laws.

In an effort to suppress U.S. application of jurisdiction, the British government passed several blocking statutes, Specifically, the United Kingdom Protection of Trading Interest Act (PTI Act).[146] The PTI Act was a direct response to decisions by U.S. courts in several cases related to the uranium industry, *Tennessee Valley Authority v. Westinghouse.*[147] Westinghouse was a complex combination of issues resulting from antitrust related allegations in the uranium industry and request for documents situated abroad.

The PTI Act's purpose is "to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom (UK) and affecting the trading or other interests of persons in the United Kingdom.[148] The Act gives the Secretary of State the discretion to prevent a company from the UK from complying with the foreign decree.[149] This jurisdictional assertion by a sovereign, (the U.S. in particular), is viewed as an encroachment on UK sovereignty.[150]

Prior to the Protection of Trading Interest Act, Britain passed the Shipping Contracts And Commercial Documents Act of 1964, which gave British shipowners a "foreign compulsion" defense in U.S. courts. The Act allowed the shipowner, charged with an offense in America, to assert that the action was based on British law. The Act also provided that the Minister of Commerce could direct any person

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146. The United Kingdom (UK) Protection of Trading Interest Act of 1980, ch 11, § 6(1)(c) [hereinafter PTI Act]; *see* Foreign Extraterritorial Measures Act 1984, ch. 49, § 1 (1984) (Can.); Thomas Murley, *Compelling Production of Documents in violation of Foreign Law: An Examination of the American Position*, 50 FORDHAM L. REV. 877, n.1 (1982) (citing several blocking statutes).

147. 429 F. Supp. 940 (E.D. Va. 1977); *see* In re Uranium Antitrust Litigation, 617 F.2d 1248, 1254 (7th Cir. 1980) (concluding that conduct abroad . . . intended to affect the uranium market in the U.S. . . . allegations fall within the jurisdictional ambit . . . as defined in *Alcoa*); *see also* Snowden v. Connaught Lab. Inc., 138 F.R.D. 138, 141 (D. Kan. 1991) ("blocking statutes do not deprive . . . a [U.S.] court of the power to order . . . produc[tion] even though the act . . . may violate that statute.").

148. PTI Act, *supra* note 146, ch. 11 §§ 1-3 (improving UK defenses against attempts by other countries to enforce their economic and commercial policies outside their own territories).

149. PTI Act, *supra* note 146, ch. 11, §§ 1-3.

150. PTI Act, *supra* note 146, ch. 11, §§ 1-3; *see* LAWRENCE COLLINS, BLOCKING AND CLAWBACK STATUTES: THE UNITED KINGDOM APPROACH COLLINS 452 (1986).

in the United Kingdom to prohibit compliance with foreign measures if it infringed on UK jurisdiction.[151] As evinced by the enactment of blocking statutes, English courts have often expressed their hostility to extraterritorial assertions of jurisdiction by U.S. courts.

The British court, in response to a U.S. citizen's attempt to apply U.S. patent law to British subjects, held that it does not recognize American courts' orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to American jurisdiction. Thus, the writ of the U.S. does not run in England, and, if due regard is had to the comity of nations, it will not seek to run in England.[152]

The voluminous litigation resulting from *In Re Insurance Antitrust Litigation*[153] highlights the complex analysis a court must employ to balance U.S. interest with the interest of another sovereign. In *In Re Insurance Litigation*, the Court considered the *Timberlane II* analysis, the UK Blocking statute, comity and many other aspects of international and domestic law. The Court, in reaching its decision, elaborated on the confusion between comity and true conflict, which the Court said may dictate a non-application of U.S. law. The Court concluded that, on balance, enforcement of the antitrust laws against activities in London's reinsurance market would lead to significant conflict with English law and policy. Following the Court's decision in *Timberlane II*, the Court decided that unless outweighed by other factors in the comity analysis, the conflict in and of itself formed a sufficient reason to decline jurisdiction; thus, the Court declined jurisdiction.

The French Blocking Statute, among other things, provides that "it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial proceeding. The parties shall forthwith inform the competent minister if they receive any request concerning such disclosure."[154] This statute is similar to the UK Blocking Statute and has also been a source of contention in U.S. courts.

In 1987, the Court, giving little credence to the existence of the French Blocking Statute, ordered the parties to make a good faith effort to obtain a waiver from the French government so they could produce the requested documents. The Court said

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151. PTI Act, *supra* note 146 (PTI Act repealed the Shipping And Commercial Documents Act of 1964.)

152. British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd. [1953] Ch. 19, [1952] 2 All ER 780 (Crt. App.).

153. In Re Ins. Antitrust Litigation, 723 F. Supp. 464, 487 (N.D. Cal. 1989), *reversed and remanded*, In Re Ins. Antitrust Litigation, 938 F.2d 919, 926-27 (9th Cir. 1991), *cert. granted in part by* Hartford Fire Ins. Co. v. California, 506 U.S. 814 (1992), *judgment aff'd in part, rev'd in part*, Hartford Fire Inc. Co. v. California, 509 U.S. 764, 817 (1993); *see* Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (1982).

154. French Blocking Statute, Art 1A-2, French Penal Code Law No. 80-538.

this action did not encroach on the French sovereign.[155] This request underscores the U.S. desire to expand its jurisdictional reach. The statute was designed to curtail U.S. expansion of jurisdiction by allowing the French to circumvent requests. Nonetheless, the U.S. insisted on production of the requested documents.[156]

Extended use of blocking statutes may continue if the U.S. continues to assert jurisdiction beyond what one considers generally accepted principles of international law. Further, the U.S. manipulation of certain agreements and obligations in order to bring about its desired results is also an area of concern.

For example, in 1984,[157] the U.S. attempted to removed itself from the International Court's jurisdiction after Nicaragua filed a suit, *Nicaragua v. United States*,[158] against the U.S. as a result of U.S. actions in the Nicaraguan civil war. This maneuver by the U.S. to avoid the International Court's (ICJ) jurisdiction sends the wrong signal to the international community and exacerbates the perception that the U.S. is a strong-arming nation that feels exempt from settled principles of international law. The U.S. is a member of the United Nations.[159] The U.S. has an obligation to adhere to the ICJ because it is, ipso facto, within the ICJ's jurisdiction. The ICJ, as a transnational tribunal, like GATT in the area of harmonized treaties, could become the model adjudicatory body if it truly had compulsory jurisdiction, with real enforcement mechanisms. Thus, if an authority existed that was vested with the capacity to penalize the U.S. for contravening international law, then incidents like the total disregard for other's laws and the blatant disregard for the ICJ's jurisdiction would cease. The authority to prescribe and enforce penalties would serve as a deterrent, not only to the U.S. but to all others.

V. MULTILATERAL HARMONIZING TREATIES

Harmonizing treaties serve several purposes; they set uniform approaches to legal problems and allow predictability. Even though many blocking statutes have been adopted, the U.S. has participated in efforts to bring about predictability by marshaling and agreeing to a great number of harmonizing treaties. On the one hand, the U.S. plays an integral part in this area; on the other hand, it has also criticized and voiced skepticism about the attempts of others to harmonize certain areas. The European Community has had its "critics, especially in the U.S. who have seen the

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155. Compagnie Francasise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co. No. 81-4463, Slip Op (S.D.N.Y. Jan 24, 1983); *see* Societe Nationale Industriele Aerospatiale v. United States Dist. Ct., 482 U.S. 522 (1987); Rich v. Kis California, Inc. 121 F.R.D. 254 (1988).

156. *See* Thomas Murley, *Compelling Production of Documents in Violation of Foreign Law: An Examination of The American Position*, 50 FORDHAM L. REV. 877 n.1 (1982) (citing several blocking statutes).

157. Preliminary ICJ Ruling on Nicaraguan Request, Department Statement, May 10, 1984, DEP'T. ST. BULL., JUNE 1984, at 78-80.

158. 1986 I.C.J. 14, 126.

159. GATT, *supra* note 127.

Convention as inhibiting harmonization, rather than securing it."[160] This argument suggests that if the member states of the European Community agree upon uniform choice of law rules, this will reduce the prospect of broader harmonization through, for example, the Hague Conference on Private International Law."[161]

This is not a correct argument. Regional and multilateral agreements are a source of conflict for countries that are not a part of the agreement, non-signatories. If this trend continues one may see a merger or combinations of mergers among the bilateral, regional, and multilateral agreements, which could ultimately merge into a "Super Gatt" type of organization. The General Agreement on Tariffs And Trade,[162] one of the most prevalent trade agreements, promulgated a gradual reduction in tariffs and an elimination of import quotas. Parties enjoy the "most favored nation" status and several other provisions that allow countries to impose sanctions against violators of GATT provisions. GATT governs international trade, lowers tariffs, and eliminates many barriers to trade and regulates discriminatory pricing practices.

When disputes arise, the Hague Evidence Convention[163] specifically sets forth certain procedures that a judicial authority in one contracting state may request evidence located in another. Specifically, [i]n civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. The expression "other judicial act" does not cover the service of judicial documents or the issuance of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or for provisional or protective measures.[164]

The Evidence Convention attempted to bridge the gap between civil and common law practices for obtaining evidence abroad.[165] The problem with the Convention, as well as other treaties of this type, is the lack of "bite" or in other words, mandatoriness. The Evidence Convention does not provide the exclusive, or even preferred, method of obtaining discovery and documents in signatory nations.[166] For

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160. PETER NORTH, PRIVATE INTERNATIONAL LAW PROBLEMS IN COMMON LAW JURISDICTIONS 136 (1993); *see* Kurt H. Nadelmann, *Impressionsism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-contractual Obligations,* 24 AM. J. COMP. L. 1, 2 (1976) (discussing the European Economic Communities' attempt to harmonize private international law and the possibility that the attempt could result in regional freezing of the law, rendering unification of law on a broader, international basis difficult, if not impossible).

161. NORTH, *supra* note 160 at 136.

162. GATT, *supra* note 127.

163. 23 U.S.T. 2555, T.I.A.S. No. 74444 (opened for signature March 18, 1970) (entered into force Oct. 6, 1974).

164. 23 U.S.T. 2555, art. I.

165. Philip Amram, *U.S. Ratification of The Hague Convention on the Taking of Evidence Abroad,* 67 AM. J. INT'L L. 104 (1973) (discussing letters rogatory, the taking of evidence abroad, and international judicial assistance).

166. Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522 (1987). *See* Snowden v. Connaught Laboratories, Inc., 138 F.R.D. 138 (D. Kan. 1991).

example, in *Rich v. Kis California Inc.*[167] a U.S. citizen who purchased photo processing equipment for a French manufacturer's American subsidiary sued the French company, its French Chairman of the Board to compel discovery. The Court said U.S. rules of civil procedure allowed discovery. "Defendants claim[ed] they are prohibited from procuring the Evidence by virtue of the French Blocking Statute."[168] The Court, using and agreeing with the analysis articulated in *Societe National Industrielle*, said foreign litigants could not insist on producing evidence solely through the Hague Evidence Convention, nor could they insist that such procedure be the primary method for directing discovery requests. To make the determination, the Court should consider the particular facts of each case, the sovereign interest involved and whether resort to the Convention would be an effective discovery device.[169] Ultimately, the Court granted the plaintiffs' motion to compel discovery from Kis France and Serge Crasninanski.[170] Not only has evidence gathering caused conflicts, but traditional U.S. service of process has also caused concerns in other countries because the service rules seem to mirror the U.S. assertion of jurisdiction. In other words, they are viewed as an intrusive extension of U.S. jurisdiction within the territory of another sovereign.

The Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters[171] (HCSA) was adopted by the U.S. even though the conventional methods of process (registered mail and by adult non-party) used by the U.S. are not set forth in the Convention. This adoption shows good faith by the U.S. to harmonize. Unfortunately, U.S. Courts do not construe the Convention as mandatory. The Court, in *Kis* held that the Convention did not provide exclusive and mandatory procedures for obtaining documents and information located within a foreign state, and first resort to the Hague Convention was not required because it contained no plain statement of preemptive intent. The French government filed an amicus brief stating that the Convention is exclusive, unless the sovereign decides otherwise. Nevertheless, the Court concluded that the Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation.[172] The Court also concluded that litigants do not have to first resort to Convention procedures whenever discovery is sought from a foreign litigant. Article I states that the Convention shall apply in all cases in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. As evinced here, the "shall" language has not been interpreted to mean mandatory.

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167. 121 F.R.D. 254 (1988); *see also* Laker Airways Ltd. v. Pan Am. World Airways 103 F.R.D. 42 (D.D.C. 1984).

168. *Rich*, 121 F.R.D. at 256.

169. *Rich*, 121 F.R.D. at 257.

170. *Rich*, 121 F.R.D. at 263.

171. 20 U.S.T. 361, 658 U.N.T.S. 163 (Feb 10, 1969); *see also* Hague Convention on The Taking of Evidence Abroad, 23 U.S.T. 255 (Mar. 18, 1970).

172. Societe Nationale Industriele Aerospticle v. United States Dist. Ct., 482 U.S. 522, 528 (1987).

The Court agreed that the Convention does not apply to discovery from a foreign litigant subject to the jurisdiction of an American court. The Federal Rules of Civil Procedure[173] also allow service of process upon individuals in a foreign country. The rule recognizes the Hague Convention on Service Abroad of Judicial and Extra-judicial documents, but does not make it mandatory or primary. Failure to construe the Convention as mandatory, obviously causes continual conflicts. This is due to lack of predictability, which is one of the major contentions foreigners have with the U.S. application of extraterritorial jurisdiction. If the Convention is not mandatory, one never knows when it will be enforced. Nevertheless, the Convention is a starting point, and it may evolve like the arbitration area.

The U.S. courts were reluctant to enforce arbitration clauses. Nonetheless, the courts now recognize arbitration clauses in international contracts and increasingly enforce arbitral awards. The Convention on the Recognition And Enforcement of Foreign Arbitral Awards[174] pertains to disputes in international commercial transactions stemming from disputes successfully arbitrated, but where the aggrieved party now seeks to recover the award in a foreign forum. If parties draft an arbitration clause into the contract, then it prevails and the courts should enforce the clause.[175] The Convention allows each signatory the right to refuse enforcement if enforcement is contrary to public policy.[176] Article III states that each contracting state shall recognize arbitral awards as binding and enforce them.[177] Arbitration provisions were embraced by the Court in *Scherk v. Alberto-Culver Co.*,[178] where a German citizen, Scherk, residing in Switzerland, to force defendants (ACC) to arbitrate their disputes over licensing trademarks for toiletries.[179] The Court said the U.S. Arbitration Act reversed centuries of judicial hostility to arbitration agreements. It was designed to enable parties to avoid the costliness and delays of litigation and to place arbitration agreements upon the same footing as other contracts. The Court also reasoned that national courts will need to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.

Nevertheless, the arbitration area of international law, like the Hague Service Convention, also encounters uncertainty in U.S. courts. A dispute over an arbitration clause arose in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth.*[180] Mitsubishi sought and obtained an order to force the parties to arbitrate, as per the agreement.

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173. FED. R. CIV. P. 4(f)(1)-(3) (1993).

174. 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970); *see* U.S. Arbitration Act, 9 U.S.C. S 1 et. seq, P.L. 103-85, (1993)

175. Scherk v. Alberto-Culver Co., 417 U.S. 506, 507-8 (1974) (citing H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924) and Article V(2)(b), 21 U.S.T. at 2520)).

176. *See supra* note 164 and accompanying text.

177. 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970).

178. *See supra* note 175 and accompanying text; *Scherk*, 417 U.S. at 513-15 (holding that the provisions of the Arbitration Act can not be ignored).

179. *Scherk*, 417 U.S. at 513-15.

180. 473 U.S. 614 (1985).

The Court required this representative of the American business community to honor its bargain. In reaching its decision, the court reiterated *Scherk's* reasoning that U.S. courts must subordinate domestic notions of arbitrability to that of international policy favoring arbitration. In *LaSociete Nationale Pour La Recherche v. Shaheen Natural Resources Co. Inc.*[181] an Algerian Company and an Illinois Co. (Shaheen) included an arbitration clause in their contract. The Court upheld the award and said that to do otherwise would violate the goal and purpose of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, i.e., to expedite the recognition and enforcement of awards.

The interesting point worth noting is the Court's reiteration of articles I and IX of the Convention, which provide that the Convention applies to arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such award is sought.[182] This rule examines the situs of the contract and not the nationality of the parties. This concept is similar to much of the analyses done by U.S. courts, for example, disregarding nationality if contacts are present.

For domestic parties seeking to enforce arbitration clauses, the court does not always enforce them.[183] In *Wilko v. Swan*, the Court recognized the difficulty of reconciling the Arbitration Act and the Securities Act. The Court, using general principles of statutory interpretation and application, decided that the Securities Act was more specific, and, thus, controlled.[184] The distinction here is the domestic versus international posture of cases dealing with arbitration clauses. The analyses and rulings in *Scherk* and *Wilko* underscore the U.S. amenability to harmonize certain areas of the law. Specifically, in *Scherk* the Court articulated the frustration that would result if the courts parochially refused to enforce intentional arbitration agreements.[185] Moreover, the Court added that a contract provision specifying the forum and law is almost an indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.[186] Here, the Court made a distinction between international and domestic issues, thus echoing the need to decide certain international cases in the light of international law and U.S. obligation under certain agreements. U.S. courts should not have the notion that U.S. law must be applied first. One must strike a balance, and the courts should always

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181. La Societe Nationale Pour La Recherche v. Shaheen Natural Resources Co, 585 F. Supp. 57, 60 (S.D. N.Y. 1983), *affirmed* La Societe National Pour La Recheche, 733 F.2d 260 (2d Cir. 1984).

182. *Id.; see* Bergesen v. Miller Corp. 710 F.2d 928, 932 (2d. Cir. 1983).

183. Wilko v. Swan, 346 U.S. 427, 438 (1953) (recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Securities Act).

184. *Wilko*, 346 U.S. at 437-38 (holding that the Securities Act was enacted to protect the rights of investors and has forbidden a waiver of any of those rights).

185. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974) (explaining that this would result in unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages).

186. *Scherk*, 417 U.S. at 516.

defer to the international application when the issues appear blatantly international and touch the concerns of other sovereigns.

Another area of contention for the U.S. is within patent law. Developing countries want to take advantage of new technologies but do not have the strict laws that the U.S. employ to protect inventors' rights. Not only is the U.S. effort to protect patent and copyrights linked to its desire to protect issues that affect U.S. commerce, but also Congress has an explicit Constitutional mandate.[187] The U.S. perception is that copyright and patent protection in most places are inadequate to protect American technology. The U.S. uses the earliest invention date (first-to-invent) as opposed to the first-to-file-system used by most countries.[188] Thus, efforts to harmonize this area are consistently a source of conflict.

The Hilmer Doctrine which allows U.S. patents to be used as prior art[189] is also contrary to most systems. Many recent changes have been developed in patent laws around the globe. Canada and the Philippines abandoned the "first-to-invent system, thus leaving the U.S. as the only major power with the first-to-invent system. Additionally, other nations are developing new patent laws with a focus on harmonization.[190]

As a result of these changes, the U.S., for a change, may need to get on board with the rest of the world and adjust certain laws to meet the prevalent international standard, especially in the patent and copyright area. Like many of the areas discussed, the most casual observer of international [copyright and patent] matters would concede that rapid changes in 'state-of-the-art' technologies have made intellectual property negotiations an important part of any international discussion with respect to trade, investment and development. For all of the progress that appears to have been made the schism between developed and developing nations, as well as between the United States and the members of the European Community and Asia, promise that harmonizing in the IP area will be particularly difficult. . . ."[191] Therefore, the U.S. should acquiesce to the international standard.

The United States-Canada Free Trade Agreement[192] diminished trade restraints between the U.S. and Canada and was the precursor to the North American Free

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187. U.S. CONST. art. I, § 8 cl. 8.

188. *See* Gary Griswold & F. Andrew Ubel, *Prior Use Rights—A Necessary Part of a First-to-File System*, 26 J. MARSHALL L. REV. 567, 569 (1993) (describing first-to-file system as the system that virtually every other country awards patents to the first person to file a patent application as the basis for priority decisions between applicants).

189. In re Hilmer, 359 F.2d 859, 861 (C.C.P.A. 1966); *see* Kate H. Murashige, *The Hilmer Doctrine, Self-Collision, Novelty and the Definition of Prior Act*, 26 J. MARSHALL L. REV. 549, 549-52 (1993) (defining prior-act as the time period before the effective filing date of the application in the first-to-file jurisdictions. In a first-to-invent jurisdiction (U.S.) prior refers to the time period preceding the moment when the invention was made).

190. *See generally* Alan S. Gutterman, *International Intellectual Property: A Summary of Present Developments And Issues For The Coming Decade*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 335 (1992).

191. Gutterman, *supra* note 190.

192. U.S.-Canadian Free Trade Implementation Agreement of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988).

Trade Agreement.[193] The U.S.-Canada Agreement was also created as a result of economic disagreements coupled with threats of countervailing duties and fear of protectionism between the countries. NAFTA's objectives, inter alia, are to:

> a) eliminate barriers to trade in and facilitate the cross-border movement of goods and services between the territories of the parties; b) promote conditions of fair competition in the free trade area;. . .[and] f) establish a framework for trilateral regional and multilateral cooperation to expand and enhance the benefits of this agreement.[194]

Multilateral agreements are a necessary tool in the globalization process. Nevertheless, it may be unrealistic to believe that multilateral and regional agreements are the answer to the jurisdiction query because they can be extremely cumbersome and time consuming to negotiate.

Cooperation on an international rather than on a regional scale is a trend worth expanding. Article 103(f) of NAFTA explicitly states the parties' desire to encompass multilateral endeavors in order to expand free trade. As different regions enter into trade agreements and membership in GATT increases, the different regional agreements may have to merge into multi-national agreements to survive economically.

Further, agreements may be drafted using the GATT model (i.e., NAFTA). GATT may have to expand by adopting a judicial branch or make the Intentional Court of Justice the mandatory judicial entity for *all* international disputes, thus relieving sovereigns of their authority to adjudicate international trade disputes.

Recently, the Uruguay Round of the Multilateral Trade Negotiations was signed, 15 April 1994; the U.S. is a party. This round established the "World Trade Organization."[195] Two of its main purposes are to expand the production of, and trade in, goods and services, and to administer the Understanding on Rules And Procedures Governing the Settlement of Dispute (DSU).[196]

Development in "trade in services" has been a contentious area for the U.S. Hence, the effectiveness of the DSU is worth tracking to see what trends develop in the near future. Namely, will they produce more contention? Perhaps the major powers will acquiesce to the DSU's authority, and as a result the DSU may become the final (supreme) arbiter for international trade disputes, a supreme transnational entity with enforcement power.

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193. NAFTA, *supra* note 125, art. 1102.

194. NAFTA, *supra* note 125, art. 1103.

195. GATT: Multilateral Treaty Negotiations Final Act Embodying The Results of The Uruguay Round of Trade Negotiations Done at Marrakesh, Apr. 15, 1994,33 I.L.M. 1125, 1140 (1994)

196. 33 I.L.M. at 1145.

VI. EVIDENCE OF JUDICIAL RESTRAINT

This paper emphasizes U.S. assertion of jurisdiction, but there are instances when the U.S. declines jurisdiction. This restraint is due to respect for the laws of other nations and specific U.S. laws geared to affording deference to other sovereigns, by avoiding contentious assertions of jurisdiction, which may cause international ramifications.

For example, in *Victrix Steamship Co., S.A. v. Salen Dry Cargo, A.B.*,[197] the court deferred to the Swedish courts based on comity, the presence of possible Recognition and Enforcement of Foreign Arbitral Awards issues, and specifically because of the bankruptcy proceedings currently underway in Sweden concerning the issue.[198] The court said the entire subject of enforcement is governed by the terms of the arbitration clause because the Convention preempts state law. Victrix a Panamanian corporation, and Salen, a Swedish corporation entered into a contract for the charter of Victrix's ship. Salen filed for bankruptcy, and repudiated the contract. Here, the bankruptcy issue weighed heavily on the Court's decision. The Court vacated the order of attachment and deferred to the Swedish proceedings.[199] This deference to foreign bankruptcy proceedings is one of several tools employed by the U.S. to restrain from asserting jurisdiction, especially when there is a possibility of intruding on another sovereign's authority.

The doctrine of Forum Non Conveniens "refers to discretionary power of [a] court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum."[200] Forum Non Conveniens is a very old doctrine that has been applied by U.S. courts for years, without realizing what they were actually doing.[201] The Forum Non Conveniens doctrine requires the court to determine whether an adequate alternative forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing a plaintiff's initial forum choice. If this balance of private interests [is found] at or near equipoise, he must then determine whether or not factors of public interest balance in favor of a trial in a foreign forum. If he decides that the balance favors such a foreign forum, the trial judge must finally ensure that plaintiffs

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197. Victrix Steamship Co., S.A. v. Salen Cargo, A.B., 825 F.2d 709, 711 (2d Cir. 1987).

198. *Victrix*, 825 F.2d at 711 (holding that even though Victrix had arbitration award, the American courts have long recognized the need to extend comity to bankruptcy proceedings—deference to Sweden serves U.S. public policy).

199. *Victrix*, 825 F.2d at 716.

200. BLACKS LAW DICTIONARY, 589 (5th ed. 1979); *see* 28 U.S.C.A. § 1404 (1948) (amended 1996); *see also Victrix*, 825 F.2d at 711 (holding that even though Victrix had an arbitration award, the American courts have long recognized the need to extend comity to bankruptcy proceedings - deference to Sweden serves U.S. public policy).

201. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); *see* 28 U.S.C.A. § 1404 (1948) (amended 1996).

can reinstate their suit in the alternative forum without undue inconvenience or prejudice."[202]

This balancing is done to preserve U.S. foreign relations, policy interests, and avoid encroaching on other sovereign's authority while ensuring that the party has the opportunity to seek relief.

The Court dismissed a claim brought by thousands of Indian citizens and the Indian government in an action arising out of an industrial disaster; methyl isocyanate was released from a chemical plant by Union Carbide India Limited.[203]

The Court clearly held jurisdiction, but dismissed on the basis of Forum Non Conveniens, with special conditions.[204] Likewise, a foreign seamen brought an action against a vessel owner to recover for injuries resulting from alleged fraudulent labor practices. The Court dismissed the claim under the doctrine of Forum Non Conveniens stating "it was necessary in light of the significant public and private interest factors which weigh in favor of proceeding in the Philippines."[205]

As discussed above, the Act of State doctrine is often enforced and allows foreign sovereigns to avoid jurisdiction in U.S. courts as long as their actions are sovereign acts. Many act of state and sovereign immunity issues are dismissed for lack of jurisdiction, which is a results of the sovereign's status.[206]

Thus, when American citizens (a married couple) sued the government of Saudi Arabia for tortious conduct based on failure to warn in an employment contract, the Court dismissed the suit holding "that respondents' action alleging personal injury resulting from unlawful detention and torture by the Saudi government is not based upon a commercial activity within the meaning of the Act (FSIA), which consequently confers no jurisdiction over respondent's suit."[207] The Court, in order to reach this conclusion, adopted the district court's analysis, which outlined the lack of a significant nexus between Nelson's recruitment and the injuries alleged. The Court deduced that the connection between the injuries and the actions was far too

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202. Carnival Cruise Lines, Inc. v. Oy Wartsila A.B., 159 B.R. 984, 990 (S.D. Fla. 1993).

203. In Re Carbide Corp. Gas Plant Disaster at Bhophal, 634 F. Supp. 842 (1987).

204. *Carbide Corp.*, 634 F. Supp. at 866-67 (order affirmed as modified by 809 F.2d 195 (1987) (finding that courts of India have the capacity to mete out fair and equal justice; therefore, U.S. court deferred to courts of India with the following special conditions: Union Carbide (UC) shall consent to jurisdiction of courts of India and shall continue to waive defenses based on the statute of limitations; UC shall agree to satisfy any judgment rendered against it by an Indian court; and shall be subject to discovery under the model of the U.S. Federal Rules of Civil Procedure).

205. Jose v. M/V Fir Grove, 801 F. Supp. 349, 359 (D. Ore. 1991); *see also* FED. R. CIV. P. 12(b)(1) (1946) (amended 1993) (noting lack of subject matter jurisdiction).

206. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977) (precluding the court from inquiring about the Libyan government's expropriations); Chuidian v. Philippine Nat'l Bank, 912 F.2d. 1095 (9th Cir. 1990) (finding that Philippine bank where Government owned majority interest qualified as agency or instrumentality of foreign state under FSIA).

207. Nelson v. Saudia Arabia, 507 U.S. 349, 351 (1993); *see* Boureslan v. Arabian American Oil Co. (Aramco), 892 F.2d 1271, 1274 (5th Cir. 1990) (asserting that "Title VII does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders").

tenuous to support jurisdiction under the Act.[208] Sovereign Immunity is a doctrine of international law under which domestic courts must refrain from asserting jurisdiction over a foreign state.[209] Therefore, sovereigns enjoy quite a bit of predictability in this area because of the presumption against extraterritoriality when a controversy involves a sovereign or a U.S. domestic statute.

In another employment related case, the Court had to decide if Title VII of the Civil Rights Act applied extraterritorially.[210] Here, a naturalized U.S. citizen (born in Lebanon) said that, while employed abroad by a U.S. company he was discriminated against because of his race, religion, and national origin. Justice Rehnquist held that Title VII does not apply extraterritorially.[211] EEOC failed to show affirmative Congressional intent to apply the statute extraterritorially and thus EEOC did not overcome the presumption against extraterritoriality.[212] Petitioner tried to argue that the Alien Exempt Clause[213] was a manifestation of Congress' intent. The Court unequivocally rejected this argument and said absent clearer Congressional intent, it was unwilling to subscribe to imposing this country's employment discrimination regime upon foreign Corporations operating in foreign countries.[214]

This articulation helps predictability in this area because of the Court's rejection of an extraterritorial application of this Statute. Consequently, this rejection allows foreign employers to know that they are not bound by this law, unlike the Sherman Act which extends extraterritorially. If the court had ruled otherwise in this case, it would have drastically extended U.S. law beyond all acceptable boundaries, such an act would totally deviate from all customarily accepted international law.

The Court's analysis in *Arabian American Oil* is similar to the *Wilko* analysis because the Court clearly distinguished between domestic and international use of the law. In some instances, U.S. courts are beginning to accept that deferring to other sovereigns, even though jurisdiction may exist under U.S. law, is the correct approach because the U.S. is part of the international community and must adhere to the international standard when considering whether to assert extraterritorial jurisdiction.

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208. *Nelson*, 113 S. Ct. at 1476.

209. International Assoc. of Machinist & Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (D.C. Cal.), *affirmed* 649 F.2d 1354, 1358 (1979).

210. EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

211. *Arabian American Oil*, 499 U.S. at 250-51 (confirming that Congress must make a clear statement if it intends for statutes to apply overseas).

212. *Arabian American Oil*, 499 U.S. at 245.

213. *Arabian American Oil*, 499 U.S. at 256 (Alien Exempt Clause expressly exempts employers with respect to employment of aliens outside of any state).

214. *Arabian American Oil*, 499 U.S. at 245 (concluding that if Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws, as it did in amending the Age Discrimination in Employment Act of 1967 (ADEA) to apply abroad).

This principle was articulated in *American Banana*[215] in 1909 when the court said that all legislation is prima facie territorial. More recently the Court held "that Federal RICO [Racketeer Influenced And Corrupt Organizations] statutes may not be applied to extraterritorial conduct alleged against the foreign defendants in light of the presumption against such application and the insufficient nexus to U.S. commerce when balanced against the interest of the Philippines."[216] This presumption has been effectively argued as evidenced by parties attempts to persuade, without much success, the Court to extend other U.S. statutes extraterritorially.

> In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation, they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to conclusion that the site of the litigation should be elsewhere.[217] This is particularly true if U.S. citizens expect to use U.S. laws that were not explicitly intended to apply extraterritorially.

VII. CONCLUSION

The U.S.desire to protect its citizens, its international policy, and its position as a world power all contribute to the U.S. posture in this area. This paper reviewed the U.S. approach to extraterritorial assertions of jurisdiction, and, as a result, recognized the uncertainty in the application of its laws and policy. Many countries oppose and have taken measures against U.S. aggressiveness in this area; therefore, we may see an increase in the use of blocking statutes if the U.S. does not reform its policy or enter into additional multilateral treaties to provide additional harmony in this critical area.

Several nations have been manipulated by U.S. threats of trade sanctions and withdrawal of the "most favored nation" status. This action is similar to actions of the U.S. against Mexico after the war. Unfortunately, the U.S. may suffer repercussions if it does not heed the warnings of the international community. International law, though much is unwritten, has been developed as a result of customary international practice in certain areas, i.e., sovereigns refusal to encroach on another sovereign's territory. As more developing countries become part of the international arena, international agreements bringing them into the power structure are going to increase. One can never foresee all points of contention at the outset of an international agreement; nevertheless, agreements at least create a forum to address problems as they arise. In order to give the agreements more "bite," stringent penalties

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215. American Banana Co. v. United Fruit, 213 U.S. 347, 357 (1909) (holding that U.S. jurisdiction may extend to conduct in other nations, but here it did not have jurisdiction because there was no effect on U.S.).

216. Jose v. M/V Fir Grove, 801 F. Supp. 349, 358 (D. Ore. 1991).

217. Carnival Cruise Lines, Inc. v. Oy Wartsalia A.B., 159 B.R. 984, 1002 (S.D. Fla. 1993).

must be implemented, which can be enforced by an international tribunal (e.g., International Court of Justice), and established in the initial stages of trade negotiations. This tribunal should have jurisdiction over all matters pertaining to extraterritorial matters.

The U.S., as a major leader, can play a pivotal role in the re-structuring of the international community, but should proceed without employing a unilateral, somewhat strong-arm approach to solving international disputes. If foreign sovereigns perceive U.S. action (jurisdiction) as fair and based on recognized or agreed to principles and not instances of overreaching manifested by refusing to decline jurisdiction, then support can be garnered to harmonize the approach to solving disputes.

The practice of global deal making is always a matter of complying with or avoiding a multiplicity of different countries' laws, rules, and policies, of weaving between overlapping legislation and political decisions made by several governments. The problem of the legal and political squeeze is always on the minds of international negotiations."[218]

Thus, "[f]or global deal makers, the final and perhaps ultimate challenge posed by the law and politics of another country is that, at some point, their country may be unfairly treated because it is foreign"[219] If this is truly a consensus, "the necessity of the courts to cede jurisdiction of a claim arising under domestic law to a foreign transnational tribunal,"[220] must be employed with all deliberate speed. This deference avoids the appearance of arbitrary extensions of U.S. law, because the U.S. is, of course, not the world's supreme court. Ultimately, the major powers of the world *must* submit to a higher transnational tribunal. According to the Austinian theory, "only when an authority superior to the state is created with the power to enforce the observance of international norms will international law be true law."[221] This theory also asserts, "that law exists only when it emanates from a superior authority and can be enforced by punitive sanctions."[222] The U.S. has the ability to enforce its sanctions; therefore, I believe this is why it has successfully utilized this tool, sanctions, as a major vehicle to influence U.S. policy abroad. The U.S. wields a big stick and as a result the receiving country suffers adverse punitive effects, which can only be avoided if a tribunal, with the requisite authority, is established to oversee international disputes.

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218. SALACUSE, *supra* note 27.
219. SALACUSE, *supra* note 27, at 124.
220. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 638 (1965).
221. ROBERT BLEDSOE AND B. BOCEK, THE INTERNATIONAL LAW DICTIONARY 4 (1987).
222. BLEDSOE & BOCEK, *supra* note 221.