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## **Reconciling National Interests in the Regulation of International Business**

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In an increasingly integrated world where political and economic issues are deeply intertwined, the regulation of international business activity raises complex problems in international law. The existence of the multinational corporation, which is possessed of multiple identities and therefore subject to the jurisdiction of both "home" nations, where it is headquartered, and "host" nations, where its subsidiaries are located, makes the potentiality of jurisdictional disputes among nations particularly acute. While attempts to apply United States law to American foreign subsidiaries virtually ensures conflicts among jurisdictions, excusing subsidiaries from compliance with domestic law could seriously undermine comprehensive regulatory activity. It could also pro-

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vide a substantial incentive for companies to shift operations abroad so as to escape U.S. jurisdiction altogether.

The virtual inevitability of jurisdictional conflict among states in today's world, coupled with the growing necessity of finding ways to ameliorate such conflict in a world becoming increasingly interdependent, has generated numerous suggestions as to how these conflicts can be resolved or at least muted. The two remedies most frequently advanced are (1) adherence to principles of international comity and (2) what might be described as the "comprehensive international agreement" approach. Though both proposals are based on the same philosophical supposition—the need for cooperation among contending nations—the two differ in their respective estimations of what *kind* of cooperation is both necessary and possible.

Proponents of the comprehensive approach advocate global adherence to an overarching agreement whose terms would not, by their very nature, permit extraterritorial disputes to arise. Proponents of comity, while accepting the inevitability of such conflicts, identify certain principles which would form, if applied to discrete jurisdictional disputes, a framework for their resolution.

After identifying some of the tenets and shortcomings of the international agreement approach, this perspective will discuss several factors which affect the ability of nations to apply the principles of comity. The main contention of this perspective is that *how* a particular conflict arises, that is, whether it arises through conflicts of statute, policy, or regulation, bears heavily on how and whether the dispute can be resolved.

It is clear, for example, that statutory conflicts are by no means the only causes of jurisdictional dispute. Conflicts may arise when the extraterritorial application of one nation's law impinges on the domestic or foreign policies of another nation whose statutes may be silent or neutral on the subject. Other times, even if the statutes and policies of two nations are congruent with respect to a particular matter, the way in which one state implements its laws can bring the two countries into discord.

The potential circumstances of jurisdictional disputes are myriad: statutory law of one country versus statutory law of another country; statutory law versus policy; policy versus policy; statutory law versus administrative regulation; administrative regulation versus administrative regulation; policy versus administrative regulation; and so forth. Each type of conflict raises different issues which, in turn, can fundamentally affect the ability of governments to resolve it. This perspec-

tive will discuss several of these factors within the context of the principles embodied in the doctrine of comity.

The "international solution" is perhaps best exemplified in a recent article by Professor Raymond Vernon of Harvard University.<sup>1</sup> Vernon argues that nations must agree to limit their jurisdictional reach through a commitment to "radically new principles governing the status of foreign-owned subsidiaries."<sup>2</sup> Under this plan, governments would agree that foreign-owned affiliates "lie wholly inside the jurisdiction of the country in which they do business"<sup>3</sup> and would further agree to deal collectively with common problems through the creation of a new set of international institutions.<sup>4</sup> These institutions would "cover the whole range of major relationships between business and government, from drug labeling and pollution to taxes and competition."<sup>5</sup>

Though proposals of this type could resolve jurisdictional disputes by eliminating extraterritoriality altogether, it is doubtful that agreements along these lines will be achieved in the foreseeable future. Developed states are likely to show strong resistance to relinquishing jurisdiction over entities now regarded as nationals or subject to the control of nationals for fear that policies and activities urged upon them by host countries might be inimical to the interests of the "home" governments.

In the United States, for example, there might be great concern over the inability to control what are regarded as corrupt practices by American subsidiaries since their bribery of foreign officials might not be subject to prosecution under United States law.<sup>6</sup> There might be similar concern about permitting American subsidiaries overseas to participate in boycotts against other American citizens or against friendly third countries pursuant to foreign policy objectives with which the United States disagreed.<sup>7</sup> For their part, developing host

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<sup>1</sup> Vernon, *Multinationals: No Strings Attached*, 33 FOREIGN POL'Y 121 (1978).

<sup>2</sup> *Id.* at 129.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 134.

<sup>5</sup> *Id.* at 133.

<sup>6</sup> HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 95-640, 95th Cong., 1st Sess. 4, 5 (1977) [hereinafter cited as H.R. REP. NO. 95-640]; SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT, IMPROVED DISCLOSURE ACTS OF 1977, S. REP. NO. 95-114, 95th Cong., 1st Sess. 4 (1977).

<sup>7</sup> SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, EXPORT ADMINISTRATION ACTS OF 1977, S. REP. NO. 95-104, 95th Cong., 1st Sess. 18, 22 (1977) [hereinafter cited as S. REP. NO. 95-104].

states are also likely to balk, as Vernon himself notes, at the establishment of any international mechanism for dispute settlement which would deprive them of their zealously guarded right to pronounce their own judgments and impose their own penalties against malfeasant foreign corporations.<sup>8</sup>

Without discounting the possibility that transnational mechanisms might be created to deal successfully with a number of common economic and social problems—tax and environmental matters may be promising candidates—it is doubtful that any nation will waive the right to unilateral and extraterritorial action in matters pertaining to national security or other interests considered to be of fundamental importance. It is difficult, for example, to imagine the United States subscribing to an agreement which, in principle, would make it possible for American subsidiaries abroad to transfer critical military technologies to foreign adversaries. Moreover, national interests considered to be of fundamental importance vary according to time and circumstance. Laudable objectives and principles embodied in an international agreement relating to boycotts, for example, might generate considerably less adherence when applied in highly charged political settings.

However skeptical one may be regarding the realization of a comprehensive international solution, it is difficult to quarrel with the philosophy of cooperation and compromise which it embodies. Indeed, if such conflicts are to be resolved, contending parties must recognize that national interests are neither mutually exclusive nor equally important and that differences in national law and policies must be accommodated.

These are by no means new revelations. In international law, of course, these considerations form the foundation of the doctrine of comity. Section 40 of the *Restatement (Second) of Foreign Relations Law* states:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required . . . to consider, in good faith, moderating the exercise of its enforcement jurisdiction in light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and

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<sup>8</sup> Vernon, *supra* note 1, at 131.

- (e) the extent to which enforcement action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.<sup>9</sup>

There are, of course, impelling practical reasons why states often seek to accommodate conflicts in their laws. Just as they pursue a variety of domestic objectives, not all of which may be in harmony, so too do they pursue a multiplicity of objectives and interests *vis a vis* other nations. It is, therefore, often possible to find common interests co-existing alongside those that conflict. Reciprocal needs and desires often comprise a transcendent rationale for cooperation which goes far towards explaining the willingness of states to adjust laws and regulations so that overall relationships are not jeopardized. On this point, the Arab League boycott of Israel is instructive.

Participating Arab states have determined it in their collective interest to conduct economic warfare against Israel and to enlist the support of third countries and their nationals in this effort. These are goals which the government of the United States does not share.<sup>10</sup> At the same time, Arab nations are interested in acquiring American goods and technology, and the United States recognizes both the importance of continuing Arab purchases and the significance of Middle East oil to this nation's overall economic well-being. The United States also fully appreciates the strategic importance of the Middle East, as well as the critical role which must be played by moderate Arab countries if a comprehensive and lasting solution to the Arab-Israeli conflict is to be achieved. Several key Arab states, fearful of radicalism and revolution, are equally cognizant of the value of a continuing American presence in the region.

These overlapping interests provided an incentive for American policy-makers to write and enforce the anti-boycott law in a manner permitting the United States to realize its basic objectives, while simultaneously respecting the Arab right to conduct a primary boycott.<sup>11</sup> Though the United States believed it essential to apply the anti-boycott law to American subsidiaries residing in boycotting countries, it also recognized the right of the Arab states to establish laws and policies

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<sup>9</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

<sup>10</sup> For a concise statement of the U.S. interest in opposing the participation of U.S. firms in the Arab League Boycott of Israel, see Moore, *United States Policy and the Arab Boycott*, 71 PROC. AM. SOC. INT'L L. 174 (1977).

<sup>11</sup> Though there is a rich literature on the subject of the Arab League Boycott, a good—if unsympathetic—examination of the U.S. response is provided in Kestenbaum, *The Arab Boycott in U.S. Law: Flawed Remedies for an International Trade Restraint*, 10 LAW & POL'Y INT'L BUS. 769 (1978).

applicable within their own territories. The desire to accommodate this potential conflict gave rise to one of the exceptions in the anti-boycott law permitting U.S. nationals residing in boycotting countries, including controlled foreign subsidiaries of U.S. companies, to comply with a host nation's boycott laws with respect to certain importing activities, as well as activities conducted solely within those nations.<sup>12</sup> For their part, many Arab states have sought to minimize potential conflicts between their boycott laws and U.S. law by such measures as agreeing to accept "positive" certificates of origin for goods received from U.S. exporters.<sup>13</sup> Both sides have shown a willingness to moderate their respective claims of jurisdiction in recognition of the desirability of minimizing conflicts and so that other vital national interests and objectives are not imperiled.

The United States has often been drawn into jurisdictional disputes with its allies over the extraterritorial imposition of export controls. Under the amended Export Administration Act of 1969, the government may restrict exports to the extent necessary to protect the national security, to further the nation's foreign policy, or to protect the domestic economy from the drain of scarce resources.<sup>14</sup> These are not necessarily mutually exclusive objectives. The integration of contemporary politics and economics often leads to an intermingling of goals and their consequences so that an ostensibly economic objective also may have important national security and foreign policy dimensions. Obversely, U.S. export restrictions applied to U.S. subsidiaries abroad can have momentous implications for the economy, foreign policy, or national security of nations which serve as hosts to these enterprises.

Though the past several decades have witnessed bitter disputes over the extraterritorial imposition of U.S. export controls—especially when such controls have been exercised over non-strategic exports to Communist nations—in more recent years the United States has exhibited some willingness to moderate the exercise of its jurisdiction in accordance with the principles of comity. In 1974, for example, the United States was embroiled in two serious controversies relating to its embargo against Cuba. When a U.S. subsidiary in Argentina attempted to sell Cuba a shipment of automobiles, the Treasury Department responded by blocking the firm's export license. Argentina,

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<sup>12</sup> 50 U.S.C. app. § 2403-1a(a)(2) (Supp. I 1977). For a discussion of these exceptions, see Marcuss, *The Antiboycott Law: The Regulation of International Business Behavior*, 8 GA. J. INT'L & COMP. L. 559, 566-74 (1978).

<sup>13</sup> For an explanation of "positive" and "negative" certificates of origin, see *id.* at 567-70.

<sup>14</sup> 50 U.S.C. app. § 2402 (1976 & Supp. I 1977). This provision has not been altered by the recently passed Export Administration Act of 1979, Pub. L. No. 96-72 (Sept. 29, 1979).

which strongly supported the transaction, countered by threatening to nationalize the company involved. After much diplomatic maneuvering, the sale was finally permitted, via a special license, in the interests of maintaining harmonious political relations with Argentina.

That same year, after initially attempting to halt the transaction, the United States bowed to Canadian Prime Minister Trudeau's protests and permitted the sale to Cuba of railroad equipment containing U.S. components. Following the decision of the Organization of American States to terminate its collective embargo against Cuba, the United States decided in 1975 to moderate the scope of its own embargo against that nation.<sup>15</sup> The export of most non-strategic items by U.S. foreign subsidiaries now is permitted if the firms operate in countries where local law or policy favors trade with Cuba and if the proportion of U.S. components involved in the transaction is twenty per cent or less.<sup>16</sup>

These experiences, however, do not suggest that the United States never ought impose foreign policy related export controls extraterritorially. There may be times, particularly when important national principles are at stake, when there is no morally or politically defensible alternative. The Cuban experience does suggest, however, that when the application of U.S. law threatens to impinge upon the sovereignty and foreign policy prerogatives of third countries, sound policy-making requires that consideration be given to several issues.

First, the extraterritorial application of trade regulations for foreign policy reasons is a game that more than one can play. As more countries which are hosts to U.S. subsidiaries come to have their own multinational firms operating within the United States, the threat of retaliation becomes more likely. When the governments of the Arab League sought to force the compliance of American firms with the boycott of Israel, the United States was properly exercised over this infringement of its sovereignty. One also can well imagine the outrage which would be generated in this country if one or more Arab nations should direct any of their subsidiaries located in the United States to terminate exports to Israel.

Second, attempts to enlist the support of American subsidiaries abroad in the achievement of United States foreign policy objectives

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<sup>15</sup> For a discussion of these and other selected controversies regarding extraterritorial conflict over U.S. export controls, see Note, *Extraterritorial Application of the Export Administration Act Amendments of 1977*, 8 GA. J. INT'L & COMP. L. 741 (1978), and Greene, *The Arab Economic Boycott of Israel: The International Law Perspective*, 11 VAND. J. TRANSNAT'L L. 82 (1978).

<sup>16</sup> 15 C.F.R. § 385.1(b) (1979).

often can serve to buttress the pervasive belief in many less-developed host countries that American firms are mere appendages of the United States government. To the extent that this occurs, the United States is likely to find its political relations with host countries strained. It also is possible that less-developed host nations will begin to regard and treat U.S. subsidiaries as aliens and thereby deny them benefits available to domestic corporations. In the long run it is beneficial to the United States to have its corporations behave and be treated as citizens of the host nations in which they operate, as long as the firms' activities do not threaten fundamental interests. It is precisely these kinds of issues and the serious questions which they raise that have caused policymakers and the international legal community to look to cooperation and compromise as the most promising means of diminishing jurisdictional disputes.

Not all jurisdictional conflicts, however, necessarily require a solution. Some may be moot or merely theoretical, as in cases where the policies and laws of the United States are in harmony with those of the host nation with respect to a certain regulatory activity. A U.S. law prohibiting controlled subsidiaries from complying with secondary or tertiary boycotts might cause little consternation in a host country with an identical policy or in a host nation which has no established policy on the matter. Yet even "theoretical" conflicts can cause great concern in an era of nationalistic sensitivity. Few nations favor foreign bribery of their government officials. The U.S. Foreign Corrupt Practices Act,<sup>17</sup> however, could be resented if it were interpreted as a messianic or paternalistic attempt by the United States to save other nations from their own corrupt leaders. Similarly, extraterritorial application of U.S. antitrust law, even when done to protect foreign nationals from monopolistic predations, could be objectionable if the foreign state had its own antitrust laws, or if it were seen as an American attempt to export the principles of free enterprise and competition to nations not in sympathy with these notions.

As a practical matter, adherence to comity is facilitated when legislation which sets out policy objectives leaves wide latitude for administrative implementation. Stringent laws which leave little to the administering agency also leave little room for the weighing, balancing, and compromising that is the very heart of comity itself. Especially in circumstances where states have politically charged or emotional interests at stake, flexibility in administration, and enforcement can deter

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<sup>17</sup> Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. § 78 (Supp. I 1977)).

the hardening of positions which often leads to results opposite of those originally intended.

In formulating the U.S. anti-boycott legislation, for example, congressional intent clearly was to resist foreign encroachments upon American sovereignty.<sup>18</sup> On the other hand, Congress did not intend to impinge on the sovereignty of the Arab nations or to foreclose the possibility of United States-Arab cooperation in other areas of mutual interest. By carefully defining "United States commerce" for purposes of extraterritorial application of U.S. law,<sup>19</sup> and by carefully constructing the "exceptions" to permit compliance by American subsidiaries with essentially primary boycott requirements,<sup>20</sup> the Commerce Department was able to accomplish congressional purpose and carry out United States policy without trampling on the legitimate jurisdictional claims of other nations. Similarly, in administering the Foreign Corrupt Practices Act, the Securities and Exchange Commission has sought to follow Congress' directive to prohibit bribery of foreign officials but to permit certain "business facilitation" payments to lower level functionaries that are frequently a matter of custom, if not law, in many foreign lands.<sup>21</sup>

In the antitrust field, the Justice Department has made it clear that the Sherman Act and other relevant statutes will be interpreted and enforced in light of new international economic realities and the desire to accommodate the important interests of other countries: "to apply the Sherman Act to a combination of United States firms for foreign activities which have no direct or intended effect on United States consumers . . . could encroach upon the sovereignty of a foreign state without any overriding justification based on legitimate U.S. interests."<sup>22</sup> In short, the greater flexibility and freedom of action inherent in administrative remedies make them generally preferable to strict legislative solutions with respect to problems that arise in the regulation of international business activity.

A related factor is the desirability of intergovernmental consultation. Close cooperation and discussion among affected governments can be especially important when the conduct or activity to be regulated has been mandated or encouraged strongly by one of the govern-

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<sup>18</sup> See, e.g., S. REP. NO. 95-104, *supra* note 7, at 21.

<sup>19</sup> 15 C.F.R. § 369.1(d) (1979).

<sup>20</sup> 15 C.F.R. § 369.3 (1979).

<sup>21</sup> For an extensive discussion of Congressional intent regarding so-called "grease" payments, see H.R. REP. NO. 95-640, *supra* note 6, at 8; S. REP. NO. 95-114, *supra* note 6, at 10.

<sup>22</sup> U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 7 (rev. ed. Mar. 1, 1977).

ments involved. Through such discussion with their foreign counterparts, government officials can learn, before final action is taken, the nature of the policy differences that separate them. They can determine whether basic principles or less serious issues are at stake. If important political forces are at work, each side can learn what steps it might take to minimize the potential political danger to the other government. The purpose of intergovernmental consultation is not necessarily to eliminate outstanding policy or legal differences among contending nations. On the contrary, in countries such as the United States, it is the function of administrative officials to implement, not to frustrate or alter, existing law and policy. Nevertheless, consultation can lead to the discovery of ways in which implementation can be effected with the least amount of damage to other vital interests each country has in common with the other. Moreover, to the extent that this can be achieved, the formidable obstacles which any nation faces in *enforcing* its laws extraterritorially may likewise be reduced.

That consultation can be an effective vehicle for moderating jurisdictional disputes is not a matter of great debate. Though not always successful in suppressing resentment, the United States for many years has discussed with affected third countries the extraterritorial scope of export controls imposed for national security and foreign policy purposes. In the antitrust field, however, it historically has been unclear how much latitude U.S. officials have had for such discussions with their foreign counterparts. Some observers, however, believe that recent court decisions indicate that domestic law contains an "element of discretion" sufficient to provide American officials with a basis for such discussions.<sup>23</sup> Indeed, the United States and Canadian governments agreed, in June 1977, to work out consultative procedures in antitrust cases affecting U.S. and Canadian national interests.<sup>24</sup>

Yet even when two governments have an interest in conferring with one another, establishing an acceptable mechanism through which it will take place often raises troublesome issues. First, governments generally prefer to deal with administrative agencies rather than with foreign legislative bodies. For foreign governments to defend their policy choices before the United States Congress, for example, would be tantamount to denying the very sovereignty they are attempting to preserve.

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<sup>23</sup> See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). See generally Annot., 40 A.L.R. FED. 314 (1977); Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195, 210 (1978).

<sup>24</sup> *Id.* at 207.

Second, if foreign governments are willing to work with administrative agencies, they also are likely to insist upon confidentiality as a precondition for their participation. "Off-the-record" interchanges between foreign and domestic officials are often likely to be controversial with the public, particularly when such conversations relate to legislatively mandated rules or regulations. Apart from the fact that *ex parte* contacts tend to create an imbalance in the public record, those whose comments on proposed regulations are available for public inspection can be expected to believe it unfair that the views of foreign officials are not similarly subject to disclosure. Given the renewed American commitment to "government in the sunshine," secretive consultations and delicate regulatory diplomacy may appear inappropriate and may even generate suspicion. Yet failure to permit such *in camera* discussion is likely to cast a pall over foreign willingness to participate, especially when highly sensitive issues are concerned.

Third, it is important to recognize that the mutuality of interest necessary for intergovernmental consultation may not always be present. Indeed, when extraterritorial application of U.S. law works to their advantage, foreign governments may not be interested in limiting it at all.

The United States is today faced with formidable economic competition. To the extent that American antitrust, securities, environmental, export control, or other laws place U.S. subsidiaries at a competitive disadvantage *vis a vis* their foreign counterparts, other governments are unlikely to feel they have much to gain by a reduction in the extraterritorial application of these statutes. On the contrary, foreign governments may perceive their best interests as lying in *expanded* American restrictions on their business enterprises. Some observers have charged, for example, that the Europeans and Japanese have profited greatly in the Soviet, Eastern European, and Chinese markets by the American use of export controls. It is also possible that America's competitors may derive benefit from U.S. anti-boycott and anti-bribery laws. In the antitrust area, U.S. law which prohibits American firms and subsidiaries from combining in foreign markets, or from forming consortia in order to finance large-scale industrial projects, augers well for European or Japanese firms whose governments permit or even encourage these practices. For the same reasons, producer cartels such as OPEC or the fledgling bauxite organization may be expected to oppose the principle of competition which lies at the heart of U.S. antitrust law. These nations are certainly unlikely to find much advantage in

international negotiations aimed at establishing a uniform antitrust code.

A key factor affecting the application of principles of comity is how broadly the entities and transactions subject to domestic law are defined. In the United States, the critical terms are frequently "United States person" and "United States commerce," since U.S. law is often applied only to U.S. persons and only with respect to transactions within U.S. interstate or foreign commerce. Identifying all third country subsidiaries of United States firms as subject, in all circumstances, to the jurisdiction of this country is generally unsatisfactory since many nations, including Great Britain, France, and Canada, do not regard mere ownership or control of such affiliates as a sufficient condition for asserting jurisdiction. Moreover, attempting to place the entire universe of international transactions involving U.S.-origin goods under United States law would constitute a gross interference with the legitimate interests of other countries.

Under its export control laws, the United States has attempted to deal with the problem of possible overbreadth in several ways. The Treasury Department's Foreign Assets Control Regulations, issued under the authority of the Trading with the Enemy Act,<sup>25</sup> extended domestic trade controls to all foreign subsidiaries owned or controlled by domestic firms and to all persons who were citizens, residents, or physically present in the United States, regardless of whether U.S. origin goods or technology were involved.<sup>26</sup> Though Congress amended the Trading with the Enemy Act in 1977 to limit its use to wartime,<sup>27</sup> the Export Administration Act was simultaneously amended to provide the Commerce Department with discretionary authority for the non-emergency exercise of extraterritorial trade controls when vital national security interests are involved.<sup>28</sup> In practice, however, the Commerce Department generally uses this authority only when U.S.-origin parts, components, or technology are included in a transaction. A similar approach was taken by the United States in 1978 when it began to embargo U.S. exports to the South African police and military: the prohibition does not extend to trade conducted by U.S. foreign subsidiaries when that trade involves foreign-origin products and technology.<sup>29</sup> In the case of Rhodesia, the international character of the

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<sup>25</sup> 50 U.S.C. app. § 5(b) (1976).

<sup>26</sup> 31 C.F.R. § 500.329 (1978).

<sup>27</sup> 50 U.S.C. app. § 5(b)(1) (Supp. I 1977).

<sup>28</sup> Title III, Pub. L. No. 95-223, 95 Stat. 1629 (codified at 50 U.S.C. app. §§ 2402, 2403, 2405 (Supp. I 1977)).

<sup>29</sup> 15 C.F.R. § 385.4(a) (1979).

United Nations embargo has permitted the United States to side-step the controversial issue of third-country affiliates; the Treasury Department's Rhodesian Sanction Regulations do not include American subsidiaries located outside Rhodesia in the definition of "persons subject to control."<sup>30</sup>

With respect to what constitutes "United States commerce," an interesting approach to the problem of overbreadth may be found in the anti-boycott provisions of the Export Administration Amendments of 1977.<sup>31</sup> Under the regulations, a U.S.-controlled subsidiary's transaction with a boycotting country generally is regarded as being in United States commerce when the subsidiary acquires goods or services from the United States for the purpose of completing the transaction with a boycotting country. Excluded from U.S. jurisdiction, however, are transactions by foreign affiliates in goods which they manufacture themselves and so-called "ancillary services," such as financial, accounting, and legal services, even if provided to the subsidiary by United States sources.<sup>32</sup> One rationale was that such services are typically interchangeable with those available from foreign sources; a rule which discouraged U.S.-source ancillary services would thus have little positive anti-boycott effect.

A particularly liberal nexus test appears in the *de minimis* principle which was adopted with respect to the continuing U.S. embargo of Cuba. By 1975, the United States had recognized that the embargo, imposed twelve years earlier, was no longer required for national security reasons but continued to have utility for foreign policy purposes. Moreover, many Latin American nations which had previously joined in the embargo had subsequently reversed their policies and were now openly promoting trade with the Caribbean island. As a result, U.S.-controlled foreign subsidiaries now are granted export licenses for most non-strategic goods, if the proportion of U.S. components contained in the item is less than twenty percent.<sup>33</sup>

In the United States, there is at present no hard and fast rule for determining how broad the scope of U.S. law will be with respect to foreign subsidiaries of American firms. The determination seems to be made within the context of particular regulatory schemes and depends, in part, upon the nature of the national interests the regulations are designed to serve. Given the wide variety of purposes—ranging from

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<sup>30</sup> 31 C.F.R. § 530.307 (1978).

<sup>31</sup> 50 U.S.C. app. § 2403-1a (Supp. I 1977).

<sup>32</sup> 15 C.F.R. § 369.1(d)(4) (1979).

<sup>33</sup> 15 C.F.R. § 385.1(b) (1979).

national security to foreign policy and antitrust to antipollution—for which the United States seeks to regulate the conduct of its business enterprises, it is perhaps impossible to propound a single uniform standard. Moreover, it probably would be unwise to attempt to do so. Protecting the interests of the United States, while simultaneously accommodating the legitimate concerns of other sovereign nations, often requires the drawing of fine and sometimes seemingly arbitrary distinctions not easily defined in advance or in the abstract.

It is clear that not all extraterritorial conflicts are created equal. The nature of the conflict, the way in which it arises, and the interests and issues at stake will determine whether and how it can be resolved. If trade is to be maximized and other basic national objectives are to be attained in a diverse and rapidly changing world, policy-makers must recognize that preserving flexibility is essential to the reconciliation of competing views and conflicting jurisdictional claims.