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Allan E. Gotlieb

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# PERSPECTIVES

## Extraterritoriality: A Canadian Perspective

*Allan E. Gotlieb\**

### I. INTRODUCTION

Extraterritoriality, or "ET" as it is known in the trade, has long been a controversial subject in international law. In recent years, several dramatic examples of its application have raised its profile considerably. Perhaps the most glamorous treatment of extraterritoriality is *E.T.*,<sup>1</sup> the recent film about the dilemmas an unusual creature faces when he finds himself trapped in a foreign jurisdiction.

This paper focuses on the Canadian perspective on ET. While it may not have quite the pace of Steven Spielberg's film, for many of us involved in this issue, the argument contains more than enough international drama to satisfy our desire for spectacle.

### II. DEFINITIONS AND CONTEXT

In strictly legal terms, extraterritoriality may be defined simply as the application of domestic law to foreign conduct. It is an extension of

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\* Canadian Ambassador to the United States. This paper was first given as an address to the International Law Association on November 12, 1982.

<sup>1</sup> *E.T.: The Extraterrestrial*, directed by Steven Spielberg, was released in the summer of 1982. An extremely popular motion picture, *E.T.* earned \$86.9 million in its first 25 days in the theaters. See TIME, July 19, 1982, at 62.

jurisdiction.<sup>2</sup> This is not, however, always objectionable. For instance, most states, including Canada, are prepared under certain circumstances to apply their criminal law to their nationals abroad or even to foreigners abroad.<sup>3</sup> International law accepts this kind of extraterritoriality—for example in hijacking cases.<sup>4</sup>

But in other cases, extraterritoriality raises serious problems; the extension of jurisdiction appears unwarranted and unjustifiable. Once again considered in strictly legal terms, the underlying issue concerns the *appropriate* reach of state jurisdiction.

Although we define extraterritoriality in legal terms, it would be misleading to limit its discussion solely to terms of legal discourse. In fact, some may argue that at the point where extraterritoriality becomes unwarranted, it steps beyond legal questions and enters the area of economic and political discourse. That is, extraterritoriality is also a political and economic issue. Before proceeding with a discussion of extraterritoriality itself, we should locate the issue within the broader political and economic context.

Let us begin with the economic context. The term “economic interdependence,” which describes the complex patterns of international economic ties that bind countries together and make them mutually dependent, is becoming increasingly familiar. It is a fact of modern life by which we are shaping our national and international institutions. During times of economic prosperity, interdependence connotes the ex-

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<sup>2</sup> See 15A C.J.S. *Conflict of Laws* § 6 (1967):

Extraterritoriality has been defined as a term used to describe the act by which a state extends its jurisdiction beyond its own boundaries into the territory of another state, and exercises it over its nationals who, for the time being, may, be sojourning in the territory of the other state.

<sup>3</sup> See, e.g., Section 5(2) of the Canadian Criminal Code which provides that “[s]ubject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada.” MARTIN’S ANNUAL CRIMINAL CODE 16 (1982). Section 6(1), however, provides that acts that would otherwise be indictable offenses if committed in Canada are, if committed on Canadian registered aircraft outside Canada or on any aircraft whose flight terminates in Canada, “deemed” to be committed in Canada. *Id.* at 16-17. Similarly, Section 423(4) of the Code provides that everyone who, while outside Canada, conspires to effect an unlawful purpose in Canada and certain other illegal acts is deemed to have conspired in Canada. *Id.* at 383.

<sup>4</sup> In *United States v. Busic*, 592 F.2d 13 (2d Cir. 1978), the United States Court of Appeals for the Second Circuit affirmed the district court’s convictions of four defendants for violating the Antihijacking Act of 1974, 49 U.S.C. § 1472(i) (1976). The defendants, whose purpose was to promote Croatia’s independence from Yugoslavia, had hijacked a United States domestic flight to a forced landing in Paris, following a refueling stopover in Montreal. The special aircraft jurisdiction of the United States under 49 U.S.C. § 1472 was explained by the United States Court of Appeals for the Sixth Circuit in *Chumney v. Nixon*, 615 F.2d 389 (6th Cir. 1980), where it was said that federal law applied to American and other aircraft en route from an airport in the United States or en route from a foreign country directly to an airport in the United States.

citement of expanding international trade and investment relations. It describes international transfers of technology and comparative advantage that account for much of the economic growth of the last few decades.

But interdependence, or mutual dependence, carries with it the risk of mutual vulnerability. The more inextricable the links among nations, the more vulnerable each becomes to the actions of others. During hard economic times these vulnerabilities generate deep frustrations with the limits imposed by the international system on individual nations. There is a feeling that individual nations are losing control of their economic destinies. For example, efforts by one country to use economic deflation to attack its unemployment problem have an almost immediate impact on that country's international competitive position and the value of its currency in international exchange markets. We are becoming familiar, if unhappily so, with the international constraints on national action.

At the same time, interdependence leads to a more specialized form of vulnerability, that which develops when the major economic actors of our time, the multinational enterprises, are used as instruments through which one state seeks to control activities in another state. To a considerable extent, the multinational corporation has been the engine of international economic activity, the economic actor whose activities so regularly cross national boundaries that it often blurs those very boundaries.<sup>5</sup> A multinational corporation makes its decisions—be they financial, research and development, marketing, or production—based on its global operations rather than on its activities within one country alone, even when the country is its home, or headquarters.

Consequently, it is not surprising that the multinational corporation has come to be regarded by some as having the capacity to operate outside the reach of any one nation's jurisdiction. From the point of view of sovereign governments, this presumed capacity becomes a critical problem when the global reach is used as a means of escaping or circumventing the policies of particular nations. It is in reaction to such evasions—or at least the possibility of evasion—that some countries feel tempted to extend the extraterritorial reach of their national jurisdictions, particularly those that see their national policies frustrated by multinational corporations. They feel compelled to assert their jurisdiction over the entire range of economic activities by

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<sup>5</sup> R. VERNON, *SOVEREIGNTY AT BAY* (1971).

multinationals.<sup>6</sup>

The political consequences of these urges to exercise extraterritorial jurisdiction are obvious. Each nation has a highly developed notion of its sovereign responsibilities and of its right to exercise sovereign jurisdiction over activities within its borders. Thus, unwarranted extraterritorial actions by one country appear as intrusions into another's domestic affairs and as a challenge going to the heart of its notion of sovereignty.

Most countries voice well-articulated points of political and legal principle in objection to such intrusions. Of course, the conflict between national jurisdictions becomes most heated when the countries involved hold different political or strategic views.<sup>7</sup> The recent conflict over United States oil and gas export sanctions provides a striking example.<sup>8</sup>

It is clear that the situation involved more than simply legal principles. The United States' views on how trade and economic relations with the Soviet Union should be conducted are at some variance with

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<sup>6</sup> For example, in the case *In Re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979), the United States district court ordered multinational corporate defendants to produce documents located abroad. The court's order came in spite of objections from certain countries in which the documents were situated. Of the five objecting countries which submitted amicus curiae briefs, Canada was most vehement in its opposition, urging the court to "defer to the critical importance which Canada attaches to its national policies and regulations." *Id.* at 1149. Moreover, the court noted that Canada had also "sent numerous diplomatic notes to the United States State Department in which it has expressed a firm position that any disclosure of documents covered in its regulations would be inimical to its national interests." *Id.* at 1155. Nevertheless, the court refused to comply with Canada's requests, and ordered production of the documents.

<sup>7</sup> *Toronto Globe and Mail*, Sept. 1, 1982, at 6, col. 1:

The problem with extraterritoriality, however, is that the cases where push actually does come to shove are really only the tip of the iceberg. A sovereign state can coerce a company on its soil into following through on a firm export order, but what of deals that are not so firm? . . . The murky iceberg below the visible tip can be melted only by an international code which would reign in the extraterritorial application of domestic law.

But that won't be a realistic possibility as long as the United States cannot reconcile its foreign and trade policies with those of its Western allies.

<sup>8</sup> On Dec. 29, 1981, the United States introduced sanctions prohibiting the export of U.S.-origin oil and gas equipment and technology to the Soviet Union, even if the equipment and technology were already outside the United States. On June 18, 1982, the sanctions were extended to prohibit the export of items manufactured outside the United States by subsidiaries of U.S. companies or licensees of U.S.-origin technology. The sanctions were lifted on Nov. 13, 1982 after a period of negotiation between the United States and the other major Western industrialized nations, all of which had objected to the extraterritorial reach of the measures. In Canada, an investigation was commenced under the Canadian Anti-Combines Act to determine whether there were grounds for referring for review by the Restrictive Trade Practices Commission the actions of certain companies which had failed to bid on contracts related to the pipeline. The investigation was terminated when the sanctions were lifted.

those of its allies.<sup>9</sup> One should not be shocked, or even dismayed, to discover that the Western allies hold different views on critical international issues. We are, after all, an alliance of free countries. Differences in approach reflect the fact that different countries pursue different national interests. While such differences are healthy, however, they become a real problem when one nation seeks to overcome them by exercising extraterritorial jurisdiction over the activities of a foreign-based subsidiary of a domestically-based multinational corporation.

The issue of political differences between countries, however, should not obscure the legal principles involved here. Even given no fundamental political differences between countries, extraterritoriality may still create serious international, legal, political and economic tensions. For example, United States efforts to freeze Iranian financial assets in the United Kingdom and in other foreign jurisdictions created serious legal problems. Those problems arose despite the widely-shared political perceptions of the hostage crisis<sup>10</sup> about which the allies agreed.

At this point it is useful to expand somewhat the "simple" definition of extraterritoriality suggested earlier. When we consider the economic and political factors along with the legal ones, we see that the real issue involves efforts by one country to extend the reach of its laws to persons located within another sovereign jurisdiction. More particularly, one country intends its extraterritorial reach to force persons located outside its boundaries to behave in ways contrary to the laws and policies of the country in which they are located.

### III. UNITED STATES' EXERCISE OF EXTRATERRITORIAL JURISDICTION

Against this background, certain United States policies and practices raise serious questions about the correct scope of the exercise of extraterritorial jurisdiction. The government does not necessarily have motives less "noble" than those of its allies. Rather, certain legal principles at work in the United States diverge sharply from widely held standards of international opinion.

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<sup>9</sup> See *European Communities: Comments on the U.S. Regulations Concerning Trade With the U.S.S.R.*, 21 I.L.M. 891 (1982).

<sup>10</sup> See McGreevey, *The Iranian Crisis and U.S. Law*, 2 Nw. J. INT'L LAW & BUS. 384 (1980).

### A. Nationality Principle Justification

The international legal issue on which there is the clearest difference of view between the United States and its allies involves the concept of corporate nationality. On a number of occasions, the United States has invoked the "nationality principle" as the legal basis for extending its jurisdiction extraterritorially.<sup>11</sup> The nationality principle provides that in certain circumstances a state may regulate the conduct of its nationals abroad; that is generally accepted.<sup>12</sup> But in our modern world of artificial legal persons, the nationality principle by itself fails to resolve many important questions. For example, what is the nationality of the foreign subsidiary of a multinational corporation? May a country regulate the foreign subsidiary of a domestic company when that subsidiary has its own nationality elsewhere? Indeed, not only the nationality of a company, but even the nationality of a product seems to pose questions of extraterritorial jurisdiction if the country in which it is produced is different from the country in which the technology employed was developed. For example, may a country regulate the sale of a product that includes material or technology originating there when the product was fabricated abroad? When United States legal advisors have answered such questions, they have considerably departed from the general international consensus.<sup>13</sup>

It is the difference of interpretation of the nationality principle that creates such anxiety abroad over United States legislation such as the Trading with the Enemy Act,<sup>14</sup> the Foreign Assets Control Regulations,<sup>15</sup> the International Emergency Economic Powers Act,<sup>16</sup> the Export Administration Act<sup>17</sup> and the Export Administration

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<sup>11</sup> Statement of John Stevenson, Legal Adviser of Department of State, Before the Annual Meeting of the Canadian Bar Association in Halifax on September 2, 1970, reprinted in "Extraterritoriality" in *Canadian-U.S. Relations*, DEPT ST. BULL., Oct. 12, 1970, at 427.

<sup>12</sup> See *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945). See also *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

<sup>13</sup> They may have also departed from the consensus of United States legal opinion. For example, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 27 comment d (1965), dealing with the nationality of corporations, provides that while a state of the nationality of the persons who own or control a foreign corporation may prescribe rules governing conduct of such persons, "it does not have jurisdiction to prescribe rules directly applicable to the corporation." For an important statement of international opinion, see *European Communities: Comments on the U.S. Regulations Concerning Trade With the U.S.S.R.*, 21 I.L.M. 891 (1982).

<sup>14</sup> Trading with the Enemy Act, 50 U.S.C. App. §§ 1-44, 40 Stat. 411 (1976).

<sup>15</sup> Foreign Assets Control Regulations, 31 C.F.R. § 500 (1980).

<sup>16</sup> International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, Pub. L. No. 95-223, 91 Stat. 1625 (1977).

<sup>17</sup> Export Administration Act of 1969, 50 U.S.C. §§ 2401-20, Pub. L. No. 91-184, 83 Stat. 841 (1976).

Regulations.<sup>18</sup> This legislation and bills regularly appearing in Congress assert jurisdiction over foreign juridical entities carrying on business on foreign territory merely because Americans own or control them.

Such legislation asserts United States jurisdiction in a manner inconsistent with and tending to undermine the sovereignty of other nations. If foreign law follows foreign capital, if the flag follows the national currency, if controls that conflict with the laws and policies of a foreign country follow enterprises located there, then eventually national sovereignty itself can be at stake. Sovereignty here refers to the right and ability of a national government to impose its own laws and policies—that is, to govern—within its own national boundaries without undue or unwarranted external interference.

Corporations are creatures of domestic law, and the logic of domestic law supports the view that United States legislation cannot repeatedly invoke the nationality principle for jurisdiction with regard to foreign corporations. Whatever the nationality of its shareholders or managers, or the origin of the technology or materials it uses, a corporation has the nationality of the country where it is incorporated. In the *Barcelona Traction* case,<sup>19</sup> the International Court of Justice upheld this view by ruling that a corporation's place of incorporation, and not the nationality of its shareholders, determines its nationality.

Furthermore, the embryonic system of international agreements on investment and multinational corporations also supports that view. The agreements clearly reflect the principle that host countries, not home countries, ought to exercise jurisdiction over those subsidiaries of multinational corporations that operate in their territory. For instance, the 1976 OECD Declaration on International Investment<sup>20</sup> provides that subsidiaries of multinational enterprises located in various countries are subject to the laws of those countries. It stresses that multinational enterprises should operate in accordance with the established general policy objectives of the host countries.<sup>21</sup> Nowhere does the Declaration mention any such prerogatives for home countries.

Consequently, in legal terms this all means that it is contrary to international legal principles for one state whose nationals enjoy some ownership of, or managerial relationship to a foreign corporation to

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<sup>18</sup> Export Administration Regulations, 15 C.F.R. §§ 368-99 (1983).

<sup>19</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 41-44.

<sup>20</sup> Organisation for Economic Co-operation and Development, Declaration on International Investment and Multinational Enterprises, art. II, § 1 (June 21, 1976).

<sup>21</sup> *Id.*



seek to impress its national laws upon that foreign corporation. It is even less justifiable for a state to use the nationality principle to justify its efforts to control the third country trade of a foreign corporation.

### B. Antitrust Extraterritorial Jurisdiction

A second United States practice which causes bilateral problems with other countries is its definition of antitrust jurisdiction. Under the civil proceedings provisions of the Sherman Antitrust Act,<sup>22</sup> United States courts virtually automatically adjudicate private damage suits against foreign corporations. In such cases the goal is not political, but overwhelmingly determined by private economic considerations. The problem derives from the fact that United States practice permits an interpretation of the objective territorial principle of jurisdiction that is too broad. According to the United States interpretation, the effects doctrine permits events outside the United States to become actionable within the United States if they affect its domestic or foreign commerce.<sup>23</sup> This is an assertion of extraterritoriality which Canadians and others find objectionable.

One example of such an assertion of extraterritoriality stemmed from the uranium production decisions of the immediate post-war period.<sup>24</sup> Those decisions led to a uranium glut in the 1960s which affected United States producers. They in turn convinced the United States government to forbid the enrichment of imported uranium that United States electric power utilities might have used in their generators.<sup>25</sup> The practical effect of these measures was a United States embargo on uranium imports. Plainly protectionist, the ban's effect on Canadian and other countries' uranium industries was catastrophic.<sup>26</sup> It forced supplier countries to encourage action by their producers to ensure orderly marketing outside the United States.<sup>27</sup> Although the ex-

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<sup>22</sup> Sherman Act, 15 U.S.C. §§ 1-7 (1976). See *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (federal court has subject matter jurisdiction when alleged antitrust activity of one U.S. litigant results in harm to another U.S. litigant's business even if the acts take place abroad); *Zenith Radio Corp. v. Matsushita Electrical Industrial Co.*, 494 F. Supp. 1161 (E.D. Pa. 1980) (Sherman Act case could be maintained against foreign manufacturer even if that manufacturer committed no act outside its own country).

<sup>23</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 444-45 (2d Cir. 1945); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

<sup>24</sup> *In re Westinghouse Electric Corp. and Duquesne Light Co.*, 16 Ont. 2d 273, 281 (1977) (quoting background paper issued by the Honorable Alastair Gillespie, the Minister of Energy, Mines and Resources for Canada).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 280.

<sup>27</sup> *Id.*

act price effect of this cooperation is debatable, one nuclear reactor manufacturer in the United States which arranged long-term uranium sales in connection with its reactor sales found that its fuel cost estimates were out of line. It had entered into long-term contracts for the sale of uranium to encourage reactor sales, but had failed to protect itself through purchase contracts. When the international price of uranium rose, the company was exposed.<sup>28</sup> The corporation attempted to transfer liability for this commercial miscalculation to the uranium producers by arguing that their pricing practices were contrary to United States antitrust law and by arguing that these practices were subject to United States jurisdiction.

In this particularly complex context, the United States courts permitted suits for damages against foreign uranium producers.<sup>29</sup> By allowing the suits, the courts in effect said that if an action outside the United States causes financial damage to a United States corporation by causing the world price of uranium to rise, the Sherman Act permits United States companies to seek redress. This holds true despite the fact that the foreign suppliers acted without any intention of affecting the United States market or its corporations; indeed, the very opposite was the case. Although the specifics of the uranium cases probably lie behind us, the United States legal reasoning in this and previous anti-trust cases remains a matter of serious international concern.

#### IV. CANADA AND UNITED STATES EXTRATERRITORIALITY

For Canada, concerns over United States extraterritoriality are not simply theoretical; the nature of our economy makes us especially vulnerable to such unwarranted exercises of extraterritorial jurisdiction. A large part of our oil and gas sector, our mining sector and our manufacturing sector are controlled from abroad.<sup>30</sup> These facts demonstrate that Canada responds hospitably to foreign investment and continues to believe in the many benefits to be gained from increased foreign investment. But arguably, Canadians also find themselves in a better position than anyone else to know the costs.

The Canadian government established the Foreign Investment Review Agency (FIRA) to mitigate some of these costs and to try to balance the demands of foreign capital with the demands of Canadians

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<sup>28</sup> *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 994 (10th Cir. 1977).

<sup>29</sup> *See, e.g., Westinghouse Electric Corp. v. Rio Algom Ltd.*, 617 F.2d 1248 (7th Cir. 1980).

<sup>30</sup> *See FOREIGN INVESTMENT REVIEW AGENCY, GOVERNMENT OF CANADA, INDICATORS OF FOREIGN CONTROL OF NON-FINANCIAL INDUSTRIES BY PROVINCE 110-11 (1978).*

to participate fully in the development of their own national economy.<sup>31</sup> FIRA is a federal mechanism which screens new foreign investment proposals to ensure that they will confer significant benefits on Canada. One of the primary objectives of discussions between FIRA officials and foreign investors is to sensitize investors to both Canada's capabilities and its aspirations. We also expect foreign investors to recognize Canadian sovereignty over economic activity within our borders.<sup>32</sup>

Although this latter point may appear self-evident, it must be recognized that the majority of the foreign investment in Canada comes from the United States. As a result, United States views on extraterritoriality and on the limits of sovereignty are profoundly important to Canadians. For example, the dispute over oil and gas sanctions indirectly engaged Canadian interests. Also, Canadians have experienced very real difficulties when Canadian subsidiaries of United States companies have been forced by their corporate parents to forego trade opportunities with Cuba and China.<sup>33</sup> This amounts to more than legal wrangling for its own sake. It has jeopardized jobs and trading relationships. Canadians have been deeply upset by foreign controls placed on Canadian-incorporated companies—especially when those controls directly conflict with Canadian law and policy.

I suppose it is Canada's particular vulnerability, because of our high level of foreign investment, which has caused other countries to look to our experience for insight on how to deal with some of the costs created by foreign, particularly United States, investment. In other words, United States extraterritorial practices have seriously affected the global economic and political system. Foreign investment and transnational corporations play vital roles in global economic development, and in general have been regarded as having a beneficial impact. That view, however, may be changing. For example, the principle of national treatment<sup>34</sup> that the United States itself finds so important may be undermined by the concern of other nations that multinational corporations based in the United States not be permitted to act like other national firms with regard to the laws and policies they follow.

The United States government has expressed genuine concern

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<sup>31</sup> Foreign Investment Review Act, Can. Stat. c. 46 (1973).

<sup>32</sup> See P. HAYDEN, J. BURNS, I. SCHWARTZ, *FOREIGN INVESTMENT IN CANADA: A GUIDE TO THE LAW* (1974).

<sup>33</sup> J. Corcoran, *The Trading With the Enemy Act and the Controlled Canadian Corporation*, 14 MCGILL L.J. 174 (1968).

<sup>34</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. III, 61 Stat. A7, A18, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 204.

for what it perceives to be increased control by foreign governments over United States foreign investment. The Canadian government and several other OECD member countries take the position that international discussion of foreign investment controls is appropriate, but should be carried out in a broader context—within a discussion of the international roles of multinational corporations and their susceptibility to extraterritorial jurisdiction. Unless we, the governments of the United States and other industrialized nations, deal with investment in a broader context, we are unlikely to reach successfully the basic source of some of these disputes.

With regard to extraterritoriality, a pattern of defensive legislation has already begun to emerge. Part of that pattern is evidenced by foreign investment controls. And, several of the United States' most important trading partners, including Canada, have either considered or enacted legislation expressly designed to prohibit persons that the United States regards as subject to its extraterritorial jurisdiction from obeying its orders and regulations.<sup>35</sup> The emerging pattern of defensive measures points to a need for more than ad hoc solutions or partial accommodations. It is now necessary that we negotiate general rules to which the United States will agree.

## V. CONCLUSION

This is the broad controversy of extraterritoriality. It is extremely difficult, and there are no hard and fast general answers. In our interdependent world it is clear that a dogmatic and exclusively *territorial* approach to sovereignty—one that completely separates national jurisdictions—will not work. Some extraterritoriality is inevitable and, sometimes, even desirable. But, it must be very limited. The international flow of trade and investment requires appreciation of how the legal and regulatory frameworks of different nations differ. In the final analysis, we must know where one jurisdiction ends and another begins; we must respect the lines of demarcation, as ill-defined as they may be.

The problem will not resolve itself. Transnational regulation of business activity is needed. And, because transnational business activity is growing in today's world, the need for regulation is growing as well. How can we establish a sensible regulatory regime for this purpose? There is no magic formula. If, for one reason or another, the

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<sup>35</sup> On July 11, 1980, Bill C-41, the Foreign Proceedings and Judgements Act was given first reading in the House of Commons of Canada.

differences of approach are intolerable, we must consult and negotiate cooperatively instead of litigating and legislating unilaterally. If transnational controls are to be effective, if individuals and companies are not to be placed in the impossible situation of receiving contradictory orders from two jurisdictions, each with the power to punish for non-compliance, then we must base transnational regulation on multilateral understanding, not on unilateral action.

When there are true cases of concurrent and conflicting jurisdiction, there is much to recommend a "balancing" or "reasonableness" approach to jurisdictional problems. Identifying the factors to be weighed, assigning weights to those factors, and choosing entities to weigh the factors all are matters of importance. Fortunately, in light of the draft revision of the United States Restatement of the Foreign Relations Law, they are now receiving attention. While we welcome the development of more sophisticated mechanisms to resolve conflicts of public law, however, we must recognize that such tests may have little relevance for corporate nationality problems. The view held almost universally—except in the United States—finds that links of ownership and control of a foreign juridical entity do not justify the exercise of prescriptive jurisdiction over such an entity with respect to conduct which neither occurs in nor very significantly affects the territory of the legislating state. In short, there is no concurrent jurisdiction in law—merely legally unfounded assertions of a conflict.

Even if, for the sake of argument, we were to assume that ownership and control create a minimal basis for exercising jurisdiction, what would be the results of a "balancing" or "reasonableness" test in the usual situation? I submit that evaluation of the relevant factors listed in Section 403 of the draft revised Restatement<sup>36</sup> suggests it would be "unreasonable" for the United States to try to impose its trade policy on foreign corporations which produce and market goods in accordance with the laws and policies of the territorial sovereign from whose laws they derive their existence.

We need established and accepted rules of the game on extraterritoriality. Fortunately, there is some hope for the future. Lots of good positive work is being done. First, two meetings sponsored by the Anglo-American Ditchley Foundation,<sup>37</sup> the more recent in March 1982, disclosed some common ground among American, European and Ca-

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<sup>36</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (Tent. Draft No. 2, 1981).

<sup>37</sup> The Ditchley Foundation meetings at which the extraterritorial application of national law was discussed were held at Ditchley Park, England, in Mar. 1980 and Mar. 1982.

nadian lawyers, business executives, and government officials. The agreement is sufficient to encourage our belief that, in the proper forum, we might agree upon enough basic principles to curb at least some of the excesses of unilateralism. Secondly, the American Law Institute is reformulating its principles on this subject. The Canadian authorities hope the results will constitute a significant step away from unilateralism and towards a regime based upon mutual accommodation. But, we still need a good deal more work by international groups of lawyers and policymakers.

A minimum of cooperative spirit and self-restraint might result in clarified international rules on state jurisdiction by which to build a basic framework for the regulation of transnational economic activity. That would benefit us all.