V. ROCK GRUNDMAN*

The New Imperialism: The Extraterritorial Application of United States Law

In the past twenty-five years the United States has had three major exports: rock music, blue jeans, and United States law. The first two have acquired an acceptance the last can never achieve. People resent being told what to do. Just two years ago, an article in *The Economist* proclaimed, "The United States Wants to Lay Down The Law on What Foreign Companies Do. Its Law, Nobody Else's."[1] The article noted the growing number of clashes of sovereignty among nations and that Britain, Holland, West Germany, Australia and Canada, "not notorious buccaneers in international business," have legislated and/or taken administrative action to prevent their national companies from complying with American requirements.

It is, of course, the multinational corporations that are caught in the clash of sovereignties. And since there are more of them, it is the United States-based multinationals that are especially caught in the middle. Our multinationals carry a disproportionate share of United States exports and, by definition, account for most of the United States foreign direct investment. This investment, which had a book value of over $140 billion in 1978 and annual sales of almost $300 billion, provides a return to the United States that, together with export sales, is the major underpinning of our balance of payments position. The seriousness of our trade deficit and the need to protect and enhance our export trade and foreign investment cannot be overemphasized.

*Mr. Grundman practices law in Dallas.

[1] THE ECONOMIST, Aug. 20, 1977, at 77.

By any measure, United States foreign investment and export trade is very large. It grew and flourished during the period from the end of World War II through the 1960s. There has probably never been such a period of worldwide expansion of trade and investment in history, not only by United States companies but among all the developed countries and including some of the less developed countries, notably Taiwan and South Korea. But United States trade is no longer growing proportionately.

What has happened to change this picture? Obviously there are many reasons, but major factors have been the massive growth in United States regulatory activity affecting export trade and foreign investment, and the politicizing of our export trade and our foreign investment, and the use of trade and United States multinationals to promote United State Government policies and views abroad.

How can all this be explained? Part of the explanation has to do with the Congress's limited ability to influence foreign policy. One method is via the Executive Branch, and Congress has saddled the President with more than seventy restrictive provisions in various bills. The other is via United States multinational corporations and export trade.

There are serious constitutional questions about limitations placed on the President in the foreign affairs area and other legal questions about laws which use United States companies and trade as instruments of policy. Unfortunately there is not a great body of law in this area, and resistance has been largely *ad hoc,* but The United States courts have been quite willing to step into the vacuum.

Where does this leave our multinational corporations? In a very vulnerable position. If they are perceived as the instruments of United States moral or legal imperialism they are also the logical targets for those who resent or want to block United States influence. Much criticism of multinational corporations may be for this reason.

Laws and regulations are very clumsy instruments for fashioning foreign policy. They are blunt and inflexible, and when we attempt to export them, resentment is natural.

Are there extraterritorial boundaries of national jurisdiction? As the world continues shrinking and the interdependence of nations becomes more apparent to all, the clashes of jurisdiction will take on increasing importance. Will the United States continue to demand that only the other side exercise comity?

No. Rather than ask other governments to defer to our laws, the new technique is to merchandise our laws, to get other governments to adopt our laws and ideas, such as antitrust laws, or for example, the recently passed Foreign Corrupt Practices Act of 1977.[2] Recognizing that our national interest may not be well served by being the only country with such self-restricting laws, we have attempted to have the United Nations take action to urge other countries to pass similar laws, so far with little result.

[2]Pub. L. No. 95-213, 91 Stat. 1494 (1977).

One area where we have seen some movement is the exporting of our antitrust laws. The Foreign Commerce section of the Justice Department's Antitrust Division has become much more active in the 1970s and is taking a leading role in urging other countries through OECD and UNCTAD to adopt competition laws.

The United States, in seeking to enforce the extraterritorial application of its laws, is often accused of attempting to unilaterally impose a solution on a multilateral problem.

There is room for broad multilateral solutions to the problem of intrusive United States and other country laws. We have the example of the Status Of Forces Treaty entered into by the members of the North Atlantic Treaty Organization.[3] This Treaty has been extraordinarily successful in muting clashes of sovereignty. There can be no more sensitive a subject than the jurisdictional questions involved in the stationing of the armed forces of one country within the territory of another. The potential for resentment in that situation makes the multinational corporation-host country relationship seem almost petty.

Turning to the specific issues where multilateral action might be preferable to unilateral action by the United States, let me first discuss human rights. This nation was founded upon a concern for human rights. In the words of the Declaration of Independence:

> We hold these truths to be self evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . .

What are these things we now call human rights? They have often gone by other names. To Franklin Roosevelt, they were embodied in the famous Four Freedoms.

One way in which this country has tried to impose our human rights values is by the granting of favors. Our foreign assistance, military assistance, and Export-Import Bank laws now include human rights considerations. We have also treated our export and import trade as a boon to be granted or withheld to promote human rights. The Export Administration Act of 1969[4] gives to the President the power to control exports for national security purposes, for conditions of short supply and foreign policy reasons.[5] Foreign policy, of course, can include human rights policy. The granting or withholding of validated export licenses to promote human rights elsewhere can have curious jurisprudential consequences here in the United States.

In May 1978, Dresser Industries, Inc. of Dallas, Texas received a validated export license to transmit the technology for an oil field rock bit plant to the

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[3]Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846.

[4]50 U.S.C. app. §§ 2401-2413 (Supp. I. 1979).

[5]*Id.* § 2402.

Soviet Union. At about the time the license was issued the trials of Soviet dissidents Shcharansky and Ginzburg were headlined everywhere. Newspaper reports quite rightly described the trials as human rights violations. Several United States senators spoke out publicly condemning the Soviet Union and requesting the President to deny and revoke all validated export licenses for the Soviet Union.

Shortly thereafter Dresser learned from a newspaper reporter that its validated license was under review to determine whether it should be revoked as a response to the Shcharansky and Ginzburg trials. The company tried to find out whether in fact its license was being considered for revocation, but could get no information. Since the license had been issued, the company had no legal recourse and no means of obtaining further information. It could only sit and wait while its fate was decided behind closed doors. Over a month later it learned by way of a nationally televised press conference of the President, that he was approving or at least was not going to revoke the license already issued. At the same time, the President announced he was denying a license to Sperry Univac for a computer for the Soviet news agency TASS, supposedly to assist with type-setting for the coverage of the 1980 Olympics.

The President did take some additional action in response to the Ginzburg and Shcharansky trials. He reimposed the requirement for a validated license on oil field and related equipment, a return to the requirements of the Cold War days.

The next month, Dresser Industries again learned through the press that the question about its validated license for the Soviet Union was again being debated at "very high levels," and that the license was again in jeopardy. At this point the company had committed very large sums of money to fulfill its contractual obligations.

The press also reported on the existence of a special report for the Defense Science Board, criticizing the issuance of the license for the rock bit plant on national security grounds. The company was denied access to the report of the Defense Science Board and was only able to obtain a copy by filing a Freedom of Information Act request.

Early in September 1978 the company heard still a third time that the President had decided not to revoke the issued license. The next day the company received a subpoena from the Senate Permanent Subcommittee on Investigations. At the subsequent Senate hearing the national security issues were put to rest when a senior Defense Department official described the national security issue as a "red herring."

It was clear through this entire process that what was at issue were human rights concerns. While we were busy debating the questions of human rights elsewhere, something almost happened to our own sense of legal justice. The Administrative Procedure Act does not apply to the export licensing procedure.[6] License applicants have no right to a hearing or to due process. The

[6]50 U.S.C. app. § 2407 (Supp. 1977).

debate within the government is conducted in secret and there is only limited access to the conclusions, and then only if they are adverse. Violations of the Export Administration Act on the other hand are a crime and can be punished severely with fines, civil penalties, jail and denial of export privileges.[7]

The Jackson-Vanik Amendment included in Title IV of the Trade Act of 1974 is the most often cited example of the untoward and even counterproductive effects that United States law may have.[8] This well-intentioned measure attempted to tie most favored nations, trading status to the emigration policies of Communist countries, principally the Soviet Union. As is well known, when it became clear that the amendment would pass, emigration from the Soviet Union was reduced by a factor of three. The Soviet Union renounced the 1972 trade agreement which was to have been implemented by the 1974 Trade Act and reimposed a strict emigration policy.[9]

One nonmarket economy country has been granted most favored nation (MFN) status through the waiver provisions of the Jackson-Vanik Amendment. President Ford invoked the waiver provisions on behalf of Romania. Thereafter, delicate negotiations with Congress and with the Romanians were conducted in which unusual care was taken to protect the sensibilities of the Romanians. Romania appeared able to meet the requirements of the act without promising in writing a liberalization of emigration policies and without commitment to any emigration quotas.[10]

In one area, human rights considerations have stabilized, and this is in the financing, guarantee and insurance programs of the Export-Import Bank.[11] The 1977 amendments to the Export-Import Bank Act [hereinafter, Ex-Im] had amended section 2(b)(1)(B) to require the Bank to: "take into account, in consultation with the Secretary of State, the observance of and respect for human rights in the country to receive the exports supported by a loan or financial guarantee and the effect such exports may have on human rights in such country."[12]

This provision caused considerable anguish among exporters who found that Ex-Im was being prevented from approving transactions on the basis of ill-defined human rights considerations in the recipient country. One major concern was that a would be exporter had no way of knowing officially in advance what countries the State Department might block Ex-Im financed transactions for on human rights grounds.

The 1978 amendment[13] removed this provision from the Ex-Im Bank Act

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[7]40 U.S.C. app. § 2405 (Supp. 1979).

[8]Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in scattered sections of 19 U.S.C.).

[9]*See* 72 DEP'T STATE BULL. 139-40 (1975).

[10]*See* Note, *An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade and Human Rights: The Romanian Example,* 8 LAW & POL. INT'L BUS, 193 (1976).

[11]Pub. L. No. 95-143, 91 Stat. 1210 (codified at 12 U.S.C. §§ 635, 635f).

[12]12 U.S.C. § 635(b)(1)(B) (Supp. I 1979).

[13]Pub. L. No. 95-630, 92 Stat. 3724 (codified at 12 U.S.C.).

and substituted a much more limited directive which states that:

> Only in cases where the President determines that such action would be in the national interest and where such action would clearly and importantly advance the United States policy in such areas as international terrorism, nuclear proliferation, environmental protection and human rights, should the Export-Import Bank deny applications for credit for nonfinancial or noncommercial considerations.[14]

Ex-Im continues to send applications for credit to the State Department for overall review, but the question of human rights is no longer a major consideration. The Office of the Assistant Secretary for Human Rights and Humanitarian Affairs in the State Department has been relatively uninvolved in Ex-Im transactions since this change in the legislation.[15]

The human rights evaluation now is limited to economic aid and military aid situations where the State Department attempts to give preference to countries with good human rights records.[16]

The 1978 amendments to the Ex-Im Bank Act contain a surprise in the addition of a second human rights provision, § 2(b)(8), which prohibits Ex-Im from extending credit in support of purchases by the Government of South Africa or any purchaser in South Africa, unless certain antiapartheid preconditions are met. Ex-Im is prohibited from supporting any export which would contribute to enabling the Government of South Africa to maintain or enforce apartheid. It may not support any export to the Government of South Africa unless the President has determined that "significant progress toward the elimination of apartheid has been made"[17] and has transmitted a statement describing and explaining this determination to the Congress.

For exports to private purchasers Ex-Im may not lend support unless the United States Secretary of State certifies that the purchaser has endorsed and has proceeded toward the implementation of a number of employment practices aimed toward desegregation of the work place. These practices are essentially the same as those referred to as the "Sullivan Principles" which have been adopted by many United States multinational corporations in some form or another.

This addition to the Ex-Im Bank Act has caused an almost comical bureaucratic snafu. The State Department lawyers looked at the requirement for the Secretary of State to "certify" and determined initially that the State Department could not implement this language requiring investigation of conditions in a firm in a foreign country.

To get around this situation, the Department of State asked the Chairmen of the House and Senate Committees involved to advise the State Department

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[14]12 U.S.C. § 635(b)(1)(B).

[15]Conversation with Stephen Corwin, Deputy Assistant Secretary for Human Rights and Security Assistance (Aug. 14, 1979).

[16]*Id.*

[17]12 U.S.C. § 635 (b)(9).

that the language "certify" was really meant to require that the Secretary of state make a statement on "reason and belief." This the Chairmen of the committees have done, leading to the next bureaucratic tangle: what kind of information and what kind of on-site inspection would be required to satisfy the "reason and belief standard"? The current draft list of questions is up to twenty, and these are not "yes or no" questions, but quite elaborate. It is expected that some procedure will be worked out by the end of September 1979.

As a practical matter, Ex-Im Bank is essentially out of the South African trade, and it is not likely that Ex-Im will ever be much involved in South Africa transactions as long as this provision remains in the Ex-Im Bank Act.

South Africa has reportedly agreed to permit subsidiaries of United States firms to give information to implement this provision, but has been silent with respect to whether or not it will permit South African firms to provide information to the United States.[18]

I. Civil Rights

Many people consider civil rights to be human rights within the current international debate. The Civil Rights Act of 1964 (CRA) prohibited discrimination in employment on the basis of race, color, religion, sex or national origin.[19]

The Act also established the Equal Employment Opportunity Commission (EEOC)[20] with the power to issue regulations and hear discrimination complaints. The CRA recognizes that in some cases employment decisions may have to be based on religion, sex or national origin, where those characteristics constitute "a bona fide occupational qualification" (BFOQ). To date, these standards for determining what constitutes BFOQ have been very stringent.[21] The question is: Do the civil rights laws apply extraterritorially? The act specifically excludes aliens employed abroad.[22] An argument can therefore be made that since the act expressly excludes only aliens working for covered employers abroad, it does include American employees of covered employers abroad. The Department of Justice and the General Counsel of EEOC have reached this conclusion.[23]

This raises the interesting question as to whether a covered American employer seeking to fill positions in Saudi Arabia must recruit women, even

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[18]Conversation with Cameron Houme, South African Desk Officer, United States Department of State (Aug. 14, 1979).

[19]42 U.S.C. §§ 1971, 1975a-d, 2000a-h (1976).

[20]42 U.S.C. § 2000 (1976).

[21]*See, e.g.*, Diaz v. Pan Am World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[22]42 U.S.C. § 2000e-1 (1976).

[23]Statement of Antonin Scalia, Assistant Attorney General, before the Subcommittee on Monopolies and Commercial Law, House Committee on the Judiciary (July 9, 1975); Letter from William A. Carey, EEOC General Counsel, to Senator Frank Church (March 17, 1975).

though a woman employee in Saudi Arabia would have to operate with severe legal and cultural handicaps, including the manner of dress and not being permitted to drive an automobile.

II. Environmental Law

A number of attempts have been made to export our environmental laws, especially the National Environmental Policy Act (NEPA).[24] Each of the several administrations since the passage of the act has been well aware that should there be a determination that NEPA applies extraterritorially, there is a huge possibility of delay and obstruction. NEPA, with its requirement for an environmental impact statement for every Federal Government major action affecting the environment, has been the favorite tool of environmentalists seeking to delay or halt some project.

One notable use of this was in the case of *Sierra Club v. Adams.*[25] This suit grew out of a project involving federally financed construction of the last two hundred fifty miles of the Pan American Highway, wholly within the countries of Panama and Colombia. The Federal Highway Administration had prepared and circulated a draft "environmental impact assessment." In the initial action, the District Court found that the voluntary environmental impact assessment satisfied neither the procedural nor the substantive requirements of NEPA, and issued a preliminary injunction.[26]

One year later the case was back before the District Court on the motion of the Sierra Club to extend the injunction on the grounds that the Final Environmental Impact Statement (EIS) was deficient in that it did not discuss adequately the possibility of the project contributing to the spread of hoof-in-mouth disease and because of inadequate treatment of the impact of the project upon the lives of the Cuna and Choco Indians who live in the region. Also challenged as inadequate was the discussion of alternative routes.[27]

Almost two years later, the Court of Appeals for the District of Columbia vacated the decision of the District Court and remanded the case finding that the Final Environmental Impact Statement had adequately discussed the issues.[28] The Court expressly declined to rule on whether NEPA would apply to United States foreign country projects that produce entirely local environmental impacts. It stated only, "In view of the conclusions that we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama."[29]

On September 24, 1976 the Council on Environmental Quality sent a "memorandum" to heads of agencies concerning application of the Environmental Impact Statement requirement to environmental impacts abroad. The

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[24]42 U.S.C. § 4321-4347 (1976).
[25]578 F. 2d 389 (D.C. Cir. 1978).
[26]Sierra Club v. Coleman, 405 F. Supp. 53, 54 (D.D.C. 1975).
[27]Sierra Club v. Coleman, 421 F. Supp. 63 (D.D.C. 1976).
[28]578 F. 2d 389 (D.C. Cir. 1978).
[29]*Id.* at 391 n. 14.

Council naturally suggested that NEPA did apply abroad, and sought to assure for itself the regulatory authority to administer the Act abroad. This sparked a great debate both within and outside the Government.

The Natural Resources Defense Council (NRDC) brought suit against the Ex-Im Bank to force a decision in this area. The suit sought to require an Environment Impact Statement on Ex-Im financed transactions that might have a significant environmental impact abroad.

The resolution of this issue was a compromise in the form of Executive Order 12, 114 of January 4, 1979 designed to "further environmental objectives consistent with the foreign policy and national security policy of the United States."[30] The order directs United States agencies to adopt procedures to consider the significant effects of their actions on the environment ouside the United States.

The order is careful to note that "[n]othing in this Order shall be construed to create a cause of action." The order is also careful to point out that it "furthers the purpose of" NEPA, but is based upon independent authority. The idea is apparently to avoid any declaration or concession that NEPA applies extraterritorially and leave to the Executive Order the total consideration of environmental questions abroad.

The order requires varying levels of response by agencies. Environmental impact statements are required for activity affecting the global commons, the oceans or Antarctica. To this extent it probably finds some support in *Skiriotes v. Florida,*[31] a case in which the Supreme Court allowed Florida to enforce a criminal statute involving regulations on sponge diving despite the fact that the conduct complained of occurred beyond the state's territorial waters.

The President's Executive Order exempts presidential actions, intelligence activities, arms transfers, export licensing or permits, and disaster and emergency relief actions.

The NRDC case had set a record for postponements; approximately thirty were allowed pending the Executive Order. The case was dismissed on the basis that Ex-Im Bank would comply with the requirement of the Executive Order with neither side conceding that NEPA did or did not apply extraterritorially.

Other laws concerning environmental protection with possible extraterritorial implications have not yet spent much time in the courts, with the exception of the the Endangered Species Act[32] and the famous, or infamous, depending on your point of view, snail darter.

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[30]Exec. Order No. 12, 114, 44 Fed. Reg. 1957 (1979).

[31]313 U.S. 69 (1941).

[32]Pub. L. No. 93-205, 87 Stat. 884 (1976) (codified in scattered sections of 16 U.S.C.).

The Premanufacture Notification Rules of the Toxic Substances Control Act proposed by the EPA on January 10, 1979, have been described by foreign chemical manufacturers as possibly causing enormous disruptions in international trade. EPA's view is that section 5 of the Toxic Substances Control Act[33] gives the agency the authority to regulate chemical substances and if it finds any substance poses unreasonable risks, importations of articles containing the substance are subject to regulation.

EPA is not presently requiring Premanufacture Notification under the Toxic Substances Control Act of 1976 for new chemical substances manufactured solely for export.[34] But EPA may change its view.

Before the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act,[35] pesticides manufactured solely for export did not have to be registered in the United States. EPA is expected in the near future to publish a policy statement on labeling requirements for exported pesticides. According to a draft policy statement, a pesticide cannot be exported unless prior to export, "the foreign purchaser has signed a statement acknowledging that the purchaser understands that the pesticide is unregistered and therefore cannot be sold in the United States." A copy of that statement must be transmitted to an appropriate official of the government of the importing country.[36]

I leave it to your own imagination as to how anxious foreign governments will be to receive those statements.

There are more than a dozen other laws in which extraterritorial application is or may be sought. This country does try to do good, sometimes with zeal, sometimes with an excess of zeal. Sometimes perhaps we try too hard to share our good intentions.

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[33]15 U.S.C. §§ 2601-2629 (1976).
[34]44 Fed. Reg. 28,566 (1979).
[35]Pub. L. No. 95-251, 92 Stat. 183 (codified at 7 U.S.C. § 136d).
[36][1979] CHEMICAL REG. REP. (BNA) 345, 346.