

Compelling Discovery and Evidence In International Litigation

This article discusses some of the highlights of the current international controversy over what is commonly called extraterritoriality, with special emphasis on the discovery of foreign located documents and on current efforts to revise the jurisdictional sections of the *Restatement of Foreign Relations Law of the United States*.¹

I. Scope and Significance of Issues

These issues are subject today to a debate that engages the attention of the most senior levels of our government and the governments of many friendly countries such as the United Kingdom, Canada, Australia and Switzerland. It includes such matters as application of economic sanctions to foreign subsidiaries, re-export controls, unitary taxation, contract sanctity, application of antitrust law to foreign conduct with effects in the United States and unilateral actions to compel the production of evidence located in a foreign country. Over the past year, to take a representative period, the United States has received well over two dozen formal and high level demarches on such issues and has seen them intrude into the highest level of inter-governmental meetings. Thousands of U.S. government "person-hours" have been spent in connection with consultations with other governments on these issues. Since I assumed office in 1981, they have been and remain among the most important politico-legal issues facing the Office of the Legal Adviser.

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¹See principally Tentative Drafts Nos. 2, 3 & 5, RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised), Secs. 401 ff. (1982-84).

These widely disparate subjects raise political and economic issues of great sensitivity. Often, the United States, looking essentially to the mandates of its own legislative, executive or judicial policies, asserts jurisdiction over persons or acts abroad. This assertion may conflict with a law or policy to which the foreign jurisdiction attaches importance. In some cases, the foreign jurisdiction may follow a policy of non-regulation or even encouragement of an act prohibited by the U.S. Applying a U.S. trade restriction or our antitrust law abroad may raise not only sensitive issues of sovereignty, but also politically charged economic issues of jobs and contracts.² Leaders like Prime Minister Thatcher, looking at the assertion of U.S. rights to regulate or control conduct within their own country, are likely to be heard asking, "Who is in charge here?"

A. SEEKING EVIDENCE ABROAD

Multinational activity, whether of individuals or companies, leads regulators and others to seek the production of foreign located evidence.³ In those cases, the needs of one state to have access to information that will permit a fair and effective adjudication of rights and responsibilities often runs directly counter to the interests of another state in preventing access to that evidence. United States policies that support disclosure of foreign located evidence are well established in our procedural rules and decisions. However, we must not underestimate the policies cited by other states to support nondisclosure.

Seeking evidence from abroad is seen as a special challenge when related to the enforcement of a law that raises policy clashes. Over the years, such attempts, particularly in antitrust cases, have spurred a number of governments to block production of that evidence. However, attempts at foreign discovery can create other significant kinds of conflict.

In some cases, there may be no particular policy clash with the United States law or proceeding for which the evidence is sought, but the foreign jurisdiction may have a bank or business secrets law prohibiting the production of that evidence itself. Or, as in the case of Switzerland, there may be a strong policy that production of evidence from its territory may only be

²See, e.g., Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980).

³Illustrative are *United States v. Vetco, Inc.*, 691 F. 2d 1281 (9th Cir. 1981) as amended 22 Oct. 1981, *cert. denied*, 454 U.S. 1098 (1981); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981); *United States v. Bank of Nova Scotia*, 691 F. 2d 1384 (11th Cir. 1982), *cert. denied*, 454 U.S. 1084 (1983); *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F. 2d 1300 (D.C. Cir. 1980); *Marc Rich & Co. v. United States*, 707 F.2d 663 (2d Cir. 1983). See generally, Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 INT'L LAW. 89 (1984).

carried out under its own internal laws and procedures.⁴ This may reflect, in part, a belief that such a policy is required to protect both its sovereignty and the rights of persons on whom discovery demands are made, or of third parties affected by such a demand, or the general right of persons to be free from government intrusions. There may be a strong reluctance in other countries to permit uncontrolled enforcement of U.S.-style discovery demands that may seem more sweeping and burdensome than their own systems allow.

B. U.S. VIEW: *Restatement (Second)*

To acknowledge these conflicts is not to suggest that the U.S. process violates international law. The U.S. view, reflected in the *Restatement (Second) of the Foreign Relations Law of the United States*,⁵ does not posit the existence of a single authoritative jurisdiction for any particular set of circumstances. Rather, the *Restatement (Second)* realistically admits the possibility of multiple competent jurisdictions, based on different connections to the persons and circumstances in question, and attempts to resolve such conflicts by principles of management. The most important of these principles is the requirement in Section 40, that, in the event of conflict, *each* state must consider in good faith moderating the exercise of its jurisdiction. The *Restatement (Second)* suggests that a number of factors be considered including, under recent judicial interpretations, balancing the interests of the conflicting jurisdictions.⁶

The *Restatement (Second)* approach resolves jurisdictional conflicts under principles of international comity.⁷ There are, of course, a number of

⁴See, e.g., Lowenfeld, *Bank Secrecy and Insider Trading: The Banca Della Svizzera Italiana Case*, 15 THE REV. OF SECURITIES REGULATION 942 (24 March 1982).

⁵RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES (1965).

⁶RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 40 (1965). Sec. 40 provides:

Limitations on Exercise of Enforcement Jurisdiction:

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 by international law 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 the 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
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state.

Id.

⁷See Robinson, *Conflicts of Jurisdiction and the Draft Restatement*, 15 GEORGETOWN J. OF INT'L L. & POL. 17 (1983).

problems with this approach. For example, one might wish to refine its list of factors. Guidance about the relative importance to be assigned to each factor would be helpful. Furthermore, it is difficult to assure that the balancing is undertaken seriously and at the appropriate stage. Also, this necessarily subjective process can be counterproductive if it is not carried out with sufficient sensitivity to the interests of the foreign jurisdiction. Nevertheless, the approach of the *Restatement (Second)*, whatever refinements it may require, has been accepted by U.S. courts and is the law of the United States on these matters.⁸ We believe this approach is clearly in keeping with international law.

C. CONTRAST PROPOSED REVISION OF *RESTATEMENT*

In contrast, the proposed revision of the *Restatement*⁹ attempts to reduce the potential for conflict by abandoning the concept of balancing in the management of clashes among what are admitted to be legitimate concurrent jurisdictions and posits instead of a winner-take-all test for determining which single state has jurisdiction as a matter of law.¹⁰ An impulse to neaten up the untidy conflicts among concurrent jurisdictions is understandable.

⁸*See, e.g.*, *Timberlane Lumber Co. v. Bank of America*, 549 F. 2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum*, 595 F. 2d 1287 (3d Cir. 1979).

⁹RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) Sec. 403. Section 403 provides:

Limitations on Jurisdiction to Prescribe

(1) Although one of the bases for jurisdiction under Sec. 402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect on or in the regulating state;

(b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of regulation to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity;

(h) the likelihood of conflict with regulation by other states. . . .

(3) An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2).

¹⁰*See id.*, Reporter's Note 10.

However, my office is of the firmly held view that the search for a single authoritative jurisdiction in each situation, as a matter of law, by means of a complex balancing process, is neither the law as it stands, nor a promising reform. This absolutist approach is unsuited to the national institutions which must, inevitably, make and administer our law and legal process on a day-to-day basis. It is also unsuited to the effective operation of the international legal system as a whole. Adopting this recommended revision would eliminate that flexibility which is essential in adapting to the ever-changing interdependent economic system. Moreover, the judgments are necessarily subjective, approximate and situation-specific. A nation should not be put in jeopardy of violating international law merely because its good faith judgments, arrived at in the light of a reasonable analysis of its own national interests, might later turn out to be different from those reached by some other person, tribunal or government. In other words, a climate that encourages international legal second-guessing is not conducive to effective international cooperation.

D. RETAIN *Restatement (Second)* Position

We believe that the current thrust of Section 40 of the *Restatement (Second)* should be retained. First, the concept of concurrent jurisdiction is well established in international law and practice. States have for generations exercised jurisdiction over persons and acts outside their own territory, based on such factors as nationality, protection of security, the punishment of universal crimes, and the effects of external acts within a State's territory.

The proposed new *Restatement* approach appears to be based in part on the incorrect view that international law generally prohibits the exercise of jurisdiction over foreign events or persons unless an exception is explicitly recognized by international custom or agreement. Despite the tendency of some to dismiss or misread it, the opinion of the Permanent Court of International Justice in the *S. S. Lotus*¹¹ unmistakably acknowledges that the Court's presumption in favor of jurisdiction for the territorial sovereign does not imply a general bar to the exercise of jurisdiction by another sovereign over foreign located persons, property or acts in appropriate circumstances. The case recognizes that states are left a wide measure of discretion in this regard. If there is a universally recognized prohibitive rule, it is that a state may not exercise jurisdiction over foreign events or persons if that state has no genuine link with those events or persons. U.S. law and practice are clearly consistent with that core requirement, especially in those discovery cases where there is generally no doubt about the legitimacy of the underlying U.S. jurisdiction over the parties or cause of action for which foreign discovery is sought.

¹¹ [1927] PCIJ, ser. A., No. 10.

II. "Conflicts of Jurisdiction" v. "Extraterritoriality"

The Office of the Legal Adviser has a strong preference for the term "conflicts of jurisdiction" rather than the buzzword "extraterritoriality."¹² The term better describes the practicalities of management and accommodation, without the image of inflexible legal norms that fail to reflect the interdependent world in which modern nation-states and multinational enterprises operate. The term "conflicts of jurisdiction" also better reflects in our view the variety and complexity of the subject matter that is involved.

That no single jurisdictional principle can be accorded *automatic* overriding force in modern international intercourse becomes self-evident when one reflects on the nature of the international community. Multinational enterprises, by definition, operate within the territory of more than one nation. Their ability to shift transactions, assets, documents, or technology from jurisdiction to jurisdiction engages important regulatory or enforcement interests of many states. One state's treatment of these enterprises may affect the legitimate interests of another. In our view, these competing interests cannot in all circumstances be subordinated to the policies or laws of the territorial sovereign.

Under U.S. law, when foreign located evidence is sought for a U.S. proceeding, United States courts do not automatically defer, even where the law or policy of the foreign jurisdiction is clearly opposed to such production. U.S. courts generally had deferred to foreign interests on a basis of comity, until in 1958 the Supreme Court, in *Societe Internationale v. Rogers*,¹³ upheld a production order despite the fact that the Swiss Government had taken custody of the documents in question. However, the Court did hold that the sanctions for non-compliance had to be limited in light of good faith efforts to comply. The 1965 *Restatement*, following *Societe Internationale*, rejected an exception to jurisdiction where foreign illegality was a barrier, articulating instead the balancing and comity requirement previously mentioned.¹⁴

The proposed revision of the *Restatement* continues the balancing approach but in a different manner. Section 420 of the new draft would expressly recognize that a U.S. court may require good faith efforts to produce documents where prohibited by foreign law, but prohibits punishment for failure to produce if such efforts are made.¹⁵ Presumably, however, if the general balancing approach of the proposed new Section 403 were

¹²Dam, Extraterritoriality and Conflicts of Jurisdiction, Address to the American Society of International Law, in Dept. of State Current Policy Bulletin, No. 481 (15 April, 1983).

¹³357 U.S. 197 (1958).

¹⁴RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40, *supra* note 6.

¹⁵Tentative Draft No. 3, RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised), Sec. 420 (1982).

followed, i.e., where only one state could be found to have jurisdiction, the Court would have to decide that, as a matter of international law, either the U.S. did not have jurisdiction to order production or the country in which the evidence was located did not, as a matter of law, have jurisdiction to block production. If the implication of any U.S. order to produce a document were that the other jurisdiction did not legally have jurisdiction to block production, each assertion or blocking action would become a zero-sum game of high jurisdictional stakes.

Several recent cases in the federal courts have recognized and applied the balancing of interests approach and have recognized the good faith defense from *Societe Internationale*, albeit in varying forms and with sometimes less than satisfactory explanations in the opinions. Among these cases are several dealing with bank secrecy statutes such as the Bank of Nova Scotia cases.¹⁶ In the now well known Marc Rich litigation,¹⁷ subpoenas connected with allegations of massive tax fraud and energy control violations are in conflict with the Swiss view of its sovereignty over documents located in its territory. Marc Rich A.G. continues to be held in contempt despite continued Swiss government assertions that the documents will not be produced in response to unilateral U.S. process. Yet it is not clear that we have worked out with the Swiss any applicable and adequate alternative.

All of these cases reflect the intimate interrelationship between judicial standards for resolving jurisdictional conflicts and the needs of the diplomatic community for restraint and mutual recognition of the values of comity in resolving international jurisdictional disputes. The Marc Rich and Bank of Nova Scotia cases, with conflicting laws and policies, demonstrate that our national interests in law enforcement require us to maintain a climate in which international cooperation is possible. This is true in other kinds of extraterritoriality cases as well. If provoked to opposition, the territorial jurisdiction has significant advantages in a case of conflicting requirements. But these discovery cases also allow us to draw some more particular lessons.

First, as for foreign governments, knee-jerk reactions based solely on the location of documents seem inappropriate. The location of the information may be insignificant when compared with the other state's identifiable interests—even where the situs state does not share the policy for which the other is seeking the documents.

Second, by definition, balancing means that the interests of the U.S. and its prosecutors will not always prevail and we must be prepared to recognize that fact.

Third, to eliminate the need for unilateral discovery in legitimate cases,

¹⁶See, e.g., *United States v. Bank of Nova Scotia*, 691 F. 2d 1384 (11th Cir. 1982).

¹⁷*Supra* note 3.

states have to establish alternative cooperative channels that are timely, effective, and not intrusive on the prosecutor's case. Some mutual assistance arrangements are already in place. With the Justice Department and other enforcement agencies, we are examining how they might be made more useful. We are also seeking to conclude such arrangements with additional countries. In this process, we are increasingly aware that it may not be feasible to insist on all the prerogatives of our system in obtaining evidence from abroad. Some delays in disclosure are certain to be built into any system. Hopefully, these can be minimized. It will be difficult to accommodate the fullest potential for grand jury secrecy, since some disclosure of the nature and scope of an investigation will likely be necessary in engaging the legal or administrative system of the foreign parties. This may require some flexible application of Rule 6(E) of the Federal Rules of Criminal Procedure, if we are to manage any necessary disclosures to foreign governments. Nevertheless, we believe that satisfactory confidential arrangements can be drafted and when implemented can serve the interests of both the U.S. and the foreign country involved.

Fourth, in this untidy situation, there will continue to be overlapping and legitimate assertions of concurrent jurisdiction. The spectre of potential conflicts will not in our view be exorcised by converting comity and balancing into a process for identifying a single legitimate jurisdiction as suggested by the draft *Restatement*.

Fifth, comity implies self-restraint and accommodation of the interests of others. There will be great strains on the international system and damage to the interests of the United States and others unless these attitudes are exercised by all, as a two-way street. As for other states, we urge real efforts to accommodate our legitimate discovery needs. As for ourselves, we cannot afford to legislate, regulate, enforce, adjudicate or negotiate without attention to the needs of the international system and its public and private members.¹⁸

This fifth point is perhaps the most important. It is currently one of the principal goals to which the Office of the Legal Adviser is dedicated. We have an active and growing diplomatic agenda concerning conflicts of jurisdiction, including discovery and mutual assistance. We hope to see progress in managing this vital process over the coming years.

¹⁸See generally, Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982).