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Beyond Balancing: International Law Restraints on the Reach of National Laws

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Assertion by states of a right to regulate conduct beyond their borders has been a source of frequent controversy and serious international conflicts for more than half a century.[1] Economic, political and technological developments have forced jurisdictional analysis out of the neat confines of the territoriality principle, and states have asserted the right to regulate foreign conduct on the basis of the effects of such conduct within their borders.

Jurisdiction based on effects is incompatible, however, with the conceptual premises of the traditional territorial view of international jurisdiction.[2] The so-called "effects principle" expands the jurisdictional rights of regulating states, but it fails to provide an effective framework for protecting the interests of states that might be affected by this expansion of jurisdiction.

During the past decade United States courts, in an effort to minimize international conflict, have begun to utilize a so-called "balancing" approach to international jurisdictional analysis.[3] Under this approach, the court weighs the relative interests of the United States against those of other states affected by a particular exercise of U.S. jurisdiction.[4]

Adoption of a balancing approach is an important step toward the development of a viable jurisdictional framework. Yet balancing, by itself, does not provide a solution to the jurisdictional problem. This Article

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1. Conflicts relating to jurisdiction over criminal offenses involving more than one state began to create significant controversies during the nineteenth century. The development is reviewed in the Harvard Research on International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 484-503 (Supp. 1935).

2. Efforts have been made to accommodate the effects principle within the concept of territoriality by substantially expanding the latter concept. *See infra* text accompanying notes 44-48; Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 156-61 (1957).

3. *See infra* notes 90-106 and accompanying text.

4. The court may refuse to exercise extraterritorial jurisdiction when "the interests of the United States are too weak . . . to justify an extraterritorial assertion of jurisdiction." Timberlane Lumber Co. v. Bank of America, 549 F.2d. 597, 609 (9th Cir. 1976).

advances the proposition that non-interference, a long-standing principle of international law, is a necessary ingredient of an effective jurisdictional framework.[5]

This Article first describes the problem of extraterritorial jurisdiction.[6] It then reviews the historical development of the jurisdictional doctrine and exposes the deficiencies of the balancing approach. Next, the Article examines the principle of non-interference in international law doctrine and practice.[7] Finally, the Article considers the need to develop and integrate the principle of non-interference into the framework of international jurisdiction, and discusses the obstacles to such development.

Because the extraterritoriality issue has developed primarily in relation to the application of United States antitrust laws, and in order to keep the present discussion within manageable bounds, this Article will focus on the problem of extraterritorial jurisdiction in the antitrust law context. The perspectives developed here, however, are considered to be of general application.

I. Extraterritoriality and the Jurisdictional Conflict

A. *Jurisdictional Conflicts: Dimensions of the Problem*

The national regulation of transnational economic activity has become a source of embarrassing and potentially dangerous international tension and conflict. Moreover, the likelihood of conflicts continues to increase.

5. A leading appeals court in West Germany has held that, in fact, international law has developed such a system. For a detailed analyisis of the German approach, see Gerber, *The Extraterritorial Application of the German Antitrust Laws* , 77 AM. J. INT'L L. 756 (1983).

6. The term "extraterritorial jurisdiction" is here used to refer to a jurisdictional claim by a state over conduct outside its borders. *See infra* notes 27-28 and accompanying text.

7. The recent legal literature on the subject of extraterritorial jurisdiction has been extensive, and one dares add to it only with great respect for the difficulties of the subject matter. According to one recent review of this literature:

> Although the literature on extraterritorial application of United States antitrust law is voluminous, its ideas are few and its repetitiveness great. The same propositions are advanced year after year with little noticeable effect one way or the other. Most of the writing in law reviews and treatises is concerned only with what the legal rules are, not with their economic consequences. Much of the more popular literature treats the political impact of extraterritoriality by discussing how United States officials have annoyed foreign nations by trying to apply United States antitrust laws to foreign corporations and nationals. The economic aspect of this subject is addressed primarily in congressional and executive publications. This sort of discussion usually is structured to produce the result desired by the committee or agency issuing the publication. Witnesses whose views are already well-known are invited to testify. Representatives of business or government serve on special commissions and deliver the pronouncements expected of them. There is a rehearsed, artificial flavor to much of the testimony and many of the reports, all of which are part of a process that is more political than intellectual.

Hood, *The Extraterritorial Application of United States Antitrust Laws: A Selective Bibliography*, 15 VAND. J. TRANSNAT'L L. 765, 767 (1982).

In particular, the assertion of extraterritorial jurisdiction by the United States has created, and continues to create, significant international conflicts.[8] These conflicts often have damaged U.S. foreign relations—especially with its allies—and they have even been held responsible for weakening the western alliance.[9]

The international conflicts resulting from these national claims to international regulatory rights have been manifested on the levels of diplomatic protest, of public confrontation, and of legislation designed to thwart certain exercises of jurisdiction, the so-called "blocking legislation." At each level such conflicts have a negative impact on U.S. interests, both public and private.

Jurisdictional conflicts are more commonly encountered at the diplomatic level, and such conflicts have been an important source of friction between the U.S. and its allies. According to one source:

> In recent years, almost every bilateral or multilateral meeting between economic officials of the United States and Western Europe has included some objection from the European side to United States antitrust enforcement. It has become also an almost automatic agenda item in diplomatic meetings with the Australians and the Canadians.[10]

There has also been little foreign diplomatic support for U.S. actions. One former government official estimates that "there have been five diplomatic protests of U.S. cases for every instance of express diplomatic support . . . ."[11] The tensions created by these repeated complaints represent a significant burden on U.S. foreign relations.

In a substantial number of cases foreign governments have felt sufficiently aggrieved by American jurisdictional assertions to take the additional step of "going public" with their grievances. Some governments have even gone before U.S. courts to plead restraint in the application of U.S. antitrust laws, in spite of a traditional reluctance on the part of states to appear in foreign courts for such purposes.[12]

8. Although such conflicts have generally involved the extraterritorial application of U.S. laws, similar problems have arisen in connection with the application of the German antitrust laws. *See generally* Gerber, *supra* note 5.

9. *See, e.g.,* D. ROSENTHAL & W. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE viii (1982); Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line,* 14 INT'L L. 151 (1980).

10. 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 101 (1981).

11. Davidow, *Extraterritorial Antitrust and the Concept of Comity,* 15 J. WORLD TRADE L. 500, 502 (1981).

12. *See, e.g.,* Brief of the French Government as *amicus curiae, quoted in* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d. 1300, 1306 (D.C. 1980). *See generally* Organization for Economic Cooperation and Development, *Participation in Antitrust Proceedings in Member Countries as Amicus Curiae,* 22 ANTITRUST BULL. 863 (1977).

When a state takes the conflict to the level of public confrontation, media involvement and public reactions often create political pressure to resist U.S. "incursions into local sovereignty." From such pressures charges of "American imperialism" have often arisen.

Such confrontations sometimes have taken on major proportions. In the 1950's, U.S. jurisdictional assertions relating to the Swiss watchmakers' cartel aroused extraordinary public outcry against the United States and caused Swiss authorities to threaten the U.S. with a variety of sanctions.[13] More recently, the application of U.S. antitrust laws to the uranium cartel in the late 1970's has had significant public repercussions in countries such as Canada[14] and Australia.[15]

A third level to which jurisdictional conflicts have recently been extended is that of retaliatory or "blocking" legislation. A significant group of foreign governments has passed legislation to thwart the exercise of U.S. jurisdiction by such means as prohibiting cooperation in U.S. legal proceedings and denying recognition to certain judgments. Such legislative action is a response to domestic political resentment of U.S. jurisdictional assertions and an attempt to protect domestic enterprises from the costs and risks of subjection to U.S. jurisdiction. Among the countries which have some form of blocking legislation are the United Kingdom,[16] New Zealand,[17] France,[18] Australia,[19] and Canada.[20]

In recent years conflicts resulting from the exercise of extraterritorial

13. United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, 1966 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1968). The case is discussed in detail in Haight,*The Watchmakers Case,* in COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT 311-63 (J. Rahl ed. 1970).

14. For the Canadian perspective, see, e.g., Henry, *The United States Antitrust Laws: A Canadian Viewpoint*, CAN. Y.B. INT'L L. 249 (1970), and Blair, *The Canadian Experience*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 65 (J. Griffin ed. 1979).

15. For the Australian view, see, e.g., Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 253 (1982).

16. Protection of Trading Interests Act, 1980, ch. 11. For an authoritative discussion of the act, see Lowe, *Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981).

17. Evidence Amendment Act (No. 2), N.Z. Stat. No. 27, Part IV (1980).

18. Law Concerning the Communication of Documents or Information of an Economic, Commercial, Industrial, Financial or Technical Nature to Aliens, Whether Natural or Artificial Persons, No. 80-583 (1980) J.O. 1799 [hereinafter cited as Law Concerning the Communication of Documents] *reprinted in* Toms, *The French Response to the Extraterritorial Application of United States Laws*, 15 INT'L L. 585, 609 (1981).

19. Foreign Proceedings (Prohibition of Certain Evidence), Act of 1976, Aust. Acts No. 121 and Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979, Aust. Acts No. 13. *See generally* Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 J. INT'L L. & ECON. 273 (1979).

20. Act of Dec. 15, 1975, ch. 76 [1974-76] Can. Stat. 1535, *amending* Combines Investigation Act, Can. Rev. Stat. ch. C-23 (1979).

jurisdiction have increased in both frequency and intensity. The increasing internationalization of the world economy means that currently existing national regulations have an ever-increasing potential for application to foreign conduct. Moreover, the opportunities for enforcing judgments in such cases increase as corporate assets become scattered throughout many jurisdictions. Finally, the growing desire of governments worldwide to regulate economic activity shows few signs of abating.

B. *The Conceptual Context*

The term "jurisdiction" is used in a variety of contexts, and it is therefore necessary to clarify the specific object of our inquiry. We are concerned here with "international jurisdiction." At issue is whether a state may take certain actions, and this is an issue of international law.

The rights or entitlements[21] included within the concept of international jurisdiction are commonly divided into three categories—prescriptive, adjudicatory and enforcement jurisdiction.[22] For each of these there is a separate set of governing principles. In general, prescriptive jurisdiction denotes the right to attach legal consequences to conduct; adjudicatory jurisdiction denotes the right to adjudicate with respect to particular persons in a particular case; and enforcement jurisdiction denotes the right to enforce the determination of a court.[23]

We are here concerned with prescriptive jurisdiction,[24] which may be defined as:

> [the] authority of a state to apply its law to the conduct, relations, or status or interests of persons, or to things, whether by legislation, by executive act or order, administrative rule or regulation, or judgment of a court, whether in general or in particular cases.[25]

21. The term "entitlement" has the advantage of being more objective than the term "rights." *See* D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L.R. 1100, 1113 (1982).

22. There is some variation in terminology in this area. Some writers, for example, divide jurisdictional entitlements into only two categories. *See, e.g.,* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 6 (1965).

23. International jurisdictional conflicts often do not arise until a state attempts to enforce a determination of its courts, and, therefore, they technically may involve enforcement rather than prescriptive jurisdiction. Yet the principles governing prescriptive jurisdiction determine which states may attach legal consequences to conduct, and thus the effectiveness of the legal framework of prescriptive jurisdiction ultimately determines the likelihood of international conflicts.

24. Prescriptive jurisdiction is often called "legislative jurisdiction." The latter nomenclature may, however, be misleading, for it suggests that the prescriptive function is necessarily performed by a legislature. It thus reflects a civil law bias.

25. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, PART IV, §402 (REVISED) (TENT. DRAFT NO. 2) (1981). This draft is summarized in Henkin, *Restate-*

Conflicts over prescriptive jurisdiction arise when the same conduct is subjected to jurisdictional assertions by more than one state. Thus, the causes of such jurisdictional conflicts and their negative effects on world order must be sought in the principles governing international prescriptive jurisdiction.

As currently framed, the issue of whether a state has prescriptive jurisdiction under international law is determined solely by whether the state has a proper "basis" of jurisdiction. The issue involves analysis of the relationship of the regulating state to the conduct involved.

There are three generally recognized bases of jurisdiction.[26] The primary one is territoriality. According to this principle, a state has jurisdiction over conduct that occurs within its borders. This principle is fully accepted and forms the basis of the traditional jurisdictional system. Nationality provides a second basis of jurisdiction. It entitles a state to exercise jurisdiction over its nationals and corporations, regardless of where their conduct occurs. Though there is some lack of clarity concerning the scope of this principle, its validity is generally accepted.[27] A third basis of jurisdiction is the so-called "effects" principle, under which a state has jurisdiction over foreign conduct which has certain effects within that state. When either the nationality principle or the effects principle serves as a basis for a jurisdictional assertion, the jurisdiction is generally referred to as "extraterritorial,"[28] because the subject conduct occurred "outside" the territory of the regulating state.[29]

It should be noted that in the context of U.S. domestic litigation the concept of international prescriptive jurisdiction is generally treated as an issue of subject matter jurisdiction. Under United States law, a court

ment of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 2, 75 AM. J. INT'L L. 987 (1981).

26. Two secondary "bases" of jurisdiction also are generally recognized: (1) the protective principle, which confers jurisdiction when conduct threatens the security of the state, and (2) the universality principle, which confers jurisdiction over a very limited number of types of conduct which are considered universally abhorrent. *See* Draft Convention on Jurisdiction with Respect to Crime, arts. 7 and 9, in Harvard Research on International Law, *supra* note 1, at 440. These bases of jurisdiction are seldom used, and play virtually no role in regard to the extraterritorial application of antitrust laws.

27. *See, e.g.*, Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 39 (1964).

28. The term has caused substantial misunderstanding. Its widespread acceptance, however, continues to justify its use. For criticisms, *see* 1 E. NEREP, EXTRATERRITORIAL CONTROL OF COMPETITION UNDER INTERNATIONAL LAW XX (1983).

29. The U.S. Department of State has indicated that it prefers the term "conflicts of jurisdiction." *See, e.g.*, Dam, *Extraterritoriality and Conflicts of Jurisdiction*, DEP'T OF STATE CURRENT POLICY BULL. No. 481, at 1 (April 15, 1983). This term, however, refers to the potential problems created by the assertion of jurisdiction rather than to the jurisdictional assertion itself.

does not have subject matter jurisdiction when there is no principle of U.S. law which may be properly applicable to the controversy before it. If the application of a legal rule would violate international law, this fact may make it inapplicable in a domestic court.[30]

C. *The Conflict Scenario*

The concept of effects jurisdiction is responsible for most international jurisdictional conflicts because it challenges the territorial principle which has traditionally delineated the reach of a state's jurisdiction. In a world fragmented into numerous territorial entities, when a state claims jurisdiction based on the effects principle, it is very likely that at least one other state will have a territorial interest in the conduct involved. The former state has a regulatory interest in the conduct, but its assertion of jurisdiction is likely to affect the legal status of nationals of the latter state, and it may impinge on the international legal rights of that state.[31] In addition, a third state also may have an interest based on the nationality of some of the parties to the conduct.

The conflict scenario is revealing. Assume that State A believes itself justified by the effects principle in exercising jurisdiction over foreign conduct in State B that has consequences within State A. Acting on the assumption that it has such a right, State A exercises jurisdiction over that conduct. The legality of the decision is determined solely by reference to the relationship of the conduct to State A.

Because the conduct over which State A has asserted jurisdiction occurred in State B, State A's action is likely to affect the interests and/or rights of State B. State B is likely, therefore, to oppose such action and, if possible, to take the position that the exercise of jurisdiction is not authorized by international law.

There are at least three grounds for a claim by State B that State A has violated international law. State B could contest the validity of the effects principle as a basis for any assertion of extraterritorial jurisdiction. A group of states,[32] led by the United Kingdom, has in fact taken the position that the effects principle is simply invalid. The United Kingdom claims that international jurisdiction is inherently and necessarily territo-

30. For further discussion of this point, *see infra* notes 64-66 and accompanying text.

31. *See infra* notes 110-157 and accompanying text.

32. The size of this group is difficult to ascertain for two reasons. First, the persistent confusion between the effects principle and the objective territoriality principle tends to obscure discussions of the subject. *See infra* notes 44-48 and accompanying text. Second, many states previously asserting the invalidity of the effects principle have now adopted it as a jurisdictional basis for their own legislation without officially acknowledging their change in position.

rial and therefore a state may not exercise jurisdiction over foreign persons on the basis of conduct that occurs outside of its own territory.[33] The British position may be undermined, however, by the European Economic Community's utilization of the effects principle in applying its antitrust legislation.[34]

The second possible claim acknowledges the validity of the effects principle, but argues that the particular exercise of jurisdiction by State A was invalid because it did not satisfy the requirements of the effects principle. Because there is little agreement concerning the scope of the effects principle, however, states have generally avoided objecting on this ground.[35]

The third type of claim recognizes the validity and the applicability of the effects principle, but asserts that the particular exercise of jurisdiction at issue violates international law because it interferes with legally protected interests of State B. This has been the most common type of objection to the exercise of extraterritorial jurisdiction.[36]

Note that the first two claims are fundamentally different from the third. They look to the relationship between State A and the conduct involved and ask whether the relationship provides a basis for jurisdiction. The third claim looks to the protected interests of State B and asks whether they have been violated by the exercise of jurisdiction. As currently formulated,[37] however, the international jurisdictional paradigm does not accommodate this third type of claim, and to that extent the jurisdictional framework is deficient.

D. *The Need for Structural Effectiveness and Reasonable Predictability*

In order to minimize conflicts, the jurisdictional framework must reflect both sets of relationships involved in the exercise of extraterritorial jurisdiction. It must authorize jurisdiction on the basis of the relation-

33. *See* British Aide Memoire to the Commission of the European Communities, Oct. 20, 1969, *reprinted in* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310, 310-13 (1979).

34. *See, e.g.*, Beguelin Import Co. v. G. L. Import Export S.A., Case 22/71, *E.C.R.* 949 (1971); Imperial Chemical Industries v. E.C. Comm'n, 11 COMM. MKT. L.R. 557 (1972).

35. The development of an international consensus concerning the scope of the effects principle is likely to be advanced by recognition of the jurisdictional paradigm here advocated. *See infra* notes 110-157 and accompanying text. Such a framework would encourage efforts to reach agreement concerning the scope of the effects principle.

36. *See infra* notes 147-49 and accompanying text.

37. For development of the argument that current articulations or formulations of international law often fail to reflect actual state practice in this area, see *infra* notes 123-60 and accompanying text.

ship between the regulating state and the conduct being regulated. As important, however, it must delineate the circumstances under which the exercise of such jurisdiction is prohibited because such exercise interferes with legally protected interests of another state. If the jurisdictional framework fails to do both, it is unlikely to be effective.

Generally accepted formulations of international law focus on the relationship between the regulating state and the conduct.[38] With limited exceptions,[39] however, they do not reflect the relationship between the exercise of jurisdiction and any states which may be affected by such exercise. The current structure of jurisdictional principles is thus defective, because it fails to reflect the legally protected interests of all states involved in an international regulatory situation.

Further, because jurisdictional conflicts are likely to occur when there is uncertainty about what international law allows, the jurisdictional paradigm also must be reasonably predictable. The applicable principles of international law therefore must be not only generally accepted, but also sufficiently clear so that their application yields reasonably predictable results.

The failure of international law to articulate an effective jurisdictional structure can be understood only by analyzing the historical development of international law principles relating to extraterritorial jurisdiction.

II. Development of the Jurisdictional Paradigm

The problem of extraterritorial jurisdiction is the result of the breakdown of a legal paradigm. This fact, largely unnoticed, must be analyzed so that the factors that have impeded understanding of the problem can better be comprehended and so that legal thinking can proceed toward a more effective jurisdictional framework.

Elements of this history have often been recounted,[40] but the underlying developmental patterns have been insufficiently analyzed. Three main threads of development can be isolated: the disintegration of a longstanding international consensus; a growing divergence between the jurisdictional needs of the international system and the conceptual structures provided for this purpose by international law;[41] and the develop-

38. In the case of the nationality principle, the focus is on the relationship between the state and the actor engaged in the conduct. This, however, is a special case and will not be further discussed here.

39. For recent developments in German law in this area, see Gerber, *supra* note 5, at 744-77.

40. *See, e.g.*, 1 J. ATWOOD & K. BREWSTER, *supra* note 10, at §§6.02-6.11.

41. For an analysis of the relationship between jurisdictional principles and the needs of

ment and persistence of legal misconceptions arising out of the inability of international law to adapt readily to the changing needs and expectations of states.

A. *Territoriality: The Traditional Approach to Jurisdiction*

Traditional international law principles relating to jurisdiction were well-established by the eighteenth century.[42] The governing principle was that of territoriality. Based on a conceptual framework developed largely by the Dutch scholar Ulrich Huber in the sixteenth century and embedded in the U.S. legal system by Joseph Story,[43] the scheme was simple enough. The world was carved up into jurisdictional spheres corresponding to the territories of states. A state was entitled to exercise prescriptive jurisdiction regarding any conduct within its territory; conversely, a state could not exercise jurisdiction over conduct occurring outside of its boundaries, except with regard to its own nationals.[44]

Jurisdictional conflicts generally were avoided under this territorial system so long as (1) situations in which conduct in one state would have had significant consequences in other states were comparatively rare, and (2) legal systems generally attached legal consequences to conduct only when the effects that were constituent elements of the offense were closely related both temporally and spatially to the conduct causing them. As long as states generally were content to regulate the conduct of individuals in their direct relations with other individuals, there was little disintegrative pressure on the territorial scheme.

During the late nineteenth century, new factors began to threaten this neat system. Developments in transportation and communications made it possible for persons acting in one state quickly and effectively to cause effects in other states. Moreover, the growing concentration of business and the internationalization of the world economy meant that actions taken in one state could have multiple effects far beyond that state's borders. A cartel arrangement in one state, for example, could significantly affect prices and even national welfare in distant states.

These factors led to an expansion of the territorial principle to include the so-called "objective" territorial principle.[45] This notion "establishes the jurisdiction of the state to prosecute and punish for crimes com-

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

42. Mann, *supra* note 27, at 27.

43. *See* Maier, *supra* note 41, at 282-84.

44. *See supra* note 26 and accompanying text.

45. This development also yielded the so-called "subjective" territorial principle. This concept authorizes jurisdiction for the state in which a crime is begun, even though such crime

menced without the state but consummated within its territory."[46] By means of this principle a state in which a criminal act was completed would not be deprived of jurisdiction to prosecute the crime.

The objective territorial principle, however, has been the source of extraordinary difficulties.[47] As originally conceived, its application was limited to situations in which some element of a crime actually occurred in the regulating state.[48] But problems were created by the lack of clear conceptual limits to the objective territoriality principle.

Nevertheless, at least as originally conceived, the objective territorial principle was consistent with territoriality, for it was applied only when the consequences of conduct could be "localized." So long as an offense could only be "consummated" in one place, the functional effectiveness of the territorial paradigm was unimpaired. Jurisdiction was generally conferred on only two states—the state in which the conduct occurred and the state in which the consequences were localized. As the consequences of traditional criminal acts by individuals are generally localizable in this respect, use of the objective territorality principle in relation to such violations created little risk of jurisdictional conflicts and left the territorial framework intact.

The territorial system was undermined only when states began to define crimes in terms of effects which could easily be achieved across significant distances and in many different places at the same time.[49] Such effects were not "localizable" to any particular place because the conduct causing them started a series of consequences that could lead in many directions. For example, cartel arrangements in one country could create distant and multiple effects. Thus, when cartel behavior was proscribed, the territoriality principle could not accommodate the situation, for these effects were not localizable. As a result, it was primarily the advent of economic regulation—specifically, antitrust regulation—which undermined the territorial system.

The judicial opinion marking the beginning of the disintegration of the

may be completed in another state. *See* Harvard Research on International Law, *supra* note 1, at 484-87.

46. *Id.* at 487-88.

47. Many writers have failed to distinguish between the effects principle and the objective territoriality principle. *See, e.g.*, Shenefield, *The Perspectives of the U.S. Department of Justice*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 12, 15 (J. Griffin ed. 1979).

48. According to Professor Jennings, "The essential requirement of the objective applications of the territorial principle is that some part of the crime should in fact have taken place within the territory of the State claiming jurisdiction." *Supra* note 2, at 158.

49. One writer has argued that the effects principle should serve as the basis for jurisdiction only with regard to the "primary effects" of any conduct. *See* Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT'L L. 145, 154-55 (1972-73).

territorial system had nothing to do, however, with economic regulation. In the *S.S. Lotus* case,[50] decided in 1929 by the Permanent Court of International Justice, France claimed that Turkey had violated international law by asserting criminal jurisdiction over the conduct of a French citizen serving on a French ship. The basis of the jurisdictional assertion was the French citizen's alleged responsibility for a collision with a Turkish ship on the high seas that resulted in the loss of several Turkish seamen. A divided court held that Turkey had a concurrent right to exercise jurisdiction over the conduct in question.[51]

Two aspects of the opinion have played an important role in the development of the extraterritoriality issue. First, the Court established a presumption in favor of the existence of prescriptive jurisdiction:

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law . . . . Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited to certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[52]

Although the court stated that prescriptive jurisdiction may be limited by prohibitory rules, it found no such rules applicable to the facts of the case. As a result, the court's language created the widespread impression that it had sanctioned broad state discretion with respect to jurisdiction. This presumption in favor of jurisdiction continues to influence the jurisdictional debate.[53]

A second central aspect of the *Lotus* case was its treatment of the objective territoriality principle. According to the court:

> It is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if one of the

50. The S.S. Lotus (France v. Turkey), 1927 P.C.I.J., ser. A., No. 10 (Judgment of Sept. 7).
51. *Id.* at 32.
52. *Id.* at 19.
53. *See, e.g.*, INT'L L. ASSN., REPORT OF THE FIFTY-FIRST CONFERENCE, 362-74 (1964); K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 285 (1958). Reliance on the *Lotus* case to support a claim of jurisdictional discretion, however, is misplaced. Prior to the *Lotus* case, jurisdiction had for centuries been almost exclusively territorial. Consequently, there not only had been no need for the development of principles of jurisdictional restraint, but no opportunity for such rules to be created.

> constituent elements of the offense, and more especially its effects, have taken place there. . . . In this case [therefore] a prosecution may also be justified from the point of view of the so-called territorial principle.[54]

The court found that the collision-caused deaths aboard a Turkish flag vessel—an extension of Turkish territory—were constituent elements of the offense of manslaughter and that the manslaughter thus could be considered to have occurred within Turkey for jurisdictional purposes. The Court's very broad formulation of the objective territoriality principle opened the way for a subtle, but fundamentally important, extension of that principle.

The next step in this extension was the publication in 1935 of the results of the Harvard Research on International Law, a massive research project sponsored by the Harvard Law School.[55] The draft convention representing the culmination of the project included a provision that was itself well within the traditional concept of objective territoriality.[56] In their comments on the objective territorial principle, however, the authors stated the principle of objective territoriality much more broadly, stating that "the setting in motion outside of a state of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters his domain."[57] These overly broad statements set the stage for the break with the traditional legal framework of territoriality that occurred in 1945 with the decision in *U.S. v. Aluminum Co. of America* (*Alcoa*).[58]

Prior to *Alcoa*, U.S. courts generally had adhered to the territorial principle in applying the antitrust laws. For example, in *American Banana Co. v. United Fruit Co.*,[59] the first case in which the United States Supreme Court was asked to apply U.S. antitrust law to foreign conduct, the Court had no difficulty in refusing to apply the Sherman Act to conduct in Costa Rica that allegedly was monopolistic within the meaning of Section 2 of that Act. Justice Holmes, writing for the Court, even stated that the very suggestion that U.S. law could reach behavior beyond U.S. borders was "startling."[60]

54. The S.S. Lotus, at 23.

55. Harvard Research on International Law, *supra* note 1.

56. According to Article 3 of the Draft Convention on Jurisdiction with Respect to Crime, "A State has jurisdiction with respect to any crime committed in whole or in part within its territory. This jurisdiction extends to (a) Any participation outside its territory in a crime committed in whole or in part within its territory." *Id.* at 480.

57. 1 C. HYDE, INTERNATIONAL LAW 422 (1922).

58. 148 F. 2d 416 (2d Cir. 1945).

59. 213 U.S. 347 (1909). The precedential value of this case for jurisdictional purposes may have been limited by the fact that there were no allegations of an effect on U.S. commerce.

60. *Id.* at 355.

Although several antitrust cases during the following three and a half decades have been interpreted as indicating a willingness on the part of U.S. courts to diverge from the strict application of the territorial principle,[61] no fact situation required the courts to address squarely the extraterritoriality issue until *Alcoa*.

B. Alcoa *and the Rise of the Effects Principle*

In *Alcoa*, the U.S. Court of Appeals for the Second Circuit, sitting by designation in the absence of an effective quorum on the Supreme Court, handed down an opinion that reversed *American Banana*, veering sharply from traditional doctrine and establishing a new U.S. approach to the issue of extraterritorial jurisdiction.

Alcoa involved an aluminum cartel centered outside the United States, whose members intentionally controlled the amount of aluminum they sent to the United States in a manner which, if performed within the United States, would have constituted a violation of Section 1 of the Sherman Act.[62] The court formulated the issue before it as whether that statute also applied when the conduct occurred outside of the U.S. The court thus squarely faced the issue of extraterritoriality.[63]

Two elements of the opinion have been of critical importance in shaping subsequent thinking about the extraterritoriality issue. The first is the court's analytical method, and the second is the conclusions it reached in applying that method.

According to Judge Hand, writing for the court, the first step in analyzing the reach of the Sherman Act was to determine whether Congress *intended* that the act reach the conduct involved. Because the supremacy clause of the U.S. Constitution requires a U.S. court to apply federal law according to the intention of Congress, this represented an unexceptional starting point for analysis.[64]

The court's point was not that there are no limits under international law on the *right* of the United States to exercise jurisdiction over foreign conduct but rather that the courts must obey Congress, and if Congress decides to violate international law and thereby incur international responsibility for such a violation, the courts must follow the directions of Congress in applying the statute.

61. *See generally* 1 J. ATWOOD & K. BREWSTER, *supra* note 10, at §6.04.
62. *Alcoa*, 148 F. 2d at 421.
63. *Id.* at 422, 434-35.
64. *See, e.g.*, U.S. v. Bowman, 260 U.S. 94, 102 (1922). *See also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909); Blackmer v. United States, 284 U.S. 421, 437 (1932).

Congressional intent as to the territorial scope of statutes, however, is often unclear. U.S. statutes, including the Sherman Act, seldom specifically designate their territorial scope, and legislative history seldom reveals any serious Congressional concern over the issue.[65] As a result, the *Alcoa* court utilized a presumption about congressional intent, stating that Congress would not have intended the Sherman Act to apply in such a way as to violate international law. According to the court, "we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers. . . ."[66] Judge Hand was again following established U.S. legal principles in interpreting the statute so as to conform to existing international law.[67] The court thus accorded international law a critical analytical role in the extraterritorial application of U.S. statutes.

The court next asked whether the facts of the case provided a basis for jurisdiction under international law. It found that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[68] Accordingly, the court found the Sherman Act applicable to the foreign conduct because it was "intended to affect imports and did affect them."[69]

Thus, the *Alcoa* opinion introduced the principle that jurisdiction could be based solely on the effects of foreign conduct. The effects principle, as established in *Alcoa*, eliminated the requirement of a close relationship between the conduct and its effects. According to the test established by Judge Hand, a state could proscribe any "conduct outside its borders that has consequences which the state reprehends."[70] Thus, *Alcoa* introduced a jurisdictional basis that is fundamentally inconsistent with a territoriality-based jurisdictional system.

Alcoa also sowed the seeds of international discord, for it marked the break-up of the existing consensus concerning the relationship between jurisdiction and territoriality. Since *Alcoa*, the international discussion of

65. For the Sherman Act *see, e.g.*, 1 J. ATWOOD & K. BREWSTER, *supra* note 10, at 25.
66. 148 F. 2d at 443.
67. *See, e.g.*, Pacific Seafarers, Inc. v. Pacific Far East Line, 404 F. 2d 804, 814 (D.C. Cir. 1968).
68. 148 F. 2d at 443.
69. *Id.* at 444. The Court cited no support for its requirement that the conduct be intentional, however, and merely appeared to be including what it considered a reasonable restriction on the scope of the new effects doctrine. This gave the unfortunate impression that the requirements of international law were satisfied by the existence of any effects and that any further limitations on the principle were at the discretion of the individual domestic judge.
70. 148 F. 2d at 443.

jurisdictional issues has been dominated by this disintegration and its consequences.

C. *The Aftermath of* Alcoa

The *Alcoa* decision is the central fact in the development of the extraterritoriality issue. It established a new U.S. approach to jurisdiction which progressively undermined the existing territoriality paradigm. Moreover, other states perceived this deviation from territoriality as threatening their interests. The result has been a polarity in thinking about extraterritorial jurisdiction which has tended to inhibit the development of a more comprehensive framework.

Almost four decades after the *Alcoa* decision, the controversy surrounding the effects principle continues, but the legal situation and its regulatory context have changed significantly. Two factors have been of particular significance in this development: (1) the controversy over the validity of the effects principle; and (2) the increasing use of the effects principle by states other than the United States.

The timing of the *Alcoa* decision is critical in assessing its significance. Because in 1945 Europeans had more pressing concerns than the assertion of a new extraterritorial jurisdictional principle by the United States, there was a significant and perhaps misleading delay in international response to the effects principle. Moreover, Europe's dependence on the United States in the years immediately following the Second World War may have inhibited some European states from protesting against U.S. actions. Finally, the special circumstances of the immediate postwar period provided relatively few factual opportunities for U.S. courts to apply the effects doctrine.

As a result, the usual means by which the international community registers its conceptions of what is acceptable under international law were largely inoperative for several years. Because acquiescence is generally considered evidence of acceptance of a principle of international law, the postwar situation seems to have created the impression in the United States that the effects principle was generally acceptable to the world community.[71]

Significant reactions to the effects principle did eventually occur, however, especially beginning in the early 1950's when a series of important tests of the effects principle arose in U.S. courts. The response of the world community was predictable. The effects principle was generally

71. *See, e.g.*, Whitney, *Sources of Conflict between International Law and Antitrust Laws*, 63 YALE L. J. 655 (1954).

criticized and rejected as invalid under international law.[72] Moreover, European states criticized the United States for "exporting" its legislation and, implicitly, its way of life, to other countries.[73] At a time when Europe was especially sensitive to domination by the U.S., the effects doctrine looked to many like "imperialism," for it forced European enterprises to conduct their affairs in a particular way in order to conform to U.S. conceptions of economic liberalism.[74]

The fact that the effects principle was primarily used to apply antitrust law is of particular importance, because antitrust law was viewed as primarily a U.S. "invention."[75] Although some general ideas of antitrust began to gain favor outside the United States during the post-war period, the progress was gradual. As a result, the effects principle appeared to represent U.S. attempts to force its own economic ideology on other countries, and therefore it was seen as a threat by many countries.

Thus, legal thinking on the issue of extraterritorial jurisdiction was polarized. On the one hand, the U.S. continued to apply its antitrust laws extraterritorially, justifying such applications under the effects principle. On the other hand, the states affected by the exercise of effects jurisdiction attempted to protect themselves by rejecting the validity of the effects principle *in toto*. The extraterritoriality issue was cast in the form of a controversy over the validity of the effects principle, and only recently has the hold of this polarized thinking begun to loosen.

While the legal controversy continued to center on the debate over the effects principle, an important change in actual state practice occurred as a significant number of jurisdictions, including some of those that had been protesting use of the effects principle by the United States, adopted the principle for use in applying their own antitrust laws. The effects principle was specifically written into the German antitrust statute enacted in 1958.[76] In addition, it is considered a basis of jurisdiction by, among others, France,[77] Switzerland,[78] Denmark,[79] Sweden,[80] and the

72. For a representative sampling of views, see INT'L L. ASS'N, REPORT OF FIFTY-FOURTH CONFERENCE 223, 562-92 (1970).

73. *See, e.g.*, Jennings, *supra* note 2, at 175.

74. *See generally* Picciotto, *Jurisdictional Conflicts, International Law and the International State System*, 11 INT'L J. SOC. L. 11 (1983).

75. *See generally* C. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES 1-14 (1967).

76. Gesetz gegen Wettbewerbsbeschraenkungen, 1957 Bundesgesetzblatt [BGBI] I 1081 (July 27). *See also* Gerber, *supra* note 5, at 760-63.

77. *See* Goldman, *Les champs d'application territoriale des lois sur la concurrence*, 128 RECUEIL DE COURS 631, 669 (1969).

78. *See, e.g.* Federal Tribunal, March 21, 1967, *quoted in* Imperial Chemical Industries v. E. C. Comm'n, 11 COMMON MKT. L.R. 557, 598 (1972); U. IMMENGA & E. MESTMAECKER, KOMMENTAR ZUM GWB 1882 (1982).

79. *See* W. VON EYBEN, MONOPOLER OG PRISER 120 (1982).

European Economic Community.[81] Thus the effects principle gradually came to be accepted in the practice of states, while international legal thinking remained focused on the debate over its validity.

These two processes have been accompanied by a third, which consists of attempts to modify and limit the scope of the effects principle to reduce the likelihood of jurisdictional conflicts. A variety of concepts have been used to reduce the scope of the effects concept. In addition to *Alcoa*'s requirement that effects be intended, effects have been required to be, for example, "substantial,"[82] "direct,"[83] "generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems,"[84] and, recently, "anticompetitive."[85]

Limiting the scope of the effects principle, however, has not provided a basis for solving the problem of jurisdictional conflicts. This limitation reduces the likelihood of conflict only insofar as it reduces the absolute number of cases in which jurisdiction will be established on that basis. If the only question a court asks is whether there are effects, regardless of how modified or how defined, the interests of other states remain unconsidered. In order to deal directly with the problem of avoidance of conflicts, a principle of jurisdictional protection was required.

III. Balancing: the U.S. Response to Jurisdictional Conflicts

In response to the reduced effectiveness of the territoriality paradigm, courts in both the United States and the Federal Republic of Germany[86] recently have added as an additional factor in the analysis of interna-

80. *See* U. BERNITZ, SVENSK MARKNADSRAETT 98 (1983); 1 E. NEREP, *supra* note 28, at 301-04.

81. *See, e.g.*, Beguelin Import Co. v. G. L. Import Export SA, Case 22/71, E.C.R. 949 (1971).

82. United States v. General Elec. Co., 82 F. Supp. 753, 891 (D.N.J. 1949).

83. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp 92, 102 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).

84. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 47 (1965). According to Section 18 of that Restatement:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either:
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

85. National Bank of Canada v. Interbank Card Ass'n, 666 F. 2d 6 (2d Cir. 1981).

86. For German developments, see Gerber, *supra* note 5, at 772-79.

tional jurisdiction a consideration of the interests of foreign nations.[87] The conceptual framework to which United States courts have turned to accommodate this consideration of foreign interests is that of "interest balancing."[88]

There are two variants of the balancing approach. The first, which may be called "comity balancing," requires a court having jurisdiction to consider refraining from the *exercise* of its jurisdictional rights for the purpose of avoiding international conflicts.[89] A second variant, which may be called "jurisdictional balancing," makes balancing a jurisdictional issue by requiring a court to apply a balancing test in order to determine whether, in fact, it has jurisdiction to attach legal consequences to the conduct of the defendants. The failure to distinguish between these two approaches has led to much confusion.

A. *Comity Balancing*

The balancing concept first gained significant attention in the U.S. with the publication in 1959 of *Antitrust and American Business Abroad* by (then) Professor Kingman Brewster. Brewster called for a "jurisdictional rule of reason" in applying the antitrust laws.[90] His rule of reason asked courts to consider foreign interests and to decline to exercise jurisdiction when the potential for international conflict seemed excessive.

Significantly, Brewster's call for such a change was not based on normative international law.[91] The action called for was politically-inspired restraint in the exercise of jurisdiction. Courts were not required by international law to refrain from the exercise of jurisdiction; they were supposed to do so to avoid conflict.

Brewster's suggestions did not find acceptance in the courts[92] until

87. *Id.* at 756. Another approach to this problem was used in the OPEC litigation. There the court did not use a balancing approach. It referred to the difficulty of such a task and declined to interfere with the foreign policy prerogatives of the executive. International Ass'n of Machinists v. OPEC, 649 F. 2d 1354,1361 (9th Cir. 1981), *cert. denied*, 456 U.S. 974 (1982).

88. The concept is borrowed from U.S. conflicts law. *See generally* Maier, *supra* note 41, at 285-91; Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983). *See also*, Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

89. Timberlane Lumber Co. v. Bank of America N.T. & S.A., 549 F.2d 597 (9th Cir. 1976). For an illuminating analysis of the political aspects of the *Timberlane* approach, see Maier, *supra* note 41, at 300-03.

90. *See* K. BREWSTER, *supra* note 53, at 301-08.

91. According to Brewster:

> Since there is no binding external authority to which the U.S. has submitted these questions, any limitation, in the last analysis, is self-imposed. In that sense, the decision to restrict jurisdiction is a matter of national policy, not sovereign power.

Id. at 287.

92. Section 40 of the First Restatement of Foreign Relations Law, published in 1962, con-

1976, when, in *Timberlane Lumber Co. v. Bank of America N.T. & S.A.* (*Timberlane*),[93] the Ninth Circuit Court of Appeals adopted a balancing test largely reflecting Brewster's ideas. *Timberlane* involved an alleged conspiracy by a U.S. corporation and Honduran corporations and individuals to restrict the export of Honduran lumber to the United States in violation of Sections 1 and 2 of the Sherman Act. The relevant conduct occurred primarily in Honduras.

The *Timberlane* court analyzed the *Alcoa* test of Sherman Act applicability and decided that it was no longer adequate: "An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness."[94] Effects within the state still constituted a valid basis of jurisdiction, but international comity required a balancing of interests to determine whether jurisdiction *should* be asserted.[95]

Timberlane's balancing test required a court to assess the interests of the U.S. in the conduct and compare them with the interests of other affected jurisdictions. A court was to exercise jurisdiction only when the contacts with the U.S. were sufficient to outweigh contacts with other states that might be affected by the U.S. exercise of jurisdiction.

The balancing test enunciated in *Timberlane* was unstructured, with the court merely stating that a court should assess the conflict and then "determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction."[96] Although the court provided a list of factors to be considered in applying the balancing test,[97] the opinion gave no guidance as to *how* a court was to evaluate these factors.

tained a political balancing approach in the context of enforcement jurisdiction. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1962). For analysis, see Maier, *supra* note 41, at 293-95.

93. 549 F.2d 597 (9th Cir. 1976).

94. *Id.* at 613 (emphasis in original).

95. *But see* Shenefield, *supra* note 47, at 22.

96. 549 F.2d at 614-15.

97. According to the court:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principle places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614.

Timberlane has had an extensive impact. Subsequent cases have followed its lead,[98] and "balancing" is now established as part of the U.S. approach to extraterritoriality.

B. *The Problems of Comity Balancing*

The balancing concept has been hailed as a solution to the problem of extraterritorial jurisdiction, because it takes into consideration foreign interests.[99] To require that foreign interests be considered in deciding whether to exercise jurisdiction is clearly a positive development, for it introduces the notion that a workable jurisdictional paradigm must recognize these interests.

Nevertheless, comity balancing does not provide an effective solution to the problems of extraterritorial jurisdiction. First, it is a political, not a legal, solution. Comity balancing leaves the effects principle intact as a basis of jurisdiction: it merely states that the court, having jurisdiction, should use its jurisdictional power wisely by answering the additional question of whether it *should exercise* such jurisdiction, based on a consideration of the legitimate concerns of foreign countries. Balancing thus operates as a political rather than a legal concept.

The political nature of comity balancing derives from its conceptual context. Although the concept of comity has had a variety of meanings, it is now generally considered to be little more than an exhortation to "neighborliness,"[100] with no specific content and no binding effect. Thus, a process that operates within this conceptual framework merely provides a discretionary basis for a court to consider the interests of foreign states in making its decision.

Further, in assessing and comparing the interests of foreign legal systems within this broad and essentially amorphous framework, the judge is placed in the position of deciding whether in a given situation the power of the United States to take a particular action should be restrained so as not to injure foreign relations. The notion that a domestic judge should be authorized, much less compelled, to make such a political decision has generally been recognized as inappropriate.[101]

The comity concept gives the *appearance* of sensitivity to the interests

98. *See, e.g.*, Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979); In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980); Zenith Radio Corp. v. Matsushita Elec. Indus., 494 F. Supp. 1161 (E.D. Pa. 1980).

99. *See, e.g.*, 1 J. ATWOOD & K. BREWSTER, *supra* note 10, at §6.11.

100. Maier points out that the original conception of comity included a mandatory as well as a "neighborliness" element. *See* Maier, *supra* note 41, at 281-85. *See generally* Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966).

101. *See, e.g.*, D. ROSENTHAL & W. KNIGHTON, *supra* note 9, at 68-80.

of foreign states without in any way limiting a U.S. court's jurisdictional competence; it provides a basis for taking foreign factors into consideration without mandating that any weight be given such factors.

Furthermore, because comity balancing does not represent the application of a legal principle, a judge's decision remains inherently and totally discretionary, neither subject to the authority of prior decisions nor capable of creating precedent to guide future decisions.

The second major problem with comity balancing is that it is not part of normative international law. The decision of a U.S. court acting in accordance with the comity balancing concept does not purport to interpret or apply a principle of international law, and, as a result, it remains an isolated political decision unrelated to what any foreign or international tribunal might do.

The third major defect of comity balancing is the amorphous content of the idea of balancing. Since this defect is shared by jurisdictional balancing, it will be discussed below in conjunction with that issue.

C. *Jurisdictional Balancing*

Recognizing the problems mentioned above, the American Law Institute and several leading commentators have called for a change in the basic structure of the jurisdictional issue.[102] They have sought to remove balancing from its comity limitations by arguing that the balancing process should determine whether jurisdiction exists, not merely whether it should be exercised.

According to the Draft Restatement of Foreign Relations Law (Draft Restatement), balancing is a jurisdictional concept required by international law. Although the effects principle continues to establish the starting point for jurisdictional analysis in the Draft Restatement,[103] Section 403 introduces the concept of "reasonableness" as a limitation on jurisdiction. According to that Section:

> (1) Even when one of the bases for jurisdiction under Sec. 402 is present, a state may not exercise jurisdiction to prescribe law with respect 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

102. *See, e.g.*, Maier, *supra* note 41; Lowenfeld, *Public Law in the International Arena: Conflicts of Laws, International Law and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 315 (1979).

103. Section 402 of the Draft Restatement provides that "a state may, under international law, exercise jurisdiction to prescribe and apply its law with respect to (1) conduct outside its territory which has or is intended to have substantial effect within its territory. . . ." RESTATEMENT OF FOREIGN RELATIONS LAW (Draft No. 7, Jan. 18, 1985).

unreasonable.[104]

To determine whether an exercise of jurisdiction is reasonable, all the relevant factors must be considered; this section contains a non-exhaustive list of such factors.[105]

Thus, under the Draft Restatement a court does not engage in the political function of deciding whether it should exercise a right which it has, but it engages rather in the legal function of determining whether it has that right at all. Because it involves application of a legal principle, jurisdictional balancing has the significant advantage over comity balancing of making balancing part of the legal process.[106] Decisions are no longer isolated exercises of discretion by individual judges, but are guided by previous decisions and are capable of forming precedent to guide future decisions. Through this process a body of experience can develop to provide predictability in the future application of the balancing principle. Moreover, putting the balancing test in a legal context avoids placing domestic judges in the position of foreign policy referees. Thus jurisdictional balancing remedies the set of problems associated with the non-legal nature of comity balancing.

D. *The Problems of Jurisdictional Balancing*

Assigning to balancing a jurisdictional function, however, does not remedy another set of problems. In order to address the extraterritorial-

104. *Id.* at §403.

105. According to section 403(2):

Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate:
(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon 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 the regulation in question 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 such regulation is of the kind adopted by other states;
(h) the extent to which another state may have an interest in regulating the activity;
(i) the likelihood of conflict with regulation by other states.

Id.

106. One disadvantage of placing balancing in a legal rather than a political context is that it could reduce the opportunity for negotiations by the State Department in those cases—primarily government antitrust suits—in which such negotiations may play a role.

ity issues effectively, a legal framework must be accepted and applied by other states as part of international law. In the case of balancing, such acceptance appears unlikely.

First, non-common law jurisdictions are generally reluctant to accord judges the wide discretion that is called for by a balancing approach. Civil law systems therefore are unlikely to accept balancing, at least in this unstructured form.[107]

Moreover, despite the Draft Restatement's attempt to ground balancing in the international law concept of reasonableness, balancing is not internationally derived. Rather, it is an approach borrowed from U.S. conflicts of law theory.

The most critical problem of balancing, however, is its vagueness. Balancing national interests on the basis of an amorphous standard of reasonableness is unlikely to produce the predictability that is required to minimize jurisdictional conflicts. Any effective jurisdictional scheme must provide reasonable predictability, for uncertainty about what is permitted by international law is a major source of jurisdictional conflicts. No system can provide complete certainty, but to be effective it must provide reasonably clear guidelines. Balancing provides no such guidelines.[108]

Moreover, balancing does not provide a basis for developing concreteness and predictability over time,[109] because it lacks conceptual structure. It provides minimal guidance concerning the kinds of factors to be taken into consideration. Moreover, it says nothing about how these factors are to be evaluated and provides no standards by which these factors may be weighed against each other.

As a decisional model, balancing is not likely to be effective in the international jurisdictional context. Even in the context of domestic con-

107. Civil law countries have generally criticized the U.S. use of the balancing approach in the conflicts of law area. For a recent collection of articles on the subject, see 30 AM. J. COMP. L. 1-146 (1982). In a review of balancing concepts employed in the field of conflicts of law, one European scholar recently stated that:

> The new tendencies [i.e. balancing theories] emerging in the U.S. have puzzled and amazed European[s]. . . . Europeans tend to criticize [them] for granting judges a measure of freedom that goes beyond the limits of appropriate judicial discretion. . . . The principle of legal certainty is of greater importance in Europe than in the U.S. . . . . The new approaches may have abandoned generally accepted notions about the nature of legal rules and judicial law-making.

Vitta, *The Impact in Europe of the American "Conflicts Revolution,"* 30 AM. J. COMP. L. 1, 2-3 (1982).

108. Professor Lowenfeld seems to believe that a certain amount of predictability may be achieved over time in the application of balancing concepts. *See* Lowenfeld, *supra* note 102, at 331.

109. The concept of balancing can, of course, be given additional conceptual structure. For a discussion of relevant German developments, see Gerber, *supra* note 5, at 772-82.

flicts law, balancing has not been perceived outside the United States as an effective legal structure,[110] and in the United States it often has been seen as only a temporary expedient to provide an experiential base for developing new conflicts principles.[111]

Domestic conflicts cases generally relate to specific issues, such as the interest of a state in providing recovery in a wrongful death action,[112] but even in such cases courts have acknowledged great difficulty in isolating policy factors in such a way as to allow predictable decision making.[113] In the international jurisdictional context the situations in which interests must be weighed are substantially more complex. The court must somehow balance one state's interest in regulation of foreign conduct against the right of another state to be free from interference.[114]

It is not an effective solution to the problem to list factors that may have some relationship to an issue and to require a court to decide, after examining those facts, when U.S. interests are strong enough to justify the exercise of extraterritorial jurisdiction; it is only through the creation of a legal structure for evaluating such factors that they can be related to each other and to other cases in other situations and thereby become part of a process of law.

Finally, the vagueness inherent in balancing renders a court susceptible to external pressure, especially when it is called on to deny jurisdiction in a case involving its own nationals. In such cases a court is likely to have difficulty in denying jurisdiction, unless the court can base its decision on a legal principle that clearly prohibits the exercise of such jurisdiction.

Balancing represents a step toward an effective jurisdictional paradigm. But it needs to be complemented with other principles which help to overcome the problems balancing poses. Only then will it provide an adequate basis for solving the jurisdictional problem.

IV. The International Law Principle of Non-Interference

One such principle is the principle of non-interference. This principle

110. *See, e.g.*, Vitta, *supra* note 107.

111. Neumeier v. Kuehner, 31 N.Y. 2d 121, 286 N.E. 2d 454 (1972).

112. *See, e.g.*, Babcock v. Jackson, 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963).

113. *See, e.g.*, Neumeier v. Kuehner, 31 N.Y. 2d 121, 127, 286 N.E. 2d 454, 458 (1972).

114. According to Judge Robert Bork, "Some courts have struggled to . . . convert a balancing of foreign policy and competition concerns into something resembling law. . . . [T]he effort to transmute a raw policy judgment into a judgment according to law is, in the end, unsuccessful. . . . The task is inherently impossible." Bork, *Introduction to Special Issues in International Antitrust*, 18 STAN. J. INT'L L. 241, 244 (1982).

is part of international law, and the need is further to develop and integrate it into the jurisdictional structure.

The principle of non-interference began to develop in the mid-eighteenth century. The Swiss jurist Emmerich de Vattel was one of the first to discuss the concept in 1757.[115] According to Vattel: "Foreign states have no right to interfere in the government of a foreign state. To govern oneself as one wishes is an attribute of independence. A sovereign state may not be disturbed by another state unless it has given that state the right to intervene in its affairs."[116] Vattel saw the doctrine as a natural application of the concepts of sovereignty and independence.

During the nineteenth century, this non-interference concept gradually became accepted by the international community as a basic principle of international law, and it remains a fundamental tenet of the international system. Although terminology has varied, with the term "non-intervention" often being used interchangeably with the term "non-interference,"[117] the basic broad concept of non-interference articulated by Vattel has remained unchanged.

This concept has always been broadly defined.[118] The reason for this broad scope lies in the fundamental role of the principle of non-interference within the international law system,[119] and it has been underscored in recent years in a variety of multi-state declarations and multilateral conventions.[120]

115. For the historical development of the concept, see, e.g., A. THOMAS & A. THOMAS, NON-INTERVENTION 3-67 (1956); F. DE LIMA, INTERVENTION IN INTERNATIONAL LAW 3-28 (1971); and Winfield, *The History of Intervention in International Law*, 3 BRIT. Y. B. INT'L L. 130 (1922-23).

116. E. DE VATTEL, LE DROIT DES GENS, *quoted in* I. Fabela, INTERVENTION 15 (1961).

117. For a discussion of the etymology of the terms "interference" and "intervention" in this context, see Winfield, *supra* note 115, at 131-39.

118. According to one of the leading international law commentaries of the first half of the twentieth century, "The term intervention is here used to describe simply the interference by a state in the domestic or foreign affairs of another in opposition to its will and serving by design or implication to impair its political independence." 1 C. HYDE, *supra* note 57, at 117.

One review of another early twentieth century text concluded that, "a reader, after perusing Phillimore's chapter upon intervention might close the book with the impression that intervention might be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland." 1 D. O'CONNELL, INTERNATIONAL LAW 300 (2d ed. 1970).

119. According to Brownlie, "a duty of non-intervention in the area of exclusive jurisdiction of other states is [one of] the principal corollaries of the sovereignty and equality of states." I. BROWNLIE, *supra* note 33, at 287. The scope of the non-interference principle is determined by the fact that it is an application of the principles of sovereignty and equality.

120. One of the broadest statements of the principle is found in the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, adopted by the UN General Assembly of October 24, 1970:

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed inter-

One potential source of confusion regarding the non-interference principle requires analysis. During the nineteenth century the term "non-intervention" came to be used not only to refer to the general concept of non-interference, but also to a particular application of this concept — namely, its use in the context of international coercion (the use of force, the threat of force or similar coercive measures by one state against another state in order to impair that state's political independence).

Because the course of international relations during the past century and a half has focused attention on the use of the non-interference principle almost exclusively in the context of coercion, many have assumed this is the only context in which it is properly applied.[121] In fact, the concept has been used primarily to distinguish between legitimate exercises of influence by one state over another state and unlawful coercion of one state by another.

Where coercive interference generally came to be referred to as intervention, confusion arose, because the term non-intervention thus acquired two distinct meanings. On the one hand, as we have seen, it was used synonymously with the term "non-interference." On the other hand, it also referred to the specific legal principles developed in the context of coercive non-interference.[122]

The tendency to identify specific principles of coercive non-intervention with the general concept of non-interference also derives from the fact that the non-interference principle has played, until recently, a relatively minor role in other areas. This is especially true with regard to jurisdiction. The reason, however, is not that the principle is not properly applicable to the jurisdictional context, but rather that until the advent of the effects principle, there was no need to apply the concept of non-interference in the area of jurisdiction, because the territoriality paradigm automatically provided its own sphere of protection from assertions of extraterritorial jurisdiction.

vention and all other forms of interference or attempted threats against the personality of the state or against its political, economic, and cultural elements, are in violation of international law. . . .Every state has an inalienable right to choose its political, economic, and cultural systems, without interference in any form by another state.

U.N.G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28), at 121, U.N. Doc. A/18028 (1971), *reprinted in* 9 I. L. M. 1292 (1970).

121. *See, e.g.*, 2 E. NEREP, *supra* note 27, at 552-55

122. For example, according to Lawrence-Winfield:

The essence of intervention is force, or the threat of force in case the dictates of the intervening power are disregarded. . . .There can be no intervention without, on the one hand, the presence of force, naked or veiled, and on the other hand, the absence of consent on the part of the combatants.

T. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 120 (revd. P. Winfield, 7th ed. 1923).

The confusion relating to terminology and usage thus should not be allowed to obscure the fundamental point that the legal principles relating to intervention, or coercive interference, are merely specific applications of the general principle of non-interference. Consequently, the scope of such principles cannot limit the scope of the general principle from which they derive.

V. Non-Interference and International Jurisdiction

When a state attaches legal consequences to conduct in another state, it exercises control over that conduct, and when such control affects essential interests in the foreign state, it may constitute an interference with the sovereign rights of that foreign state. Consequently, the principle of non-interference is properly applicable to the exercise of jurisdiction.

Moreover, incorporation of the concept of non-interference into the jurisdictional structure responds to the needs of the international system.[123] This concept provides that a state is not entitled under international law to assert extraterritorial jurisdiction when such assertion would interfere with legally protected interests of another state. Integration of this non-interference principle into the jurisdictional paradigm would provide an effective legal framework for considering the interests of states affected by an exercise of jurisdiction. With it, the basic goals of balancing are achieved, while the weaknesses of a pure balancing approach are minimized.

Integrating this non-interference principle into the legal structure of jurisdiction creates a three-pronged jurisdictional analysis. First, a basis of jurisdiction exists if there is a sufficient relationship between the regulating state and the proscribed conduct. Second, the assertion of jurisdiction is not permitted by international law if it would interfere with legally protected interests of a foreign state. The principle of non-interference thus would delimit the range of permitted jurisdictional competence. Finally, the concept of reasonableness requires that jurisdictional rights not be abused. Application of the reasonableness concept would negate jurisdiction if the interest of the regulating state in regulating the conduct is clearly and substantially outweighed by likely harm to the governmental interests of a state affected by such exercise of jurisdiction.[124]

Within this structure, the reasonableness concept continues to play an important role, but its function is limited to identifying cases of jurisdic-

123. The concept of "systemic need" in relation to the international law of jurisdiction is discussed in Maier, *supra* note 41, at 303-16.

124. This structure is similar in certain respects to the approach being developed in Germany. *See* Gerber, *supra* note 5, at 772-79.

tional abuse.[125] Whereas the concept of reasonableness may be too vague to be effective as a framework for international jurisdiction, that concept is appropriate to the more limited task of identifying situations in which jurisdictional rights are abused.[126]

The addition of the non-interference principle restores to the jurisdictional framework the effectiveness lost with the advent of the effects principle. The territoriality paradigm automatically created for each state a territorially-defined sphere of protection. The effects principle destroyed the effectiveness of the paradigm by eliminating the territorial principle's sphere of protection. Where the effects principle operates, protection for affected foreign states must be provided by other legal concepts. The non-interference principle provides such protection by delimiting a sphere of operation for each state within which it is protected from jurisdictional incursions by other states. Unlike current formulations of international jurisdictional principles, which invite conflict and encourage unfettered extensions of jurisdiction by considering only the relationship between the regulating state and the conduct, a jurisdictional paradigm that incorporates the non-interference principle will provide a means for considering the "other side" of the jurisdictional issue by focusing on the interests of affected states.

The structure of this non-interference paradigm is critical because it is the mechanism that will provide reasonable predictability and render the law amenable to judicial application. While balancing is an essentially amorphous notion, the non-interference paradigm isolates specific relationships to which particular principles are applicable. The relationship between the regulating state and the conduct determines whether a state has a basis of jurisdiction. The principle of non-interference then indicates whether the exercise of jurisdiction violates the entitlements of some other state. Finally, by applying the concept of reasonableness, the decision-maker may determine whether the regulating state has abused its jurisdictional competence. This isolation of specific relationships creates a jurisdictional structure that can be applied with reasonable consistency and predictability.[127]

125. This view appears in RESTATEMENT OF FOREIGN RELATIONS LAW §403, *supra* note 103, Comment a.

126. An abuse principle logically requires that the interests of the states not be merely "balanced," but that the exercise of jurisdiction only be declared unlawful when the interests of the regulatory state in regulating conduct are *significantly* outweighed by the interests of the affected states in disallowing the proposed regulation. Thus, the Draft Restatement's reasonableness concept is more appropriate to identify abuse than to serve as the basis of a "balancing" test.

127. Use of the non-interference principle represents the application of a legal principle to the relationship between the regulating state and the affected state. Moreover, it has the spe-

Integration of the non-interference concept into the jurisdictional framework minimizes jurisdictional conflicts by focusing on and protecting those interests that are likely to be of greatest importance to the affected state. It assures states that certain essential state interests are legally protected, and it makes clear to any state that the invasion of this sphere violates international law. Thus, the non-interference paradigm can substantially lessen the uncertainties and concomitant tensions involved in jurisdictional conflict situations.

This structure also creates incentives to restrict rather than expand jurisdictional assertions. Whereas the effects principle creates an incentive for states to extend their assertions of jurisdictional rights, the principle of non-interference creates a counterbalancing incentive for states to limit their jurisdictional assertions, and to support a reasonably large sphere of protection.[128] This follows from the fact that all states must depend for protection on the same principle.

By introducing the concept of non-interference, it may be possible to obtain broad international acceptance for the jurisdictional framework. Whereas balancing is essentially a U.S. notion, the principle of non-interference is distilled from the practice of states and represents the application of general principles to an area in which they are regularly used.[129] A national court utilizing such a principle is applying international law and deriving its authority from the practice of states.

In addition, the principle of non-interference is capable of appealing to civil law-trained judges and officials. Because the problem of extraterritoriality must be solved internationally, an effective international legal paradigm must appeal to a broad spectrum of courts. It must be used by courts, lawyers, and officials in many countries and from many legal traditions. Whereas civil law jurisdictions have generally rejected balancing concepts as too unstructured,[130] the non-interference principle is suffi-

cific purpose of protecting state entitlements against the exercise of jurisdiction. This does not, of course, suggest that there will be no difficult cases, nor does it call for a mechanical or "black-letter" approach to the issue. Professor Lowenfeld's argument that rules and norms are inappropriate in the international jurisidction context may relate to the fact that the conceptual framework which has been operative has been particularly undifferentiating and inflexible. *See* Lowenfeld, *supra* note 102, at 321. The framework proposed here combines flexibility with reasonable certainty. The critical factor is that the conceptual structure of the applicable law renders often extremely complex situations susceptible of judicial resolution.

128. The non-interference principle, however, creates an incentive for states to restrict their jurisdictional assertions because they cannot adopt a policy of extending their own jurisdiction without reducing the protection they enjoy from jurisdictional incursions by other states.

129. The Draft Restatement also derives the reasonableness concept from state practice. *See* RESTATEMENT OF FOREIGN RELATIONS LAW §403, *supra* note 103, Comment a.

130. *See supra* note 107 and accompanying text.

ciently structured to be used within this tradition.

Finally, the non-interference principle reduces the external domestic pressures on the judiciary often present when a balancing approach is utilized in determining jurisdiction.[131] If a court determines that an exercise of jurisdiction would violate the non-interference principle, it is not open to the charge that it has attached insufficient weight to the interests of U.S. plaintiffs, as it would be under the balancing approach. The judge is impelled by a principle of law not to violate rights of a foreign state.

A. *Legal Literature and Case Law*

Several leading authorities on international law have specifically recognized a jurisdictional principle of non-interference. One of the first to do so was Professor F. A. Mann, for whom international prescriptive jurisdiction exists only when (1) there is a reasonable relationship between the conduct and the forum, and (2) the exercise of jurisdiction does not interfere with the sovereign rights of another state. "The reference to the paramountcy of international law implies what one may call the requirement of non-interference in the affairs of foreign states."[132] Mann does not elaborate on the scope or function of the principle, but he sees it as derived from the concept of sovereignty.

Professor R. Y. Jennings, now a judge of the International Court of Justice, also has referred to the concept of non-interference in describing the international law of jurisdiction. According to Jennings:

> Against [a jurisdictional entitlement] must be set also the legitimate and reasonable interests of the State whose territory is primarily concerned, for the extraterritorial exercise of jurisdiction must not be permitted to extend to the point where the local law is supplanted: where in fact it becomes an interference by one state in the affairs of another.[133]

In his *Principles of Public International Law*, Professor Ian Brownlie similarly describes the concept of non-interference, stating that the lawful assertion of extraterritorial jurisdiction requires "that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed. . . ."[134] Thus, each of these writers considers the principle of non-interference as part of the law of international jurisdiction.

131. *See supra* notes 112-13 and accompanying text.

132. Mann, *supra* note 27, at 47.

133. Jennings, *supra* note 2, at 153. Jennings, however, fails to develop the concept because he believes that any assertion of extraterritorial jurisdiction over parties who are not nationals of the regulating state violates the non-interference principle. *See id.* at 175.

134. I. BROWNLIE, *supra* note 33, at 309.

Although few courts have applied the principle of non-interference to the jurisdictional issue, in part, perhaps, because of its lack of articulation and development by international legal scholars, they have done so in several important instances. A German appeals court recently utilized the concept of non-interference in the context of the extraterritorial application of the German antitrust laws.[135] *Bayer/Firestone* involved the appeal of a decision by the German Federal Cartel Office under German antitrust law to prohibit the purchase of a division of a French subsidiary of a U.S. corporation by a French subsidiary of a Canadian holding company owned by a German corporation.[136] The appeals court rejected the application of German law to the transaction. It concluded:

> These [doubts] result from the fact that . . . the center of gravity of the acquisition plan—which was prohibited *in its entirety*—is outside the country, while within the country, in contrast, a relatively unimportant additional restraint of competition would result from the strengthening of a market-dominating position of Bayer. The competent French legal office approves of the acquisition and the competent French authorities welcome it on the basis of economic and sociopolitical considerations. In this situation, prohibition of the acquisition with respect to the involved foreign enterprises [presents] a conflict between the conflicts-of-law rule of Sec. 98(2) of the GWB . . . and generally recognized principles of international law, namely, the principles of (1) reasonable forum contacts in international administrative law and (2) the principle of nonintervention.[137]

Bayer/Firestone represents the most explicit use of the non-interference concept in the context of jurisdiction.[138]

A jurisdictional principle of non-interference thus has been recognized by both commentators and courts. Articulation and development of the non-interference concept in the context of international jurisdiction, however, has been impeded by the narrow conceptual limits of the controversy about the validity of the effects principle. As long as the center of concern was the validity and scope of the effects principle, articulation and development of the non-interference concept was effectively precluded.

B. *State Practice*

A jurisdictional principle of non-interference has been invoked in state

135. For a description of this development and its background, see Gerber, *supra* note 5, at 772-79.

136. KG, Nov. 26, 1980, WuW/E OLG 2411 (Synthetischer Kautschuk I, 1980) and KG, Nov. 26, 1980, WuW/E OLG (Synthetischer Kautschuk II, 1980). *See also id.* at 774.

137. Synthetischer Kautschuk II, at 2420 (emphasis in original).

138. For the most recent decision in this line of cases, *see* KG, July 1, 1983, WuW/E OLG 3051 (Morris-Rothmans) (on appeal to the Supreme Court of West Germany).

practice. Even when it is not explicitly recognized, it is often implicit in actions based on a perceived configuration of international entitlements and obligations that presupposes the principle of non-interference. The doctrinal preoccupation of the last forty years with the validity of the effects principle, however, has obscured the development of this pattern.

In recent years, jurisdictional conflicts generally have related not to the issue of the validity of the effects principle, but rather to the issue of interference by regulating states in the affairs of other states. An analysis of these conflicts reflects widespread, if often unarticulated, reliance on the concept of non-interference.

1. Diplomatic Protests

Jurisdictional conflicts frequently occur as a result of diplomatic protests which tend to be based on the unlawfulness of jurisdictional assertions that interfere with protected interests of the affected state.[139] Thus, while the doctrinal controversy often has been preoccupied with the issue of the validity of the effects principle, jurisdictional conflicts have tended to occur in relation to the issue of whether a particular exercise of jurisdiction was justified. Protests against the exercise of extraterritorial jurisdiction regularly assert that the regulating government has "violated the sovereignty" of the affected state or "interfered with" that sovereignty by exercising jurisdiction.[140] Proponents argue that the concept of sovereignty establishes a sphere of protected interests for each state and that foreign jurisdictions may not intrude on that legally protected sphere.[141]

2. Public Confrontations

States also have attempted to enforce the non-interference principle by publicly participating in litigation to contest assertions of jurisdiction. Participation in litigation entails more costs and more risks than diplomatic protest and therefore may serve as a more important indicator of

139. As one commentator has noted, "[t]he concrete causes of these [diplomatic] protests and the argumentation used in them indicate that the states were more concerned with the protection of concrete economic interests than with the claim of basic invalidity of the effects principle." U. IMMENGA & E. MESTMAECKER, *supra* note 78, at 1882. Such protests and reactions seldom state the specific rationale behind the assertion of interference, but they regularly represent the position that state sovereignty prohibits one state from interfering in the affairs of another state. For examples, see INT'L L. ASS'N, *supra* note 53, at 565-92.

140. The Canadian government explained its protest of U.S. action in conjunction with the uranium investigation in a memorandum to the United States, dated October 6, 1978: "[T]here is [also] the principle of non-interference in the affairs of a foreign State. Although the determination of what amounts to interference is always a difficult one, it is clear that good faith and reasonableness are essential ingredients of such a determination." *Reprinted in* Copithorne, *Canadian Practice in International Law*, 17 CAN. Y. B. INT'L L. 334, 335 (1979).

141. *See id.*

the strength of the positions taken.[142]

The participation of foreign states in litigation in the United States and elsewhere as *amicus curiae* or in other forms often has focused on the claim that jurisdictional assertions have interfered with legally protected rights of the affected state. For example, in *U.S. v. Watchmakers of Switzerland Information Center, Inc.*,[143] the Swiss government's *amicus curiae* brief focused on the sovereignty issue in arguing against the extraterritorial application of U.S. antitrust laws to the Swiss watch industry. Counsel for the Swiss government argued that the district court's proposed judgment involved:

> the potential threat of intruding upon the sovereignty of Switzerland and vital concerns of the Swiss Confederation with respect to the maintenance of its watch industry as a vibrant part of its total economy . . . . Our concern throughout has been only with respect to possible interpretation of the judgment that might be construed to impinge upon Swiss sovereignty and Swiss concern for its domestic watch industry.[144]

In *Westinghouse Electric Corp. v. Rio Algom. Ltd.*,[145] similar positions were taken by the four governments filing *amicus curiae* briefs in opposition to the assertion of extraterritorial jurisdiction by the U.S. For example, the government of South Africa stated:

> In the view of the South African Government there is no legal justification for the extra-territorial application of U.S. anti-trust laws to South African companies whose association and activities with other non-U.S. uranium producers directed at stabilizing the industry outside the U.S. were not only lawful under South African law but considered by the South African Government to be in the national interest. The South African Government respectfully, but with equal emphasis, submits that apart from the legal and economic implications of such application, extra-territorial application of such laws to non-U.S. companies acting lawfully in terms of their own national laws and international law, would constitute a challenge to the sovereignty of nations and could disturb friendly relations with the United States.[146]

Other *amicus curiae* submissions also emphasized the fact that extraterritorial application of U.S. law would interfere with domestic interests.[147]

142. For a discussion of the evidentiary value of protests and other diplomatic practice, see A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 47-72 (1971).

143. 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, 1966 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1968).

144. Haight, *supra* note 13, at 334-35.

145. 617 F.2d 1248 (7th Cir. 1980).

146. Brief of Government of the Republic of South Africa as Amicus-Curiae at 7, Westinghouse Electric Corp. v. Rio Algom, Ltd.

147. *See, e.g.*, Memorandum of the Government of Australia at 4-9, and Memorandum of the Government of Canada at 2-6, *Westinghouse*.

3. Blocking Legislation

Blocking legislation represents the third major category of state practice based on the non-interference principle. It is particularly significant, because a state that passes blocking legislation often incurs substantial costs and risks, and thus such actions may indicate strong support of the legal positions involved.

Blocking legislation is specifically intended to thwart the extraterritorial application of antitrust or other economic regulatory laws. There are three main types of provisions included in such legislation. The first prohibits the production of documents to be used in foreign antitrust litigation, the second prevents domestic courts from enforcing orders of foreign courts in antitrust litigation, and the third provides a domestic cause of action in favor of a domestic party forced to pay particular kinds of damages in such litigation. These legislative provisions are designed to protect the state from interference in the form of jurisdictional assertions by another state.

Blocking statutes began to appear as early as the late 1940's in response to the exercise of extraterritorial jurisdiction by the United States.[148] The number and severity of such statutes increased significantly in the 1960's, largely in response to U.S. investigations of the shipping industry, and there has been a further increase in recent years, mainly in response to the uranium cases.[149]

Blocking legislation generally is based on the claim that international law entitles states to the protection that such legislation represents. It is seen as a means of enforcing rights established by international law and represents an application of the principle of non-interference.

For example, when it adopted blocking legislation,[150] the British government stated that its aim was "to reassert and reinforce the defenses of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us."[151] The aim of the legislation was thus protection from the imposition of foreign policies within Britain.[152] Vitually all blocking legislation has been enacted for

148. *See generally* 1 J. ATWOOD & K. BREWSTER, *supra* note 10, at §4.17.

149. Blocking legislation also has been inspired by the realization that the most effective defense to extraterritorial application of U.S. law is the foreign government compulsion defense. Because U.S. courts generally will not enforce American laws where such enforcement would require foreign conduct that would violate foreign law, foreign governments have an incentive to compel, and thus protect, certain kinds of activities.

150. Protection of Trading Interests Act of 1981.

151. 973 Parl. Deb., H.C. (5th ser.) 1533 (1979), *reprinted in* Lowe, *supra* note 16, at 257.

152. Canada's stated reasons for adopting its blocking legislation were similar. According to the Canadian government:

> Canada considered it contrary to her sovereign prerogative for foreign states to question the propriety or legality of the actions of Canadian uranium producers that were taken

the same basic stated purpose.[153]

If one turns from the stated reasons for blocking legislation to an analysis of the legislation itself, it is evident that the principle of non-interference is a major operative concept in such legislation. For example, the central provision of the French blocking statute, enacted in 1980,[154] prohibits French nationals, residents, and representatives of companies having an office in France from giving to foreign public officials any document or information "which threatens the sovereignty, the security, or the essential economic interests of France or [its] public policy (*ordre public*) . . . ."[155] The predecessor law, dating from 1968,[156] referred to the concept of sovereignty alone, and references to "essential economic interests" and "security" were added to the statute in order to avoid any uncertainty concerning the scope of the concept.[157]

The British Protection of Trading Interests Act is also built around the concept of non-interference.[158] According to section 1 of the Act, the Secretary of State is empowered to take "blocking" actions when a foreign state has taken, or proposes to take, measures that he believes "are damaging or threaten to damage the trading interests of the United Kingdom."[159] The use of the "trading interests" concept was designed to make clear that the statute protected sovereignty in the broadest sense, including "economic sovereignty."[160] Thus, the principle which is operative here is the principle of non-interference.

Other blocking statutes reflect the same pattern and are based on the same principle. They represent an effort by states to defend those interests which were formerly protected by international law through the principle of territoriality. Thus, they represent a response to the development of the effects principle.

> outside the United States and were required by Canadian law or taken in implementation of Canadian government policy. . . .The Canadian government promulgated the Regulations to serve a vital national interest, particularly the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies respecting a vital Canadian natural resource in the face of jurisdiction by non-Canadian tribunals. These Regulations were not procured by members of the uranium industry, and they were not adopted to protect the commercial interests of those companies.

Amicus Curiae filing of the Canadian Government, *quoted in* Gulf Oil Corp. v. Gulf Canada Ltd., 1980-81 Trade Cas. (CCH) ¶ 63,285, at 78,453 (Can. S. Ct. 1980).

153. *See generally* Cira, *supra* note 15, at 247-60.

154. Law Concerning the Communication of Documents, *supra* note 18.

155. *Id.* at art. 2.

156. Law No. 68-678, July 26, 1968, 1968 J.O. 7267.

157. *See* Toms, *supra* note 18, at 591-92.

158. *See* Protection of Trading Interests Act, *supra* note 16.

159. *Id.* at §1.

160. Lowe, *supra* note 16, at 274. The predecessor blocking statute empowered the Secretary to take such action when he believed that foreign actions "constitute[d] an infringement of the jurisdiction which, under international law, belongs to the United Kingdom." Shipping Contracts and Commercial Documents Act, 1964, ch. 87.

Conclusion

The advent of the effects principle undermined the effectiveness of the territoriality paradigm which had allocated prescriptive jurisdictional competence among states. In doing so, it created a need for a modification of that paradigm to protect states from jurisdictional interference. Balancing was a first and important attempt introduced by courts to meet this need. Yet balancing has several difficulties which must be remedied if an effective international jurisdictional framework is to operate.

The incorporation of the principle of non-interference as a major ingredient of the jurisdictional framework, as proposed in this Article, responds to needs created by changes in the international system, and it minimizes the deficiencies of the balancing approach. As non-interference begins to be considered as a necessary ingredient of a new jurisdictional framework, its proper content will be defined by the regular assertion-response process of international law.[161] This process will only operate, however, when the non-interference principle is recognized as an essential part of the jurisdictional framework.

The articulation of a jurisdictional framework that includes the principle of non-interference also should encourage bilateral and multilateral attempts to agree on the scope of that principle, because it provides a mechanism for reflecting and aligning the interests of all states. Using such a framework, the international community can move away from the pattern of international jurisdictional conflict in which it now finds itself and toward a process of defining collectively acceptable limits on state behavior.

The continuing escalation of international jurisdictional conflicts in the postwar period indicates that the existing jurisdictional paradigm is inadequate. These conflicts also indicate the concepts that must be integrated into the jurisdictional framework in order to restore its effectiveness. These concepts include non-interference, the articulation and development of which could be critical to the orderly development of the world economy and ultimately, perhaps, to world order.

161. *See generally* McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, in M. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 157, 185 (1960).