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## Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States

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# Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States

Kathleen Hixson

## **Abstract**

This Note argues that the Restatement Third provisions fail to provide a precise outline of jurisdictional boundaries as generally accepted by the international community. Part I analyzes the jurisdictional provisions in the Restatement Second and contrasts them with corresponding sections in the Restatement Third. Part II examines issues that have arisen under the Restatement Second jurisdictional scheme. Part III examines those same issues in light of the Restatement Third modifications. This Note concludes that the Restatement Third provisions limiting extraterritorial prescriptions function as abstention principles developed by the U.S. judiciary, and that in order to determine the outermost limits of U.S. jurisdiction under international law, the executive and legislative branches should be guided by principles commonly understood by a consensus of the international community as acceptable extraterritorial prescriptions.

EXTRATERRITORIAL JURISDICTION UNDER THE  
THIRD RESTATEMENT OF FOREIGN  
RELATIONS LAW OF THE  
UNITED STATES

INTRODUCTION

In the typical classroom hypothetical, a criminal fires a gun across an international border, wounding a victim on the other side.<sup>1</sup> Which state has the greater right to bring the criminal to justice? The criminal's home state might well argue it has the more powerful right to prescribe and enforce laws governing the behavior of those within its territory. The victim's state, however, might claim a greater interest in enacting and enforcing laws designed to protect those within its borders.<sup>2</sup> Additionally, both states may have strong public policies to be considered with regard to the actions they may choose to take.<sup>3</sup> This basic hypothetical illustrates the difficulty of setting down guidelines to determine when a state may prescribe laws governing conduct beyond its borders and under what circumstances that state ought to be allowed to disregard the territorial sovereignty of another in order to implement its own national policies.

This is the task with which the American Law Institute (the "ALI")<sup>4</sup> was confronted when, in 1979, it undertook to revise and update the Restatement (Second) of Foreign Relations Law of the United States (the "Restatement Second").<sup>5</sup> While the Restatement Second merely purported to state and clarify existing law,<sup>6</sup> its successor, Restatement of the Law Third, Re-

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1. See, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 illustration 2 (1965) [hereinafter RESTATEMENT SECOND].

2. See *infra* text accompanying notes 33-34.

3. See *infra* notes 141-43 and accompanying text.

4. The American Law Institute (the "ALI") is a voluntary private association made up of judges, lawyers, and law professors. RESTATEMENT SECOND, *supra* note 1, at IX.

5. RESTATEMENT SECOND, *supra* note 1. A restatement is a volume that "tell[s] what the law in a general area is, how it is changing, and what direction the authors think this change should take." BLACK'S LAW DICTIONARY 1180 (5th ed. 1979). Although restatements are not binding as law, they have been accorded such high respect by the courts that as of April 1, 1986, over 94,000 citations to them have been recorded. *Citations to the Restatement of the Law and ALI Codifications up to April 1, 1986*, 63 A.L.I. PROC. 470-71 (1986).

6. RESTATEMENT SECOND, *supra* note 1, at XI.

statement of the Foreign Relations Law of the United States (the "Restatement Third"),<sup>7</sup> contains provisions that appear to deviate from traditionally acknowledged principles of international law, particularly section 401 on categories of jurisdiction, section 402 on bases of prescriptive jurisdiction, and section 403 on limitations to prescriptive jurisdiction.

This Note argues that the Restatement Third provisions fail to provide a precise outline of jurisdictional boundaries as generally accepted by the international community. Part I ana-

The Foreign Relations Law of the United States includes portions of international law, as that term is used to describe the legal aspects of relations between nations, and that part of the domestic law of the United States that is involved in the conduct of the foreign relations of the United States, including constitutional law and some portions of conflict of laws.

*Id.* This particular restatement, adopted in 1962 and published three years later, differed from previous restatements adopted by the ALI:

The inclusion of the international legal aspects of foreign relations law in the Restatement of this Subject presents certain problems, particularly those of source material, that have not been present in the preparation of other Restatements. This results in large part from differences in the sources of international law and domestic law. In general, rules of domestic law tend to be based upon authoritative declarations by legislatures and courts. While many of the rules of international law have been authoritatively declared, as by a "law-making" international agreement or by an international tribunal, others are based primarily upon opinions held by experts or positions taken by governments in diplomatic correspondence with other governments. In these latter situations the positions or outlooks of particular states, including the United States, should not be confused with what a consensus of states would accept or support.

*Id.* at XI-XII. In recognition of the diversity of opinions, policies, and practices that might well lay claim to being termed "international law," the ALI acknowledged that the work "[represented] the opinion of The American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law." *Id.* at XII. The Restatement Second was intended as neither an official statement of United States policy, nor a pragmatic submission of improvements in existing international law. Its approach was merely to "state and clarify existing law, international and domestic . . ." *Id.* at XI.

7. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1988) [hereinafter RESTATEMENT THIRD]. The project of preparing the Restatement Third was commenced in 1979 and continued over the course of seven years, tentative drafts being issued on April 1, 1980; March 27, 1981; March 15, 1982; April 1, 1983; April 5, 1984; April 12, 1985; and April 10, 1986. By May 1985, virtually all of the material in the 1985 draft had been submitted to, and tentatively approved by, the ALI. At the request of administration officials, final adoption of the revisions was postponed for a year to give the Department of State and the Department of Justice further opportunity to review the sixth draft revisions. Statement of President Roswell B. Perkins, 62 A.L.I. PROC. 374-77 (1985). Ultimately, the Restatement Third was approved at the ALI's 1986 annual meeting. 1986 Proceedings, 63 A.L.I. PROC. 140-41 (1986).

lyzes the jurisdictional provisions in the Restatement Second and contrasts them with corresponding sections in the Restatement Third. Part II examines issues that have arisen under the Restatement Second jurisdictional scheme. Part III examines those same issues in light of the Restatement Third modifications. This Note concludes that the Restatement Third provisions limiting extraterritorial prescriptions function as abstention principles developed by the U.S. judiciary, and that in order to determine the outermost limits of U.S. jurisdiction under international law, the executive and legislative branches should be guided by principles commonly understood by a consensus of the international community as acceptable extraterritorial prescriptions.

### I. MODIFICATIONS TO EXTRATERRITORIAL JURISDICTION UNDER THE RESTATEMENT THIRD

Both restatements contain three major provisions on jurisdiction: first, they specify types of jurisdiction;<sup>8</sup> second, they enumerate bases for prescriptive jurisdiction;<sup>9</sup> and third, they provide for limitations on jurisdiction where possible bases for prescription by two or more states overlap.<sup>10</sup> The major changes to these sections in the Restatement Third are in its split of jurisdiction into three types (as opposed to two in the Restatement Second),<sup>11</sup> its expansion of "effect within the territory" as a basis for prescriptive jurisdiction,<sup>12</sup> and its relaxation of the limitations placed on a state's right to prescribe and enforce laws extraterritorially.<sup>13</sup>

#### A. *Jurisdiction: A Basic Approach*

The definition of jurisdiction is set out in section 6 of the Restatement Second as follows: " 'Jurisdiction,' as used in the Restatement of this Subject, means the capacity of a state under international law to prescribe or to enforce a rule of

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8. See *infra* notes 14-29 and accompanying text.

9. See *infra* notes 30-44 and accompanying text.

10. See *infra* notes 45-53 and accompanying text.

11. See *infra* notes 14-20 and accompanying text.

12. See *infra* notes 39-40 and accompanying text.

13. See *infra* notes 49-55 and accompanying text.

law."<sup>14</sup> "To prescribe," in this context, refers to the lawmaking process, regardless of whether it arises out of the exercise of authority of the legislative, executive, or judicial branch (this is referred to as prescription or prescriptive jurisdiction).<sup>15</sup> "To enforce," on the other hand, means to enforce rules properly prescribed (this authority is referred to as enforcement jurisdiction).<sup>16</sup> The interrelationship between the two is further addressed in section 7: "(1) A state having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it in all cases. (2) A state does not have jurisdiction to enforce a rule of law prescribed by it unless it had jurisdiction to prescribe that rule."<sup>17</sup> Thus, valid prescriptive jurisdiction is a prerequisite to valid enforcement jurisdiction, and any limitations placed on prescriptive jurisdiction will operate to limit enforcement as well.<sup>18</sup>

The Restatement Third expands these two types of jurisdiction into three.<sup>19</sup> According to section 401, international law subjects a state to limitations on its authority to exercise prescriptive, adjudicative, and enforcement jurisdiction.<sup>20</sup> "Prescriptive jurisdiction" is defined as the application of a

14. RESTATEMENT SECOND, *supra* note 1, § 6.

15. *Id.* comment a.

16. *Id.*

17. *Id.* § 7.

18. For example, the Restatement Second limits application of the "effects" basis of jurisdiction as a prescription in § 18. *See infra* note 33. Those same limitations would effectively limit enforcement under § 7 as well. *See supra* text accompanying note 17.

19. *See* RESTATEMENT THIRD, *supra* note 7, § 401; *infra* note 20. "The change from the dual concept to the triad concept according to the Reporters was necessary because the earlier concept was too simple. My own view is anything that's simple in the law is so unusual and unique that it should be preserved." Report of the Panel Proceedings: *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?* 18 (1987) [hereinafter Panel] (remarks of Cecil Olmstead) (draft available at the *Fordham International Law Journal* office) (to be published in 81 AM. SOC'Y INT'L L. — (1987)).

20. RESTATEMENT THIRD, *supra* note 7, § 401. The text of § 401 reads as follows:

Under international law, a state is subject to limitations on

(a) jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;

(b) jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;

(c) jurisdiction to enforce, *i.e.*, to induce or compel compliance or pun-

state's law to the activities, relations, or status of persons—again, whether by the legislative, executive, or judicial branch.<sup>21</sup> “Adjudicative jurisdiction” is the authority to subject persons or things to the process of a state's courts or proceedings, and “enforcement jurisdiction” is the authority to compel compliance or punish noncompliance with the laws of a state.<sup>22</sup>

This provision introduces a number of modifications to the earlier jurisdictional scheme. First, it eliminates the facet of jurisdiction that covers the process of *creating* law; thus all subsequent limitations on jurisdiction appear to speak only to the application, as opposed to the creation, of a particular rule of law.<sup>23</sup>

Second, under the Restatement Second, the authority of a state to enforce its laws would only exist subject to limitations placed on both enforcement and prescriptive (lawmaking) jurisdiction.<sup>24</sup> The same authority under the Restatement Third (termed “prescriptive”) would exist subject only to those limitations that apply expressly to prescriptive jurisdiction.<sup>25</sup>

Third, under the Restatement Second, prescriptive jurisdiction arises under international law, implying that a state's authority should either be granted or acknowledged by customary international law.<sup>26</sup> The Restatement Third, on the other hand, presents jurisdiction subject to limitation under international law, there being a presumption of jurisdiction in the absence of an explicit limitation.<sup>27</sup>

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ish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

*Id.*

21. *Id.*

22. *Id.*

23. See Panel, *supra* note 19, at 19.

24. See *supra* text accompanying note 17.

25. See *infra* note 49.

26. See *supra* text accompanying note 14.

27. See *supra* note 20 and accompanying text. This concept finds support in early caselaw. In *S.S. Lotus* (Turk. v. Fr.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), a French steamer collided with a Turkish vessel in international waters, killing eight Turkish nationals. The officer on watch on the French vessel at the time of the accident was later arrested in Turkey and charged with involuntary manslaughter under Turkish law. The issue of whether the prosecution violated international law was submitted by the governments of both France and Turkey to the Permanent Court of International Justice, which held that a state cannot exercise its power in the territory of another state absent a specific grant under international law. However, with regard

Finally, the very definition of "international law" in the Restatement Third reflects a shift in emphasis favoring a state tribunal's authority to declare principles of international law. While the Restatement Second identified "international law" as being the ALI's view of rules that an "international tribunal" would apply in deciding a controversy in accordance with international law,<sup>28</sup> the Restatement Third altered this standard to read an "impartial tribunal."<sup>29</sup> This redefinition opens the possibility that decisions of a federal court could be interpreted as declarations of international law, if it could be successfully argued that the court was an impartial tribunal deciding a controversy in accordance with international law.

### B. *Bases of Jurisdiction to Prescribe*

The bases of jurisdiction in the Restatement Second draw upon traditional principles of international law<sup>30</sup> that have found general acceptance abroad; these bases of jurisdiction include territory<sup>31</sup> and nationality.<sup>32</sup> As an offshoot of the traditional territoriality principle, section 18 recognizes the

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to the exercise of jurisdiction within its own territory, a state may act in the absence of explicit limitations under international law. Thus, the court affirmed Turkey's authority. *Id.*

28. *See supra* note 6.

29. RESTATEMENT THIRD, *supra* note 7, at 3. This change was not actually incorporated into the Restatement Third until 1986, seven years and six tentative drafts after the project was begun. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Draft No. 6, 1985). The change has been justifiably criticized, not only for its substance, but also for being such a fundamental alteration of the "yardstick against which things are tested," long after many segments of the Restatement Third had been considered and approved by the ALI, presumably under the old Restatement Second standard. *See* Panel, *supra* note 19, at 27 (remarks of Monroe Leigh). The standard was changed under pressure from the Department of State, which at the time took the position that the International Court of Justice was not an "impartial" tribunal. *See id.* at 28; *id.* at 38 (remarks of Detlev Vagts); *see also* Remarks of Prof. Louis Henkin, 63 A.L.I. PROC. 105 (1986) (standard changed because the administration was "very allergic" to the International Court of Justice). Allowing the Department of State to assume so substantial a role in the ALI's work product, while at the same time allowing it to disclaim the Restatement Third, *see supra* note 7, at IX, will probably only result in confusion abroad. *See* Panel, *supra* note 19, at 11 (remarks of Detlev Vagts).

30. *See* RESTATEMENT SECOND, *supra* note 1, § 10. *See generally* *Harvard Research on International Law: Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L. 435, 445 (Supp. 1935) (discussing the most widely accepted bases for jurisdiction under international law).

31. *See, e.g.,* *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891, 893 (1982) [hereinafter *EEC Memorandum*] ("[T]he



more controversial "effects" doctrine, wherein a state may have prescriptive jurisdiction over conduct occurring outside its territory that causes an effect within.<sup>33</sup> The effects doctrine is limited to rare circumstances when conduct is generally recognized as a crime; the effect within the territory is direct, substantial, and foreseeable; and the rule is consistent with the principles of justice in states that have reasonably developed legal systems.<sup>34</sup>

The Restatement Third enumerates bases of jurisdiction to prescribe in section 402.<sup>35</sup> Within this section, the second and third subsections outline the "nationality" and "protective" principles of jurisdiction.<sup>36</sup> Subsection (1) deals with the

notion that a state should restrict its rule-making in principle to persons and goods within its territory . . . is a fundamental notion of international law . . .").

32. *See, e.g., id.* (prescription of rules governing nationals, wherever located, is a generally accepted basis for jurisdiction under international law).

33. *See* RESTATEMENT SECOND, *supra* note 1, § 18. The effects doctrine receives the following treatment in the Restatement Second:

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.

*Id.*; compare *id.* with *infra* note 35 (either actual or intended effects sufficient to support exercise of jurisdiction).

34. *See* RESTATEMENT SECOND, *supra* note 1, § 18; *supra* note 33.

35. RESTATEMENT THIRD, *supra* note 7, § 402.

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1) (a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

*Id.*

36. *Id.* § 402(2)-(3); *see supra* note 30.

principle of territoriality under three approaches:<sup>37</sup> two of these allow a right to prescribe with respect to conduct within the territory or the status of persons or things present within the state;<sup>38</sup> the third allows a state to prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory."<sup>39</sup> Although the Restatement Third takes a traditional approach to territorial jurisdiction generally, this last subsection substantially relaxes the more stringent requirements on the effects doctrine found in the Restatement Second.<sup>40</sup> While the Restatement Second requires direct, substantial, and foreseeable effects,<sup>41</sup> under the Restatement Third the effect need not be actual, but merely intended.<sup>42</sup> Actual but unintended effects would also be sufficient to support jurisdiction.<sup>43</sup> And finally, the Restatement Third eliminates the requirement that the conduct in question be generally recognized as a crime in the international community.<sup>44</sup>

### *C. Limitations on Jurisdiction*

Both the Restatement Second and the Restatement Third recognize that conflict may arise when two states concurrently exercise jurisdiction. The Restatement Second approaches this problem, in section 40, as one of the proper exercise of enforcement jurisdiction.<sup>45</sup> While the first prerequisite to enforcement jurisdiction is valid prescriptive jurisdiction, the impact of enforcement jurisdiction is then further ameliorated by

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37. RESTATEMENT THIRD, *supra* note 7, § 402(1); *see supra* note 35.

38. RESTATEMENT THIRD, *supra* note 7, § 402(1); *see supra* note 35.

39. RESTATEMENT THIRD, *supra* note 7, § 402(1)(c); *see supra* note 35.

40. *See* RESTATEMENT THIRD, *supra* note 7, § 402(1)(c); *supra* note 35; *cf.* notes 33-34 and accompanying text.

41. *See supra* notes 33-34 and accompanying text.

42. *See* RESTATEMENT THIRD, *supra* note 7, § 402(1)(c); *supra* note 35.

43. *See* RESTATEMENT THIRD, *supra* note 7, § 402(1)(c); *supra* note 35.

44. *See* RESTATEMENT THIRD, *supra* note 7, § 402(1)(c); *supra* note 35.

45. *See* RESTATEMENT SECOND, *supra* note 1, § 40. Section 40 reads in pertinent part:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith,

section 40.<sup>46</sup> Where the assertion of concurrent jurisdiction by two or more states might require inconsistent conduct, section 40 requires a state to consider in good faith moderating its enforcement jurisdiction.<sup>47</sup> This consideration is stated as an express requirement of international law.<sup>48</sup>

The Restatement Third provides for conflict resolution in section 403 under the heading "Limitations on Jurisdiction to Prescribe."<sup>49</sup> This section states, first, the so-called "rule of reason," which is the foundation of the Restatement Third bal-

moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

*Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. RESTATEMENT THIRD, *supra* note 7, § 403. Section 403 reads:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the 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;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;

ancing test.<sup>50</sup> Under this rule, a state may not exercise prescriptive jurisdiction over persons or things having connections with other states where the exercise of such jurisdiction is unreasonable.<sup>51</sup> Reasonableness, in this provision, is to be measured by evaluating all relevant factors, including certain nonexclusive factors listed in subsection (2).<sup>52</sup> Where the prescriptions by two or more states are both reasonable, but conflict nonetheless, each state must evaluate its own, as well as the other state's, interest and should defer to the other state if that state's interest is clearly greater.<sup>53</sup>

In this area, the Restatement Third has taken perhaps the most radical departure from the Restatement Second. First, under the Restatement Second, the good-faith weighing of interests is presented as a requirement of international law.<sup>54</sup> Under the Restatement Third, however, a state "has an obligation" to evaluate, but "should" defer if the other state's interest is "clearly" greater.<sup>55</sup> The actual moderation of jurisdiction is presented more as an exercise of deference based on principles of comity.<sup>56</sup>

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

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

*Id.*

50. *See id.* The "rule of reason" itself is a somewhat controversial standard, and has been criticized as being unsupported either by federal or international law. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 952 (D.C. Cir. 1984) ("[N]o rule of international law [holds] that a 'more reasonable' assertion of jurisdiction mandatorily displaces a 'less reasonable' assertion . . ."); *see also* Panel, *supra* note 19, at 21 (remarks of Cecil Olmstead) (questioning whether the concept of reasonableness is established, either in the United States or internationally); *see generally* Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 *LAW & CONTEMP. PROBS.* 1001 (1987) (discussing possible origins of reasonableness in conflict of laws principles).

51. *RESTATEMENT THIRD, supra* note 7, § 403(1); *see supra* note 49.

52. *RESTATEMENT THIRD, supra* note 7, § 403(2); *see supra* note 49.

53. *RESTATEMENT THIRD, supra* note 7, § 403(3); *see supra* note 49.

54. *See supra* notes 45-48 and accompanying text (considering balancing factors is an express requirement of international law).

55. *See supra* text accompanying note 53.

56. *See infra* note 93.

Second, the Restatement Third places less emphasis on territoriality. Instead, it focuses on elements such as the nature of the activity, the effect on the regulating state, and the interests of both the regulating and territorial states, which interests are measured by the amount of regulation generally exercised.<sup>57</sup> These factors are far more difficult to quantify than the narrowly defined factors of the Restatement Second.<sup>58</sup> Thus, they open the door to a substantially broader interpretation of extraterritorial jurisdiction.

Finally, the Restatement Third limitations turn on the concept of reasonableness.<sup>59</sup> This leaves open to the courts the interpretation of the meaning of reasonableness. Furthermore, the question remains as to whether a state must defer when another state's interest is somewhat greater, but not "clearly" greater.<sup>60</sup>

## II. ISSUES ARISING UNDER THE RESTATEMENT SECOND FORMULATION

Although restatements are not binding sources of law, they are nonetheless widely consulted by U.S. courts.<sup>61</sup> Three major issues have arisen with the use of the jurisdictional

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57. See *supra* note 49. Two of the factors in § 403(2) in particular focus on the extent of a state's regulation: § 403(2)(c) refers to "the extent to which other states regulate such activities . . ." and § 403(2)(g) refers to "the extent to which another state may have an interest in regulating the activity." These factors may be misleading in that they fail to consider the interest a state may have in maintaining an unregulated environment. For example, the deregulation of the U.S. airline industry in 1977-78, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978); Air Cargo Deregulation Act of 1977, Pub. L. No. 95-163, 91 Stat. 1278 (1977), resulted both in lowered fares to consumers and the largest profits ever in the history of domestic aviation. See Dempsey, *Turbulence in the "Open Skies": The Deregulation of International Air Transport*, 15 *TRANSP. L.J.* 305, 328 (1987). However, as the state's interest is in allowing market factors to be the regulating force, see *id.*, it would not be accurate to say that the degree of U.S. interest in the airline industry is somehow proportional to the amount of regulation the government exercises as per § 403(2)(c) and (g).

58. See *supra* note 45.

59. See *supra* notes 49-50 and accompanying text.

60. See *Laker Airways v. Sabena, Belgian World Airways*, 731 F.2d 909, 949 (D.C. Cir. 1984) (examining feasibility of a court's making an accurate determination of greater and lesser state interests).

61. See *supra* note 5 and accompanying text; see also Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 *INT'L LAW.* 487, 488 (1985) ("United States courts have often relied on the Restatement as an accurate articulation of international law.").

scheme outlined in the Restatement Second: (1) expansive interpretation of "effects within the territory," (2) imperfections inherent in systematically resorting to judicial interest-balancing in the resolution of jurisdictional clashes, and (3) the difficulty of adapting this judicially-developed procedure for use by the executive and legislative branches. In order to understand how these issues were treated in the Restatement Third, it is necessary to examine briefly the context in which they arose.

### A. *The Effects Doctrine*

The modern-day effects doctrine originated in the 1945 antitrust case *United States v. Aluminum Co. of America (ALCOA)*.<sup>62</sup> Under *ALCOA*, U.S. antitrust laws may be applied whenever conduct abroad is intended to, and results in, substantial effects within the United States.<sup>63</sup> This concept of effects jurisdiction was modified and incorporated into the Restatement Second as a general jurisdictional principle.<sup>64</sup> The element of intent was deleted, and the application of effects jurisdiction was limited to two situations. First, it may apply where "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."<sup>65</sup> Alternatively, effects jurisdiction may apply where the impact of the conduct is substantial, direct, and foreseeable, and the rule of law is "not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."<sup>66</sup> These two provisions have worked as a check on a state's ability to interpret broadly the somewhat open-ended meaning of

62. 148 F.2d 416 (2d. Cir. 1945); see *Laker Airways*, 731 F.2d at 925; *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1301 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 610 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985).

63. *ALCOA*, 148 F.2d at 443.

64. See *supra* note 33 and accompanying text; discussion at 39 A.L.I. PROC. 319 (1962); Panel, *supra* note 19, at 23 (remarks of Cecil Olmstead).

65. RESTATEMENT SECOND, *supra* note 1, § 18(a), reporter's notes 1-2. The Restatement Second traces effects jurisdiction back to *S.S. Lotus*, (*Turk. v. Fr.*), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), which held that injury to Turkish nationals on international waters produced an effect within the territory of Turkey sufficient to support the exercise of jurisdiction over the French national responsible for that injury. *Id.* at 32; see RESTATEMENT SECOND, *supra* note 1, § 18, reporter's note 1.

66. RESTATEMENT SECOND, *supra* note 1, § 18(b).

“effects within the territory.”<sup>67</sup>

Even within these narrow confines, effects jurisdiction has been criticized abroad, and its application both within and beyond the area of antitrust remains controversial.<sup>68</sup> The provision has, for example, been incorporated into U.S. securities law, allowing U.S. prescriptive jurisdiction (and its attendant enforcement mechanisms) to reach parties worldwide.<sup>69</sup> Because a substantial portion of U.S. securities law cannot be said to be “generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems,”<sup>70</sup> effects jurisdiction will generally be applied to securities cases under the Restatement Second section 18(b), which requires, first, the effect within the United States to be direct, substantial and foreseeable and, second, the rule of law to be not inconsistent with generally recognized principles of justice.<sup>71</sup>

The effects doctrine was first introduced to securities law

67. See *infra* notes 72-81 and accompanying text.

68. See, e.g., *Symposium, Transnational Litigation—Part II: Perspectives from the U.S. and Abroad*, 18 INT'L LAW. 771 (1984) [hereinafter *Symposium*]. Switzerland takes the position that territorial jurisdiction supercedes effects jurisdiction, *id.* at 790, while the United Kingdom objects to extraterritorial assertions by the United States on principles of international law, *id.* at 773. Generally, effects jurisdiction is less widely accepted under international law than the traditional bases of territory and nationality. *EEC Memorandum, supra* note 31, at 896.

[T]he United States, so far as I have been able to determine, is the only nation or authority (including the European Economic Community) that claims the right to enforce its jurisdiction unilaterally to override, in peacetime, contrary national laws or fundamental policies of foreign states concerning conduct taking place wholly or in significant part within foreign territory.

Rosenthal, *supra* note 61, at 488-89.

69. See *Schoenbaum v. Firstbrook*, 405 F.2d 200, *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969); *Tamari v. Bache & Co. (Lebanon)*, 547 F. Supp. 309 (N.D. Ill. 1982), *aff'd*, 730 F.2d 1103 (7th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984); *S.E.C. v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

70. See *supra* text accompanying note 65. For example, Japanese insider trading provisions, modelled after the United States Securities Exchange Act of 1934 §§ 10(b), 16(b), 15 U.S.C. §§ 78j(b), 78p(b) (1982), and rule 10(b)(5), 17 C.F.R. § 240.10b-5 (1988); see Tsunematsu, Yanese, Yasuda & Tokuoka, *Japan*, in 3 Int'l Sec. Reg. (Oceana) Booklet 1: Commentary 62-69 (June 1986), tend not to be frequently invoked or strictly enforced. See *id.* at 68; *Tatsuta, Japan*, in 10C Int'l Cap Mkt. & Sec. Reg. (Clark Boardman) §§ 11.10-14 (H. Bloomenthal ed. Aug. 1988) (general antifraud provision not regarded as a source of private remedy).

71. See *supra* note 33; *supra* note 66 and accompanying text.

in *Schoenbaum v. Firstbrook*,<sup>72</sup> where the Second Circuit upheld U.S. jurisdiction over a derivative suit brought on behalf of a Canadian corporation, despite the fact that the challenged transaction involved Canadian stock and had taken place in Canada.<sup>73</sup> Because the stock itself had been registered on the American Stock Exchange, the Second Circuit held that an assertion of extraterritorial jurisdiction was necessary "to protect the domestic securities market from the effects of improper foreign transactions in American securities."<sup>74</sup>

The effects doctrine was applied again to an international securities transaction in *Tamari v. Bache & Co. (Lebanon) S.A.L.*<sup>75</sup> *Tamari* involved misrepresentations made in Lebanon by a Lebanese defendant to a Lebanese plaintiff, where the defendant placed orders through its U.S. parent company's Chicago office for execution on two different U.S. exchanges.<sup>76</sup> The trial court held that "in a case such as this, where the challenged transactions involve trading on domestic exchanges, harm can be presumed, because the fraud alleged implicates the integrity of the American market."<sup>77</sup>

The extraterritorial reach of U.S. securities laws eventually came into direct conflict with Swiss bank secrecy laws in *SEC v. Banca Della Svizzera Italiana*.<sup>78</sup> In that case, the defendant, a Swiss bank, refused to disclose to the SEC the identities of its customers in Switzerland, claiming that disclosure would subject it to criminal liability under Swiss penal and banking law.<sup>79</sup> Applying the Restatement Second test to resolve the conflict, the district court found the United States's interest in the protection of its securities markets sufficiently compelling to justify a U.S. order directing the Swiss bank to comply with the discovery order.<sup>80</sup> Switzerland, however, was satisfied with neither the end result nor the process by which that result was

72. 405 F.2d 200, *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

73. *Id.* at 208.

74. *Id.* at 206.

75. 547 F. Supp. 309 (N.D. Ill. 1982), *aff'd* 730 F.2d 1103 (7th Cir. 1984).

76. *Id.* at 310.

77. *Id.* at 313.

78. 92 F.R.D. 111 (S.D.N.Y. 1981).

79. *Id.* at 117.

80. *Id.* at 112.



achieved.<sup>81</sup>

B. *Resolution of Jurisdictional Conflicts:  
The Interest-Balancing Approach*

The balancing test set forth in the Restatement Second section 40<sup>82</sup> was adopted in *Timberlane Lumber Co. v. Bank of America*<sup>83</sup> to aid in the resolution of an international antitrust dispute. In *Timberlane*, the effects doctrine was criticized as being "by itself . . . incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country."<sup>84</sup> By requiring an analysis of this relationship, *Timberlane* modified *ALCOA*; this modification took the form of the balancing test of the Restatement Second section 40.<sup>85</sup> The court noted that federal antitrust statutes, like much federal regulation, contain "sweeping jurisdictional language";<sup>86</sup> "it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction."<sup>87</sup> The court further observed a distinct feature of antitrust law: commercial market reactions, on which "effects" jurisdiction is often based, generally extend well beyond the borders of the United States.<sup>88</sup> Thus, the interest-balancing test was seen as a method by which the substantiality of the effect could be determined; whether the effect within the

81. See Symposium, *supra* note 68, at 790.

If secrecy has to be lifted against the will of its master, this can be properly done only by compulsion that is imposed by Swiss authorities, not by a U.S. court that punishes the party or witness with contempt sanctions. The balance of interests test is no solution since Switzerland, among many other nations, opposes it and does not accept that a U.S. court may decide under what circumstances Swiss law has no effect on Swiss territory.

*Id.*

82. RESTATEMENT SECOND, *supra* note 1, § 40; see *supra* note 45.

83. 549 F.2d 597 (1976), *aff'd on rehearing*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

84. *Id.* at 611-12.

85. See *id.* at 613-14.

86. *Id.* at 609 n.14.

87. *Id.* at 609.

88. *Id.* at 611. "[A]nything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States." *Id.* (quoting Katzenbach, *Conflicts on an Unruly Horse*, 65 YALE L.J. 1087, 1150 (1956)).

United States was substantial would be determined by comparison with the effect abroad.<sup>89</sup>

*Timberlane*, in examining the Restatement Second balancing test, made two important observations about the test itself. First, it noted that the Restatement Second test "was obviously fashioned with trade regulation problems in mind, for all five illustrations presented in the comment to this section involve such regulation."<sup>90</sup> Second, it noted that section 40 indicates that "'jurisdictional' forbearance in the international setting is more a question of comity and fairness than one of international power."<sup>91</sup> This interpretation is reinforced by the fact that section 40 counsels moderation of enforcement, rather than prescriptive, jurisdiction;<sup>92</sup> a state may have jurisdiction to prescribe law but nonetheless, under section 40, should refrain from enforcing that prescription in deference to legal and policy interests of another state. This suggests that section 40's function is that of an abstention provision, rather than a definition of the outermost boundaries of a state's jurisdictional reach.<sup>93</sup> Thus, section 40 allowed a degree of judicial discretion, although it failed to ensure that the United States

89. See *Timberlane*, 549 F.2d at 610-13.

90. *Id.* at 613 n.27.

91. *Id.*; see *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). "When foreign nations are involved . . . it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction." *Id.* at 1296 (emphasis added).

92. See RESTATEMENT SECOND, *supra* note 1, § 40; *supra* note 45.

93. Abstention doctrine allows a court with valid jurisdiction over a dispute to decline from exercising that jurisdiction in a limited set of circumstances. See generally, WRIGHT, *LAW OF FEDERAL COURTS* § 52 (1983). For example, in *Younger v. Harris*, 401 U.S. 37 (1971), the U.S. Supreme Court overturned a valid lower court injunction barring a local district attorney from prosecuting an individual, despite the lower court's authority to enjoin, admittedly existing under 28 U.S.C. § 2283. The Supreme Court supported its action on principles of "comity," or a "proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of state governments." *Id.* at 44. Considerations of comity in the federal-state relationship are analogous to considerations of comity in the international context. Cf. *supra* note 91 and accompanying text. The difficulty remains where foreign states do not accept the United States's presumption of jurisdiction, even if that jurisdiction is not actually exercised:

[T]he U.S. courts claim subject matter jurisdiction over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations. Although in recognition of international objections to the wide reach of anti-trust law enforcement in civil cases, the U.S. courts have begun to devise tests which may limit the circumstances in

would interpret its own prescriptive jurisdiction abroad as subordinate to that of the territorial state.

*C. Extraterritorial Assertions of the Executive  
and Legislative Branches*

The Restatement Second's jurisdictional provisions define prescriptive jurisdiction as the capacity of a state to make law, whether by the legislative, executive, or judicial branch.<sup>94</sup> However, as noted in the previous section, the limitations of section 40 appear to function as abstention principles rather than as jurisdictional limits and, thus, are more likely to be read as speaking solely to the judicial branch.<sup>95</sup> In practical terms, this means that the executive and legislative branches might not apply the balancing of interests to limit their extra-territorial prescriptions.

This was precisely the situation that arose in 1982, when, in an attempt to inhibit the construction of the Soviet trans-Siberian pipeline, the U.S. Department of Commerce amended the U.S. Export Administration Regulations.<sup>96</sup> The amended regulations required permission of the U.S. government before any goods or technological data of U.S. origin could be exported or re-exported to the Soviet Union, if such goods or data related to oil and gas exploration, transmission, or refinement.<sup>97</sup> The restrictions were to apply to "person[s] subject to the jurisdiction of the United States," defined as including not only U.S. citizens, residents, and corporations, but also any person within the United States and "[a]ny partnership, association, corporation, or other organization, wherever organized or doing business, that is owned or controlled" by any of the persons or entities enumerated above.<sup>98</sup> The European Eco-

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which the remedy may be available, these tests remain within these wider claims to jurisdiction to which Her Majesty's Government object.

*United Kingdom Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill*, 21 I.L.M. 847, 849-50 (1982).

94. RESTATEMENT SECOND, *supra* note 1, § 6 comment a; *see supra* text accompanying note 15.

95. *See supra* notes 82-93 and accompanying text.

96. 47 Fed. Reg. 27,250 (1982), amending 15 C.F.R. §§ 376, 379, 385 (1982), repealed by 47 Fed. Reg. 51,858 (1982).

97. *Id.*

98. *See* 47 Fed. Reg. 27,252 (1982), amending 15 C.F.R. § 385.2(c)(2) (1982), repealed by 47 Fed. Reg. 51,858 (1982). The broad sweep of this provision would mean

conomic Community (the "EEC") responded with a memorandum (the "EEC Memorandum")<sup>99</sup> that was sharply critical of the United States's attempt to extend its jurisdiction, solely on the basis of control by U.S. shareholders, to EEC-registered corporations doing business in Europe.<sup>100</sup>

The EEC Memorandum, relying on the Restatement Second as a valid statement of U.S. policy,<sup>101</sup> noted that the United States failed to evaluate EEC interests in four ways: first, the EEC interest in regulating foreign trade of its own nationals is paramount over U.S. foreign policy purposes; second, conduct would take place within the territory of the EEC and not within the United States; third, nationality ties may be stronger to EEC Member States than to the United States; and fourth, justified expectations of these EEC nationals might be hurt by the measures.<sup>102</sup> The EEC Memorandum also noted that interest-balancing should take place at the rule-making stage, because the offending legislation "may not be subject to substantive judicial review. This means that U.S. Courts may not be able to apply their balancing of interests approach in a clash of enforcement jurisdiction. It is therefore appropriate for the executive to apply it at the rule-making stage."<sup>103</sup>

Although the amendments to the U.S. Export Administration Regulations were later repealed,<sup>104</sup> the question remains as to whether the political branches consider themselves bound by the limitations of the interest-balancing test. This question remains unanswered in the Restatement Third's jurisdictional scheme.

### III. *THE RESTATEMENT THIRD PROVISIONS*

The cases outlined above evidence no clear consensus of international law to support the principles that underly the

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that a foreign businessperson traveling through the United States would be subject to U.S. export controls if he or she controlled a foreign-registered business operating entirely abroad, if that business exported the forbidden technology to the Soviet Union, even though the business might be operating within the law in its own territory. *Id.*

99. See *EEC Memorandum*, *supra* note 31.

100. *Id.*

101. See *id.* at 899-901.

102. *Id.* at 901.

103. *Id.* at 900.

104. See 47 Fed. Reg. 51,858 (1982).

United States's broad assertions of extraterritorial jurisdiction.<sup>105</sup> It is further evident that restatements are relied upon for guidance, both within the United States<sup>106</sup> and abroad.<sup>107</sup> Whether or not the U.S. government (or, in fact, any sovereign) chooses to act within boundaries generally accepted within the international community, it is nonetheless helpful to each state to understand where those boundaries are. An examination of the Restatement Third provisions demonstrates that it has failed to accomplish such a purpose.

First, in its treatment of effects jurisdiction, the Restatement Third creates a provision with less common law support and fewer limitations than that which existed under the Restatement Second.<sup>108</sup> Second, its interest-balancing formula gives inadequate guidance to the judiciary on how enforcement jurisdiction might be moderated, while at the same time, it fails to safeguard against improper extraterritorial prescriptions on the part of the political branches.<sup>109</sup> Finally, it should be emphasized that conflicts of policy, rather than of prescriptions, are the true source of jurisdictional conflicts. These conflicts are more appropriately resolved through diplomatic communication with the territorial state, not through unilateral interest-balancing by the judiciary.<sup>110</sup>

#### A. *Effects Jurisdiction Under the Restatement Third*

In *SEC v. Banca Della Svizzera Italiana*,<sup>111</sup> the Restatement Second formulation of effects jurisdiction was used to justify attempts to extend the reach of U.S. law and its attendant enforcement mechanisms so as to override the territorial authority of Switzerland.<sup>112</sup> The decision was criticized by the Swiss as an unacceptable intrusion,<sup>113</sup> thus illustrating the question of the degree to which effects jurisdiction may or may not be recognized internationally.

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105. See *supra* notes 68, 81, 93, and text accompanying note 102.

106. See *supra* note 5.

107. See *EEC Memorandum*, *supra* note 31, at 899.

108. See *infra* notes 111-20 and accompanying text.

109. See *infra* notes 121-30 and accompanying text.

110. See *infra* notes 131-40 and accompanying text.

111. 92 F.R.D. 111 (S.D.N.Y. 1981).

112. See *supra* notes 78-80 and accompanying text.

113. See *supra* note 81 and accompanying text.

If it is questionable whether the Restatement Second formulation of effects jurisdiction has found acceptance abroad,<sup>114</sup> the Restatement Third can hardly be said to have brought respectability to it. Antitrust jurisdiction, from which the effects doctrine was originally drawn, is treated in a separate provision; this provision, in accordance with *ALCOA*, requires *both* actual and intended effects within the territory.<sup>115</sup> The Restatement Third formulation of effects jurisdiction, however, draws a general jurisdictional principle that extraterritorial conduct may be subject to regulation where there is *either* actual or intended effect within the territory of the regulating state.<sup>116</sup> This principle broadens the Restatement Second's application of "effects" jurisdiction in three ways. First, it allows for prescription where there is nothing more than the intent to cause effects within the territory of a state.<sup>117</sup> Second, effects jurisdiction is no longer limited to conduct that is generally recognized as a crime or tort under the law of states that have reasonably developed legal systems.<sup>118</sup> And third, the separation of securities and antitrust jurisdiction from the gen-

114. See *supra* note 68.

115. RESTATEMENT THIRD, *supra* note 7, § 415.

Jurisdiction to Regulate Anti-Competitive Activities

(1) Any agreement in restraint of United States trade that is made in the United States, and any conduct or agreement in restraint of such trade that is carried out in significant measure in the United States, are subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct.

(2) Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

*Id.*; see *supra* notes 62-63 and accompanying text. A similar provision is given with respect to jurisdiction to regulate securities. See RESTATEMENT THIRD, *supra* note 7, § 416.

116. See RESTATEMENT THIRD, *supra* note 7, § 402(1)(c); *supra* note 35.

117. See RESTATEMENT THIRD, *supra* note 7, § 402(1)(c); *supra* note 35.

118. Compare RESTATEMENT THIRD, *supra* note 7, § 402(1)(c); *supra* note 35 with RESTATEMENT SECOND, *supra* note 1, § 18; *supra* note 33 (requiring extraterritorial

eral provision may have the effect of releasing effects jurisdiction from limitations that have in the past been imposed by common law. This is because antitrust and securities cases, while applying the Restatement Second jurisdictional test, would nonetheless be bound by common-law jurisdictional tests as well.<sup>119</sup> As the Restatement Third treats these two areas in separate provisions,<sup>120</sup> the general area of effects jurisdiction now stands free of these additional common-law limitations. While the separate treatment of securities and antitrust jurisdiction implies that the general effects provision will be invoked with less frequency, it also implies that once invoked, the provision might allow "effects" to be interpreted more broadly. Thus, the Restatement Third has substantially relaxed limitations on a state's permissible exercise of effects jurisdiction, while increasing the likelihood that such exercise will conflict with the laws of the territorial state.

## B. Interest-Balancing Under the Restatement Third

### 1. Judicial Interest-Balancing

The interest-balancing test of the Restatement Third, as outlined above, presents a formula with which a state must consider the reasonableness of its prescriptions.<sup>121</sup> The formula was put to a practical test in *Laker Airways v. Sabena, Belgian World Airways*.<sup>122</sup> In *Laker*, the D.C. Circuit was called upon to review the propriety of a district court's preliminary injunction barring the defendant airlines from seeking antisuit injunctions in the United Kingdom against the plaintiff;<sup>123</sup> defendants in a previous suit had sought and obtained such relief both before and after the initiation of U.S. antitrust action.<sup>124</sup> In upholding the injunction, the court examined the jurisdic-

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conduct and effect to be generally recognized as elements of a crime or tort under the law of states that have reasonably developed legal systems).

119. For example, an antitrust controversy would still require the element of intent to cause effects under *ALCOA*, even though the Restatement Second had no such requirement. Compare *supra* notes 62-63 and accompanying text with RESTATEMENT SECOND, *supra* note 1, § 18; *supra* note 33 (requiring actual effects but no intent to cause effects).

120. See *supra* note 115.

121. See *supra* notes 49-57 and accompanying text.

122. 731 F.2d 909 (D.C. Cir. 1984).

123. *Id.* at 915.

124. See *id.* at 914-15.

tional tests in both the Restatement Second and the Restatement Third.<sup>125</sup> While most of the balancing factors listed in section 403 were acknowledged as being useful to the determination as to whether sufficient national contacts exist to support a finding of jurisdiction, "their usefulness breaks down when a court is faced with the task of selecting one forum's prescriptive jurisdiction over that of another."<sup>126</sup> Furthermore, the opinion notes that factors such as the interest of other states in regulation and the likelihood of conflict might be useful insofar as they forecast whether a conflict will arise, but give no guidance as to how such a conflict should be resolved.<sup>127</sup> Finally, the remaining factors "generally incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing."<sup>128</sup>

In examining these political factors, the court unearthed a further defect in the interest-balancing approach, namely, that where political branches of the government have relied upon a valid base of prescriptive jurisdiction to enact law in furtherance of national policy, the desirability of that law is not an appropriate subject for judicial review.<sup>129</sup> The Restatement

125. *See id.* at 948-50.

126. *Id.* at 948.

127. *See id.* at 948-49.

128. *Id.* at 949.

129. *Id.* This defect may be further exacerbated by the Restatement Third's having shifted the emphasis in the definition of prescriptive jurisdiction from the process of making the law to the process of applying it; the balancing of interests would now seem beyond question to be a judicial function, rather than a legislative function. *See supra* note 20 and accompanying text. In a footnote, the *Laker* decision recognizes that

[b]ecause Congress and the Executive can neither anticipate nor resolve all conflicts with foreign prescriptive jurisdiction, they legitimately expect the full participation of the Judiciary in minimizing conflicts of jurisdiction . . . . Evaluating the strength of the United States interests in a particular transaction to determine the reasonableness of an assertion of jurisdiction is consistent with those expectations and assures that concurrent jurisdiction will never be lightly assumed.

*Laker*, 731 F.2d at 952 n.169. This observation allows for a measure of moderation in the form of abstention; if the U.S. basis of jurisdiction is not overly broad, factors such as those enumerated in RESTATEMENT SECOND, *supra* note 1, § 40; *see supra* note 45, which focus on territorial links, would give appropriate guidance to a court. However, the *Laker* decision notes that the factors enumerated in the Restatement Third test focus more on political concerns that are beyond the judiciary's authority to consider. *See supra* text accompanying note 128.



Third defines—and thus limits—prescriptive jurisdiction without regard to whether it arises out of the executive, legislative, or judicial branch.<sup>130</sup> However, with regard to limitations on prescriptive jurisdiction, these “political factors” are generally presented to the judiciary, which is the one branch of the government for whom, in the absence of constitutional violation, the authority to overturn a particular law is most in doubt.

## 2. Executive and Legislative Interest-Balancing

As with the Restatement Second, the Restatement Third balancing test applies to prescriptions generally, whether they arise out of the exercise of executive, legislative, or judicial power.<sup>131</sup> In a situation such as the pipeline controversy,<sup>132</sup> the political branches would have been expected to determine the reasonableness of an assertion of U.S. jurisdiction over EEC nationals acting lawfully within their own territory.<sup>133</sup> As noted above, the factors enumerated in section 403 incorporate concerns of national interest and international comity—concerns that are appropriate for consideration by those political branches.<sup>134</sup> However, as the EEC Memorandum noted, the political branches failed to engage in a good-faith balancing of interests when expanding the reach of U.S. export controls.<sup>135</sup>

The problem here was not with the factors themselves, but rather with the expectation that the political branches would fairly balance U.S. and foreign interests. In the litigation context, from which the concept of interest-balancing was drawn, opposing interests will be presented to an (ideally) impartial judge. The adversarial process provides a forum for the presentation of these opposing interests, and this forum is, for the most part, unique to the judicial branch. The executive and legislative branches, on the other hand, often operate solely to the benefit of their own constituency in a politically sensitive (and often emotionally charged) climate. When given the task of balancing U.S. and foreign interests, these branches will be

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130. See *supra* note 20 and accompanying text.

131. *Id.*

132. See *supra* notes 96-104 and accompanying text.

133. See RESTATEMENT THIRD, *supra* note 7, § 403; *supra* note 45.

134. See *supra* notes 127-30 and accompanying text.

135. See *supra* text accompanying note 102.

less likely to favor the greater interest than the more popular one. While criticism abroad has indeed focused on the need for moderation by U.S. lawmakers,<sup>136</sup> the real problem is not so much moderation within the boundaries of the United States's subjective interpretation of its own jurisdiction, but rather a clearer understanding of the limits of U.S. jurisdiction under international law.<sup>137</sup> A clearer statement of extraterritorial jurisdiction under international law would have met this need.

The Restatement Third has expanded the permissible bases for jurisdiction;<sup>138</sup> it has not presented actual moderation as a requirement of international law, and has not brought federal interpretations of jurisdiction in line with those accepted by the international community.<sup>139</sup>

### *C. National Policies: The Source of the Conflict*

When a criminal fires a gun across an international border and wounds a victim on the other side, most states in the international community would be in agreement, more or less, on the conduct in question being recognized as a crime or a tort. Among friendly nations, and all other factors being equal, there would be no true jurisdictional conflict, as both states would be in agreement on the need to deter violent criminal behavior.<sup>140</sup> True jurisdictional conflicts arise where the inter-

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136. See *supra* note 103 and accompanying text.

137. See *supra* notes 82-93; see also Rosenthal, *supra* note 61, at 488-91.

138. See *supra* notes 35-44 and accompanying text.

139. The Restatement Third acknowledges that federal law may be inconsistent with "international" law. The federal prescription does not then become invalid under international law; however, its enforcement may subject the United States to liability under international law. See *RESTATEMENT THIRD*, *supra* note 7, § 115. It is difficult to see how this approach provides comfort to a foreign litigant being prosecuted in the United States under U.S. export controls. See *supra* notes 94-104 and accompanying text.

140. See Remarks of Adrian S. Fisher, 39 *A.L.I. PROC.* 316 (1962).

Well, when you get to the conventional crimes, there has really been no argument between any of the various proponents on [effects jurisdiction]. . . . [W]e used rather esoteric illustrations because my colleagues on the reportorial staff had threatened to resign if I ever used the term "shooting across the border" again. . . . I came back from Switzerland about a month ago, and, lo and behold, there was a bona fide international dispute in which a Swiss border guard shot and severely wounded an Italian after a slight difference of opinion that grew up over a customs matter.

*Id.*

ests of nations differ: where the U.S. policy of securities enforcement comes into conflict with the Swiss policy of bank confidentiality,<sup>141</sup> where U.S. policy encouraging private anti-trust actions conflicts with British policies against private attorneys-general,<sup>142</sup> or where U.S. policy regarding the Soviet trans-Siberian pipeline is inconsistent with European Economic Community policy.<sup>143</sup> In these situations, and in those to arise in the future, conflicts can better be resolved through good-faith diplomatic efforts.

The problem with the Restatement Second jurisdictional provisions was that the balancing of interests was more adapted to judicial abstention than to executive and legislative moderation; this defect has been carried through to the Restatement Third despite the adoption of political factors in the interest-balancing test. Where conflicting prescriptions arise out of clashes in national policy, it is unlikely that either the executive or the legislative branch (and, as a consequence, the judiciary) will see another state's political concerns as paramount over U.S. interests. Judicial abstention itself is a wise solution in circumstances where jurisdictional clashes are unforeseeable; in such situations, it is appropriate for the judiciary to weigh interests under federal law. However, to avoid these clashes where possible, the U.S. government must have a clear understanding of what is acceptable prescription in the international community. Excessive reliance on the Restatement Third jurisdictional test will not further this end: to be

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141. Compare *S.E.C. v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 112 (S.D.N.Y. 1981) (compelling disclosure of defendant's clients in violation of Swiss penal and banking law necessary to protect vital U.S. interests) with *Symposium*, *supra* note 68, at 789-90 (bank secrecy is a firmly entrenched principle of Swiss law).

142. Compare *United States Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill*, 21 I.L.M. 840, 843 (1982) ("United States antitrust law reflects a public policy so important to the United States that violations carry criminal penalties. The private treble damage action is a crucial aspect of United States antitrust enforcement.") with *United Kingdom Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill*, 21 I.L.M. 847, 849 (U.K. policy opposes private enforcement of public law) and *Symposium*, *supra* note 68, at 775.

143. See *EEC Memorandum*, *supra* note 31, at 895.

The practical impact of the Amendments to the Export Administration Regulations is that E.C. companies are pressed into service to carry out U.S. trade policy towards the U.S.S.R., even though these companies are incorporated and have their registered office[s] within the Community which has its own trade policy towards the U.S.S.P.

*Id.*

effective, jurisdictional boundaries, no less than national boundaries, must be clearly drawn.

*CONCLUSION*

The value of a restatement is in the guidance that it gives to both the U.S. government and those with whom the United States deals abroad. This guidance should properly have taken the form of a precise outline of jurisdictional boundaries as generally accepted by the international community, with the balancing of interests treated as an abstention consideration under federal law. The Restatement Third formulation of effects jurisdiction does not accomplish this purpose. Furthermore, by presenting political interest-balancing factors to the judiciary, the Restatement Third fails to give guidance on jurisdictional limitations where it is most needed: at the lawmaking stage.

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