Interest Balancing and Extraterritorial Jurisdiction

INTRODUCTION

The extraterritorial application of United States law has been an irritant in United States relationships with its allies and other trading partners since World War II. Other governments have regularly voiced objections in principle to assertions by United States courts, government officials or commentators that the norms of United States regulatory legislation govern events or persons located abroad. The sharpest confrontations and the ones with the greatest potential for disrupting amicable political and economic relations, however, occur when the United States seeks to use its power over persons or entities before its courts or agencies to enforce its policies by requiring or prohibiting acts or omissions abroad that are contrary to the laws or policies of the foreign territorial sovereign.

HAROLD G. MAIER is Professor of Law and Director of Transnational Legal Studies, Vanderbilt Law School. This article is based on an unpublished paper presented at the International Law Section of the Association of American Law Schools, 7 January, 1983, in Cincinnati, Ohio. The author wishes to acknowledge the excellent research assistance provided by Mr. Michael Russell, Research Editor, Vanderbilt Journal of Transnational Law, '84.


United States efforts to exercise control over technology and to exert pressure on U.S. business entities to prevent participation by European enterprise in the construction of the Soviet natural gas pipeline resulted in just such a confrontation. These jurisdictional


3. In 1981, the Soviet Union finished a series of agreements with several European enterprises to construct a pipeline to deliver Russian natural gas to Western Europe. This arrangement had the blessing of the European governments affected. When General Jaruzelski imposed martial law in Poland in December 1981 to deal with internal agitation to create a freer Polish society, the United States accused the Soviet Union of complicity in Jaruzelski's action. On 29 December, the United States government banned the export of U.S. manufactured oil and gas equipment for use in constructing the pipeline. On 18 June 1982, President Reagan, acting under the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (amending 50 U.S.C. app. §§ 2401-13 (1976)), expanded the ban to include equipment produced by foreign subsidiaries of U.S. companies as well as equipment manufactured abroad by U.S. licensees. European nations protested the June 18 ban. The West German government offered loan guarantees in June to the failing AEG Company that had a substantial contract in connection with the pipeline. One 21 June, Soviet Foreign Minister, Andrei A. Gromyko, stated that construction would continue despite the ban. One 30 June, the British government warned that local firms must comply with British, not with U.S., law when there was a conflict, under the British Protection of Trading Interests Act, 1980, ch. 11. President Reagan defended the sanctions, citing the possibility of Soviet blackmail once control over gas supplies was secured and stating that building the pipeline would subsidize the Soviet economy.

On 13 July, several West German banks signed a finance agreement with the Soviet foreign trade bank for $1.6 billion in credits. That agreement was guaranteed by the West German government. On 22 July, the French government ordered French enterprises to honor all pipeline contracts and West German Chancellor Helmut Schmidt gave his support to the French. In response, the U.S. Department of Commerce, at President Reagan's request, outlined the legal effects of the Export Administration Act on licensees of U.S. technology: Licensees were required to comply with the presidential order; the embargo included licenses already issued; business between companies that defied the embargo could be prohibited; fines of up to $100,000 could be imposed; and recourse to the courts was available to enforce these rules.

On 24 July, the Italian government announced it would honor all pipeline contracts. Great Britain in August also ordered British companies to honor pipeline contracts and characterized the assertion of extraterritorial jurisdiction under the United States ban as internationally illegal. The U.S. House of Representatives Foreign Af-
issues of extraterritoriality are of special importance because United States courts and scholars are engaged in on-going efforts to revise and refine the manner in which standards guiding jurisdictional assertions under United States law are being articulated.4

My thesis is simply stated. The development of processes to resolve conflicting claims of authority to forbid or require conduct within a nation's borders is most appropriately carried out by diplomatic exchange, not by judicial decisions in which a forum balances its own interest against the competing interests of other states. A trend toward the development of such processes may be getting underway. Careful nurturing and encouragement of this approach will

fairs Committee voted on 10 August to rescind the U.S. sanctions. Western European leaders formally protested the sanctions on 12 August. On 23 August the French government requisitioned equipment that was earmarked for the pipeline from Dresser, France, a wholly-owned subsidiary of Dallas-based Dresser Industries, Inc. A federal district court denied Dresser Industries a temporary restraining order, citing lack of proof that the ban would cause harm. The U.S. imposed sanctions against Dresser, France, and a French government-owned engineering company. On 1 Sept., the U.S. government narrowed the scope of its sanctions in France to apply solely to purchases of U.S. oil and gas equipment. Nevertheless, additional sanctions were imposed by the Commerce Department on 9 Sept. against British and Italian companies allegedly violating the ban. The British government once again ordered British companies to defy the ban and fulfill their pipeline contracts in accordance with British law.

On 29 Sept., the House of Representatives came within three votes of requiring rescission of the sanctions. The Commerce Department imposed sanctions against four West German companies on 5 Oct. and the U.S. Customs Service executed its first seizure under the trade sanctions on 8 Oct. The pipeline sanctions were finally lifted by President Reagan on 13 Nov. when he announced that the U.S. and its European allies had agreed to consultations about future concerted action vis-à-vis the Soviet Union in the trade area and that preventing the use of U.S. technology in the pipeline was no longer necessary. The information in this footnote is summarized in 40-42 Facts on File (1980-82).


The Department of State appears to have adopted the official position that it will henceforth characterize these issues as ones involving "conflicts of jurisdiction" instead of using the term "extraterritoriality." Dam, "Extraterritoriality and Conflicts of Jurisdiction," Address to the American Society of International Law, in Dept. of State Current Policy Bulletin, No. 481 at 1 (15 April, 1983); Robinson, "Conflicts of Jurisdiction and the Draft Restatement," Remarks before the International Division of the District of Columbia Bar, 7 June 1983 (copy in author's files) to be published in revised form in Georgetown J. of Int. L. and Pol. in 1984. The danger of this characterization lies in the fact that when used in the context of adjudication by domestic courts, it suggests that these decisionmakers are selecting between applicable laws. Rather, each such adjudicator is determining whether the law of his own jurisdiction is applicable, not whether to apply the regulatory system of some foreign nation. See Maier, "Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law," 76 Am. J. Int'l L. 280, 290 (1982). Thus, the jurisdictional system correctly contains the theoretical possibility that some private activities may be beyond the regulation of any state—but these would necessarily be activities that have no significant impact on the interests of any state.
serve the needs of the international system to resolve such conflicts with emphasis on coordinating competing interests in a climate of international cooperation, not on unilateral resolutions enabled by coercive local power. More important, it will contribute to the development of a community consensus by means of international dialogue on jurisdictional restraints that will further facilitate the flow of transnational commerce.

**INTEREST BALANCING IN THE DIPLOMATIC FORUM**

Three characterizations describe the overlapping jurisdictional considerations involved in determining the legal legitimacy of applying the social policies of a nation to events or persons outside its borders: jurisdiction to adjudicate, jurisdiction to prescribe and jurisdiction to enforce. Assertion of jurisdiction by United States courts to adjudicate claims based on activities of foreign persons carried out abroad usually engenders only the lowest level of foreign concern, primarily because the standards of due process and equal protection in this country require that the exercise of such jurisdiction not be so unfair as to violate minimum fairness standards. The assertion of jurisdiction to prescribe a rule of law applying to foreign events or persons runs a greater risk of interference with foreign sovereign interests because such assertions by a nation with the vast commercial influence of the United States has a coercive effect on acts abroad by persons or enterprises who might believe themselves likely later to become subject to judicial jurisdiction in United States courts. Ordinary prudence argues that the United States standard should be observed by persons or entities having commercial relations in this country, regardless of the validity of the

---

5. These characterizations are recommended in *Restatement of Foreign Relations Law of the United States (Revised)*, Tentative Draft No. 2 (1981). § 401. Categories of Jurisdiction Defined. As used in this Restatement:
   (1) “Jurisdiction to prescribe” means authority of a state to apply its law to the conduct, relations, status or interests of persons, or to things, by legislation, executive act or order, administrative rule or regulation or judgment of a court, whether in general or in particular cases.
   (2) “Jurisdiction to enforce” means the exercise by a state of authority to compel or induce compliance, to reward compliance or to impose sanctions for noncompliance, with statutes, rules, orders, regulations, or judgments, whether through judicial proceedings or otherwise.
   (3) “Jurisdiction to adjudicate” means authority of a state to subject persons or things to the process of its courts or administrative tribunals, whether for the purpose of enforcing the states' laws and regulations or otherwise.


7. Rosenthal & Knighton, supra n. 1 at 8, 26-27, 61.
prescriptive jurisdiction asserted. The assertion of jurisdiction to enforce United States standards by requiring acts or omissions by United States citizens or foreign nationals within the borders of foreign nations creates a clash of governmental policies that can be resolved only by capitulation by some or compromise by all in the light of principles of international law reflecting a weighing of both sovereign and community interests.  

The conflict between the United States and its foreign allies over the Soviet pipeline construction contracts illustrates such a resolution in the international diplomatic forum. The United States sought to use its power over domestic corporations to influence them to put pressure on their foreign branches or subsidiaries not to fulfill contracts to deliver goods or technology to the Soviet Union for the pipeline project. The United States' action was inspired by an interest in applying pressure to the Soviet Union to mend its ways in Poland and a desire to prevent its European allies from being placed in a position of dependence on the Soviets' keeping the pipeline open. On the other hand, the European nations involved perceived a real self-interest not only in reaping immediate economic benefit from participating in the huge construction project but longer term interests in diversifying energy resources available to their people. When it became apparent to the United States that its interest in using this form of pressure on the Soviet Union was less than its interest in maintaining effective relationships with its allies and in reassuring foreigners trading with United States connected firms that their commercial contracts would continue to be viable, the United States withdrew its threatened sanctions.

---


Resolution of the pipeline dispute reflected not only the balancing of competing interests that occurred as part of each nation's internal decision-making processes but also that weighing of the relative interests of each nation against those of others that is inherent in the dispute resolution process in the international forum. This interest balancing in the formulation of reliable international jurisdictional rules in the diplomatic forum contrasts with that other “balancing of interests” that has been alluded to by United States courts and by some scholars to describe an appropriate mode for judicial resolution of extraterritorial jurisdictional conflicts in United States domestic forums.

In the diplomatic forum, the label “balancing of interests” merely characterizes the ordinary international law formation process of demand, response and eventual accommodation in the light of reciprocal national needs and tolerances. The rules of international law describe community expectations that result from this process. Jurisdictional rules are fundamental because they describe community expectations about the reach of sovereign power. Therefore, these jurisdictional rules especially must reflect community interests. If they do not, jurisdictional principles become instruments of anarchy, not of order, and lose their utility as organizing principles for transnational conduct.

It is for this reason that the territorial principle of jurisdiction and its variations continues to serve as the benchmark against which other jurisdictional principles are weighed. The principle serves both to limit state authority and to distribute competence among political units. In this latter role, it enables the regulation of transnational activities by states in a system built on the funda-

4 (14 Nov. 1982). Speculation in some quarters that the President's justification was merely a face saving maneuver was fueled by France's categorical denial of its participation in an agreement when it disassociated itself from the new U.S. position. "France Denies Trade Pace Was Reached," id. at A10, col. 4 (15 Nov. 1982).


16. See Rosenthal & Knighton, supra n. 1 at 26-28, 58, 86-87; Lowenfeld, supra n. 1 at 367; Atwood & Brewster, supra n. 1 at 159-64; Kestenbaum, supra n. 8 at 316-19.


20. McDougal & Reisman, International Law in Contemporary Perspective 1295
mental premise that a state’s *bona fide* territorial interests will be recognized as legitimate by the other members of the international community. This mutual recognition of legitimacy is a central element of the principle of comity and validates the exercise of state power. By characterizing the fundamental parameters of state responsibility, the territorial principle enables the process of reciprocal claim and mutual tolerance that is essential to the functioning of the system. The reciprocal nature of this claim and response process is the functional limit upon the exercise of state power. Therefore, any accurate description of that limit must include reference to a community dynamic. Neither fixed rules nor superficial comparisons of the relative local law interests of a small number of states in contention about a specific assertion of jurisdictional competence will suffice.

Thus, the long-term interests of all nation states in preserving and developing an effective system must necessarily be foremost among the interests that energize diplomatic resolution of jurisdictional conflicts to create precedent compatible with an orderly resolution of future competing jurisdictional claims as well. Both interests in attaining short term benefits and interests in having a system that permits effective future accommodation of competing national claims with a minimum of confrontation and a maximum of flexibility are necessarily influential.

In the pipeline situation, for example, a successful assertion of authority to act as it did by the United States would have seriously injured the reliability of the international jurisdictional system and, thus, have created a never-never land for transnational transactions. Ultimately, the countervailing pressures generated by the confrontation between the United States and its European allies made it clear that all parties had a greater interest in a system that would lend support to the reliability of transnational contracts and reaffirm the authority and responsibility of sovereign states to plot their own

(1981). For a reference to this same role for the territorial principle in a municipal context, see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

21. "Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." Island of Palmas Case (Netherlands v. U.S.), 2 R. Int'l Arb. Awards 829, 839 (1928).

22. Story, *Commentaries on the Conflict of Laws* § 33 at 32 (Bigelow ed. 1883).


25. Maier, supra n. 4 at 318; see McDougall, supra n. 16 at 186; Rosenthal & Knighton, supra n. 21 at 21, 25, 67, 81, 93; Robinson, supra n. 4 at 3.
economic and political destinies than in the creation of community expectations that a single nation in pursuit of short term foreign policy goals could legitimately pressure foreign business entities to act contrary to the perceived interests of their host or national states.  

Another, but less dramatic, illustration of effective compromise of competing jurisdictional interests in the diplomatic forum is the agreement between the United States Securities and Exchange Commission and Swiss banking authorities to permit the release of information about Swiss accounts related to SEC investigations of the insider trading activities in the United States. Swiss banks agreed to furnish such information if the SEC could not obtain it under the United States-Swiss mutual legal assistance treaty. The effect of the SEC agreement is to meet the United States' need for information while recognizing the long-term interests of both nations in avoiding any interference with Swiss interests in maintaining bank secrecy for depositors. Similarly, the United States-Swiss double-tax treaty permits the exchange of information between taxing authorities but prohibits the disclosure of business secrets.


The possible adverse impact of extraterritorial enforcement of U.S. law on the willingness of foreigners to deal with United States firms is not a new concern. See Brief for Appellants at 41-43, United States v. First Nat'l City Bank, Civ. Act. No. M-11-188 (2d Cir. 1967). The court, in its opinion attempted to balance the interests of the United States in receiving the subpoenaed material against the interest of Germany in maintaining bank secrecy but did not deal with the possible adverse effects that a successful assertion of enforcement jurisdiction might have on international trading patterns or commercial contracts. United States v. First Nat'l City Bank, 396 F.2d 897, 902-904 (2d Cir. 1968).


29. Convention on Double Taxation of Income, 24 May 1951, United States-Swit-
though the SEC agreement is not regarded as a true international agreement by the United States Department of State,\textsuperscript{30} both it and the tax treaty result from that compromise of competing interests that is possible in the international negotiating forum.

The United States-Australian agreement on antitrust cooperation establishes a mechanism for effective diplomatic interest balancing, designed to avoid confrontations between the two countries growing out of efforts to apply United States antitrust enforcement to acts or persons in Australia.\textsuperscript{31} In addition to providing for prior notice of contemplated actions or policy changes, the agreement requires that the governments take account of each other's interests and consider modifying governmental policies accordingly.\textsuperscript{32} The United States has agreed to enter U.S. private party antitrust litigation touching Australian interests under the agreement to notify the court of the content of intergovernmental consultations on these issues.\textsuperscript{33} Australia has agreed that its blocking statute will not be triggered solely by United States efforts to use legal processes to procure documents or other evidence located in Australia.\textsuperscript{34} This agreement establishes an appropriate forum for governmental interest balancing and makes the results of that process available to the courts for consideration in domestic adjudications.

The forum of negotiation is the ideal forum in which to accomplish an effective balancing of competing national interests of this kind. In that forum there is no authoritative decision-maker to lend legitimacy to the resolution of the dispute by means of \textit{ex cathedra} statements. Rather, the participants themselves are the legitimizers


\textsuperscript{31} “U.S.-Australia Accord on Antitrust Enforcement” 43 \textit{Antitrust & Trade Reg. Rep.} (BNA) No. 1071, at 36 (1 July 1982).

\textsuperscript{32} Id. art. 2(5)-(6).

\textsuperscript{33} Id. art. 6. The role of messenger accepted by the United States in this agreement is similar to the practice begun in the 1950s when the U.S. government acted as a “sort of post office” to transmit foreign governments' positions to the courts. See Becker, “The Antitrust Law and Relations with Foreign Nations,” 40 \textit{Dept. St. Bull.} 272, 274 (Feb. 1959). Practice since 1978 has been to encourage foreign governments to address the courts directly as \textit{amicus}. See Shenefeld, supra n. 14 at 55, 966.

\textsuperscript{34} Id. art. 5(2).
of the resulting decision. Their dual role as advocates and decision-makers necessarily requires them to balance short-term against long-term interests—or, put another way, to balance interests in achieving specific short-term results against interests in maintaining and developing an effective system for the future. This incentive for effective compromise and mutual tolerance is not present when such competing claims are sought to be resolved by unilateral action in a judicial forum. That domestic courts purport to apply international jurisdictional rules implicitly recognizes the increased legitimacy that community endorsement through an interest balancing process in negotiation or by generally accepted customary practice gives to conclusions about the validity of assertions of U.S. authority to coerce actions in foreign nations. These international jurisdictional norms reflect the results of a process in which the balancing of national interests is the principal characteristic of the law-formation function.

INTEREST BALANCING IN THE NATIONAL JUDICIAL FORUM

The two cases most often cited as modern authority for judicial interest balancing are Timberlane Lumber Co. v. Bank of America and Mannington Mills v. Congoleum Corp. In each of the cases the court listed factors and contacts to be considered in determining whether the standards of United States antitrust law should be applied to events taking place in foreign countries. Each court described the process as one that involved the balancing of governmental interests and reflected the principle of international comity embodied in sec. 40, Restatement (Second) of Foreign Relations Law. The term “interest balancing” suggests a decision-

36. See McDougal, supra n. 15 at 357-58; McDougal, Lasswell and Vlasic, Law and Public Order in Space 647 (1963).
38. 549 F.2d 597 (9th Cir. 1976).
39. 595 F.2d 1287 (3d Cir. 1979).
40. Restatement (Second) of Foreign Relations Law of the United States (1965), see 549 F.2d at 613-14, 595 F.2d at 1296, 1298. The cases have been distinguished on the grounds that Timberlane balances interests to determine whether jurisdiction exists while Mannington Mills balances interests to decide whether existing jurisdiction should be exercised. Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680 (S.D.N.Y. 1979); Case Note, “Antitrust Law: Extraterritoriality-Mannington Mills, Inc.,” 20 Harv. Int. L.J. 667, 673 (1979). The distinction does not affect the court’s endorsement of the interest balancing technique, although it may have an impact on either a court’s willingness to consider foreign interests or on the stage of the case at which interest balancing takes place. See 595 F.2d at 1299-1301 (Adams J. concurring); Shenefeld, supra n. 14 at 55,964.
making process in which the court identifies the interests of the
countries having contact with the situation to be adjudicated, weighs
each country’s interest in having its law applied against that of the
others, and makes the choice of law decision according to the turn of
the scales. Since in these two cases the principal issue was jurisdic-
tion to prescribe, not jurisdiction to enforce, neither court actually
carried out the balancing of interests that it mandated. Each re-
manded to the district court for further proceedings according to the
appellate opinion.41 These cases, together with authority from the
domestic conflict of laws field, represent the principal judicial sup-
port for the interest balancing approach to resolve international ju-
risdictional issues adopted in Sec. 403 of Tentative Draft No. 2 of the
revision of the foreign relations law restatement42 currently under-
way. They are cited by other courts43 and commentators44 to estab-
lish the legitimacy of judicial “interest balancing” in extraterritorial
jurisdiction cases.

The concept of “interest balancing” is directly related to the
concept of comity.45 Comity, in turn, refers both to legal policies
that energize the rules of conflict of laws and to considerations of
high international politics concerned with maintaining amicable and
workable relationships between nations.46 Thus, the term “interest
balancing” includes not only references that are meaningful in the
context of the analytical jurisprudence of choice of law but has
strong political implications as well.47 The remainder of this article

41. At this writing, the Timberlane case is still in the discovery stage after re-
mand. In Mannington Mills, after remand the defendant moved to dismiss on the
grounds that the interest of the United States was so insignificant when compared to
that of each of the other 26 countries involved that no further balancing was required.
After the district court denied this motion, the case was settled. Settlement was ap-
parently encouraged in part by the difficulty involved in gathering and submitting
facts sufficient to permit effective balancing of the interests of each of the other coun-
tries against those of the United States. Cf. Shenefeld, supra n. 14 at 55,964.

42. Restatement of Foreign Relations Law of the United States (Revised), Tent.

43. See United States v. Vetco, Inc., 691 F.2d 1281, 1288-89 (9th Cir. 1981) as
AMAX Inc., 661 F.2d 864, 869-70 (10th Cir. 1981); El Cid, Ltd. v. New Jersey Zinc Co.,
551 F. Supp. 626, 629, n.5 (S.D.N.Y. 1982); Vespa of Am. Corp. v. Bajaj Auto Ltd., 550 F.
Supp. 224, 227-29 (S.D. Cal. 1982); Conservation Council of W. Austl., Inc. v. Aluminum
Co. of Am., 518 F. Supp. 270, 275 (W.D. Pa. 1981); Zenith Radio Corp. v. Matsushita

44. See, e.g., Lowenfeld, supra n. 1 at 407-11; Rosenthal & Knighton, supra n. 1 at
26-28; Ongman, “‘Be No Longer a Chaos’: Constructing a Normative Theory of the
Sherman Act’s Extraterritorial Jurisdictional Scope,” 71 Nw. U.L. Rev. 733, 741 (1977);
Kestenbaum, supra n. 14 at 316; Robinson, supra n. 4 at 4.

45. Atwood and Brewster, supra n. 1 at 163-66, 173-78.

46. See Maier, supra n. 25 at 281-85.

47. Shenefeld, supra n. 14 at 55,959; Baxter, “Antitrust in an Interdependent
addresses only the first element—the utility of judicial “interest balancing” as an analytical tool to enable decisions that will effectively coordinate the relevant substantive policies of nation-states and thus contribute to the development of a workable and reliable trans-national jurisdictional system.48

The adoption of the term “interest balancing” to describe the touchstone of legal analysis in these cases is unfortunate. In the domestic judicial forum the concept implies an unwarranted flexibility that encourages “reasonableness” as a substitute for analysis and leads to the assertion of the primacy of United States interests in the guise of applying an international jurisdictional rule of reason49 without identification of the policies to whose achievement that reasonableness should be directed.50 In cases such as Timberlane and Mannington Mills which deal with jurisdiction to prescribe rules of law to apply to foreign-based events, the interest balancing process principally involves identifying the interests that the appellate court believes should be considered, leaving for further consideration in the light of additional evidence the extent to which one nation’s interests can be said to outweigh the other’s. Although those cases involving enforcement jurisdiction in which the resolution of a direct clash of national interests is required use the balancing rubric, they either give foreign national interests short shrift or ignore them completely. Some recent cases are illustrative.

In United States v. Vetco, Inc.51 the Internal Revenue Service sought documents located in Switzerland pertinent to business activity of two of Vetco’s Swiss subsidiaries. A Swiss blocking statute made it a criminal offense to divulge business secrets to foreigners in certain circumstances. The District Court held Vetco in contempt for refusing to require its subsidiaries to produce the documents and the Ninth Circuit affirmed. The Court of Appeals compared the “strong American interest in collecting taxes” and discovering tax fraud52 with what it declared to be Switzerland’s weak interest in keeping the information private. At no time did the Court inquire about the governmental purpose of the blocking statute, nor did it evaluate the conflicting jurisdictional claims in the light of interna-

48. Useful discussions of the role of the courts as participants in the foreign policy decision-making process in extraterritorial jurisdiction cases are found in Atwood and Brewster, supra n. 1 at 175-78; Kestenbaum, supra n. 14 at 335-44; Shenefeld, supra n. 14 at 55,964-66; Kadish, “Comity and the International Application of the Sherman Act: Encouraging the Courts to Enter the Political Arena,” 4 Nw. J. Int’l L. & Bus. 130 (1982).
49. The phrase is taken from Brewster, Antitrust and American Business Abroad 446 (1958), quoted in 549 F.2d at 613.
50. Maier, supra n. 23 at 318-19.
tional community interests. Most of the opinion is devoted to a discussion of the fairness to the private parties whose rights might be affected by requiring production under these circumstances.

The same Swiss statute was involved in SEC v. Banca Della Svissera Italiana. In that case the SEC sought information about the identities of principals for whom the Swiss bank had acted in a stock purchase deal in which the SEC suspected insider trading. The court asserted that its decision to require disclosure resulted from a careful balancing of the governmental interests at stake as well as consideration of other factors. In fact, the court’s analysis of governmental interests amounted principally to pointing out that the United States securities laws were important, that bank secrecy made it difficult to enforce them and that the Swiss government had not objected to the court’s ordering disclosure except to point out that disclosure without permission of the bank’s clients would open the bank to criminal prosecution.

A third illustration is United States v. Bank of Nova Scotia. In this case a Canadian bank refused to submit documents subpoenaed for a grand jury investigation of alleged narcotics and tax law violations on the grounds that the Bahamian bank secrecy laws prohibited the branch that held the documents from releasing them. The court of appeals ordered disclosure on the grounds that the United States’ interest in disclosure was greater than the Bahamian interest in preventing it. In arriving at this conclusion, the court made no effort even to identify the competing policies represented by the disclosure order on the one hand and the bank secrecy requirement on the other. It found the Bahamian interest weak because the Bahamians would permit disclosure for their own local law purposes, but not for use in foreign tax investigations. It was most significant that the court made it clear that the Bahamian law interfered with the United States need to enforce its own legal requirements and therefore would not be given effect.

These cases are unsatisfactory for at least three reasons. First, the courts focus on the national interests reflected in the local laws in conflict, ignoring internal systemic interests that more accurately reflect the relationship between the authority claimed by the nations involved and their ability to function as responsible and independent sovereigns for municipal purposes. The internal systemic interests that are implicitly in conflict in these cases are the United States interest in having available all the information

54. For an excellent comment on this case, see Lowenfeld, “Bank Secrecy and Insider Trading: The Banca Della Svissera Italiana Case,” 15 The Rev. of Securities Regulation 942 (24 March 1982).
55. 691 F.2d 1384 (11th Cir. 1982), cert. denied 454 U.S. 1084 (1983).
necessary for it to do justice in its courts and the interest of the foreign nation in being able to provide reliable guarantees of confidentiality to encourage beneficial local economic activity. Instead, the court compares the United States interest in collecting taxes or implementing its securities laws with the foreign interest in maintaining secret bank accounts and, not surprisingly, concludes that United States interests are superior. This narrow focus on local law subject matter policies rather than on the relationship between possessing the authority asserted and the ability of each claiming sovereign to meet both its domestic and international social obligations necessarily encourages a myopic view focused on parochial considerations.

The courts' emphasis should clearly be on finding the "natural" assignments of competence that are discoverable from the implications of a system based on territorially divided power, not on case-specific analyses attempting to weigh, for example, the apples of taxation against the oranges of bank secrecy to determine which is somehow more important to the governments whose laws assert these interests. As one writer puts it, this kind of balancing in effect requires a court "to choose between being unpatriotic or disingenuous." In each of these cases, the court chose the latter.

A comparison of these illustrations with the Tenth Circuit's decisions in In re Westinghouse Electric Corporation Uranium Contracts Litigation is instructive. In that case, Westinghouse sought documents from Rio Algom, a Canadian corporation, to support its allegation that the price of uranium had been artificially raised by the activities of an international uranium cartel. The Canadian Uranium Information Security Regulations made it a crime to produce these documents or to testify about their contents and a Canadian court had so held when it refused Westinghouse's earlier efforts to have the material produced by means of letters rogatory. The court of appeals reversed the district court's contempt citation against Rio Algom for refusing to produce the documents. After finding that Rio

57. Of course, in other cases, these internal systemic interests may be different. For example, it is conceivable that a nation might have decided that it wished to discard the model of a competitive economy in favor of a system in which rationalization of production can occur through concentration of economic power. An attempt to enforce a United States antitrust decree to require subsidiaries of United States corporations located in such a country to compete with each other in a relevant export market would create a direct conflict between two municipal choices about the preferred shape of an economic system. See, e.g., Panel Discussion, "Sovereign Compulsion Defense in Antitrust Litigation: New Life for the Act of State Doctrine?," 1978 A.S.I.L. Proceedings 97, 114-15, Dam, supra n. 4 at 3.
58. Atwood & Brewster, supra n. 1 at 173.
59. 563 F.2d 992 (10th Cir. 1977).
Algom's efforts to procure a waiver from the Canadian government were not shown to be in bad faith, the circuit court concluded that the Canadian "national interest in controlling and supervising atomic energy" was superior in this case to the United States interest in providing adequate discovery for litigants in its courts since the evidence sought was to a degree cumulative. Thus, although in this case the Canadian interests are identified, they appear to be given effect principally because they reflect policies that meet with the approval of the U.S. forum. The result flows not from a true balancing of conflicting governmental interests but from an evaluation of the substance of the conflicting policies. Taken together, the thrust of these cases is that we will respect those foreign laws and policies whose purposes we approve, but not those that we dislike. This is hardly a useful policy on which to base the development of an effective transnational system. It amounts, in effect, to applying the universality principle without universality. The courts made no effort to determine whether the conduct in question is, or even should be, universally condemned in the interests of the international community. Judicial approval or disapproval of the foreign national policies in question was the determining factor.

The second difficulty with these cases is their failure to assess the utility of the jurisdictional assertion that the court approves in the context of the jurisdictional competences and limitations that will best contribute to maintaining an international system reflecting divisions of authority appropriate to long term community interests. This difficulty is to a great degree inherent in any municipal decision-making process that purports to require objective balancing of the forum's local law interests against those of a foreign nation. The stimuli in the diplomatic forum that encourage effective balancing of short term against long term interests are not operative in the municipal judicial forum except in very general terms. The courts focus principally on municipal law. Even international legal considerations are treated as relevant in United States courts principally in terms of the inferences they raise about Congressional in-

60. Id. at 998.
61. Id. at 999.

A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking or aircraft, genocide, war crimes, and perhaps terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

Comment (a) points out that "[u]niversal jurisdiction over the listed offenses is established in international law as a result of universal condemnation of those activities and general interest in cooperating to suppress them. . . ." Id. at 114 (emphasis added).
63. See text at n. 15.
tent, not because they reflect considerations that are viewed as being independently important.\textsuperscript{64} The Constitution is the legitimizer of the municipal process. As long as the court fulfills its constitutional role, its decisions are by definition municipally legitimate. These courts do not seem to understand that their decisions are functional components of the international decision-making system nor that the international legitimacy of these decisions depends upon the degree to which they address systemic needs. In none of these cases does the court address the wisdom of a jurisdictional rule permitting the enforcement of one nation's social policies inside the territory of another contrary to that territorial sovereign's wishes in light of the impact that its selected jurisdictional rule would have if adopted in the international community generally.

The court, unlike the diplomat, will not have to confront a foreign counterpart of equal status in a later negotiation and have to live with the results of its current decision. At worst, it may have to distinguish the case. Therefore, unlike the decisionmaker-advocates in the diplomatic forum, the court is not faced with that immediacy inherent in deciding one's own future fate. In the domestic judicial forum, it is never the institutional interest of the decision-maker that is being balanced in any immediate sense when it applies the jurisdictional rule. Where a United States societal interest is involved, it is likely that courts will protect that interest by ruling in favor of the applicability of United States law, leaving it to the diplomatic forum to work out any difficulties that might arise in connection with the impact of the decision on the international legal system. In other words, the United States interest in contributing to an effective international system is not treated as one of the interests to be balanced in these cases to determine whether jurisdiction may be legitimately exercised.\textsuperscript{65}

Lastly, these decisions, by purporting to apply principles of international law while in fact arriving at results based primarily on judicial evaluations of short term local law goals, weaken rather than strengthen the international system. Whenever one sovereign attempts to coerce or require activities inside the borders of another that conflict with the foreign sovereign's local law policies it interferes with that nation's interest in controlling and guiding its own affairs.\textsuperscript{66} Decisions by national courts that purport to recognize foreign governmental interests while in fact adopting a parochial analysis do a greater disservice to the international system than would a

\textsuperscript{64} See, e.g., The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); See United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (1945).

\textsuperscript{65} For a review of several Supreme Court cases that do emphasize the importance of considering international system interests, see Maier, supra n. 23 at 303-16.

\textsuperscript{66} See 1 Hyde, International Law § 200 at 641 (rev. 2d ed. 1947).
straightforward approach that gives primacy to forum interests sub-
ject to international dispute resolution in the diplomatic forum at a
later time.\textsuperscript{67} Such decisions use international law as a political
cover, not as an authoritative source, and by so doing encourage and
sanction similar attitudes abroad. As Arthur Nussbaum once put it,
"Nothing is more inconsistent with harmonious international coo-
eration than insistence upon national viewpoints under the pretense
of their being international."\textsuperscript{68}

\textbf{Conclusion}

Protection of sovereign rights is not solely, or even primarily, for
the benefit of individual nations. It is in the interest of the general
community as well. The corollary of sovereign power is sovereign
responsibility—and the more exclusive that power over nationals
and territory, the more responsibility the community can reasonably
impose on the government that exercises that power. Weakening

\textsuperscript{67} One illustration of a rejection of "interest balancing" in favor of a more direct
approach is In re Uranium Antitrust Litig., Westinghouse Elec. Corp. v. Rio Algom
Ltd., 480 F. Supp. 1138 (N.D. Ill. 1979). There the court found that the United States
had important interests in seeking the information subpoenaed and that balancing
these interests against the concerns of foreign nations was neither useful nor rele-
vant, at least before issues of appropriate sanctions for failure to comply arise. Id. at
1154-56. The test described in the opinion is somewhat reminiscent of the so-called
"important interests" test to determine legislative jurisdiction under domestic constitu-
tional law. Compare Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306
U.S. 493, 503 (1939) with Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal.,

The court of appeals in Marc Rich and Co. v. U.S., 707 F.2d 663 (2d Cir. 1983), ig-
nored interest balancing entirely, primarily on the grounds that judicial jurisdiction
over the parties in a grand jury investigation created all the connection necessary to
permit the court to order enforcement of a subpoena to produce foreign-located docu-
ments by a contempt citation. In that case Marc Rich, A.G., a Swiss corporation, did
business in the United States through Marc Rich International, its wholly-owned U.S.
subsidiary. In a proceeding before the grand jury in the grand jury in the Southern
District of New York to investigate charges of criminal tax fraud, the district court
subpoenaed documents located in Switzerland and denied Marc Rich A.G.'s motion to
quash the subpoena. The court found both that it had personal jurisdiction over Marc
Rich, A.G. and that United States interest in tax enforcement was greater than the
Swiss interest in preventing disclosure of business documents under Art. 273 of the
Swiss Civil Code. When the defendant still did not produce the documents in ques-
tion, the court found it in civil contempt. The Court of Appeals for the Second Circuit
affirmed the finding that personal jurisdiction existed and omitted any discussion of
the relative interests of the U.S. and Switzerland. The court reasoned that since the
crime and the parties being investigated are subject to the jurisdiction of the grand
jury and the court, the evidence also is subject to that jurisdiction. Thus, the court
could enforce an order for production of foreign situs evidence for use by the grand
jury. 707 F.2d at 667. The court concluded that a nexus sufficient to create jurisdic-
tion over the Swiss corporation automatically evidenced a U.S. interest sufficient to
permit enforcement of the subpoena. The Supreme Court denied certiorari after a
motion for expedited review. In August 1983, Swiss prosecutors seized the docu-
ments that were remaining in Switzerland to be held pending further negotiations.

\textsuperscript{68} Nussbaum, "Rise and Decline of the Law-of-Nations Doctrine in the Conflict
sovereign rights of necessity weakens the sources of responsibility in the international community and thus weakens the community itself since reliable community expectations can only develop in circumstances that permit fixing responsibility for meeting them. Due regard for this benefit of territorial sovereignty is essential in developing all jurisdictional rules.

I am not suggesting that United States courts should abdicate adjudication entirely when dealing with these cases. Rather, in those instances where a direct clash of sovereign policies and assertion of United States enforcement jurisdiction will inevitably lead to requiring acts contrary to the legitimate wishes of a foreign sovereign in its own territory, United States courts should indulge the strong presumption that international law and, thus, the law of the United States does not permit such interference. This is the thrust of Sec. 418, of the Restatement revision's Tentative Draft No. 2,69 that prohibits a nation from using its power over domestic parties to coerce results illegal abroad. This section of the draft effectuates the policy of Sec. 20, Comment (b), Restatement (Second), that enforcement jurisdiction is strictly territorial.70

In fact, Secs. 419 and 420 of Tentative Draft No. 3,71 make it clear that the territorial state shall have preference when a direct conflict of legal policies exists and that the forum will seek to require only good faith efforts by parties in United States courts to procure waiver of foreign prohibitions against the production of evidence. This result is far more satisfactory than one that might be achieved by judicial interest balancing uninformed by the recognition that both domestic and international system policies are relevant to the task.

One case emphasizing similar policies is FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson,72 decided in 1980. While conducting an investigation of possible antitrust violations, the FTC sent a subpoena requiring the production of certain documents to French corporations in France by registered mail. The district court upheld the service in the face of a jurisdictional challenge by the French companies and a diplomatic protest by the French government. The Court of Appeals reversed on the grounds that international law forbade the service of a subpoena to require conduct within the borders of a foreign state and that this was especially so when

72. 636 F.2d 1300 (D.C. Cir. 1980).
prescriptive jurisdiction over the original cause of action in pursuit of which discovery was being sought had not yet been established. The court did not engage in any effort separately to “balance” the interests of France and the United States in the outcome of the issue, either under the rubric of judicial deference or to determine if jurisdiction existed. Rather, it rested its decision squarely on its own analysis of international law and principles of territorial sovereignty, concluding that the method of service violated international law and that the statutes allegedly authorizing the attempted service could not have been intended to permit such a violation.

An analytical approach that identifies and seeks to implement policies important to the international system provides the most effective support for the creation of a jurisdictional system that will reflect an appropriate compromise of national interests in the light of the self-interest of all nations in an effectively functioning international community. Greater certainty in international contracts and a system that reliably fixes both power and responsibility on territorial premises are only two of the benefits that will flow from such an arrangement.73 What appears to be a developing trend in the executive branch to attempt to resolve issues of this kind in advance by means of international agreement or at least on the basis of prior communication74 is far preferable to leaving the interest balancing that is essential to any generally acceptable solution to the judicial forum. Continuing work on international agreements to address these issues is of considerable utility. One important effect will be the relieving of United States courts from a task that they are ill-equipped to carry out and that they have not, in most instances, effectively undertaken.

74. See Robinson, supra n. 9 at 37-38; Dam, supra n. 4 at 4-5. See supra text accompanying n. 26-34.