神戸学院法学　第26巻第4号（1996年11月）

EXTRATERRITORIAL APPLICATION OF DOMESTIC LAW IN INTERNATIONAL LAW*

Shigeo Kawagishi

I. Introduction

The problem of the extraterritorial application of domestic law is one of the most complex issues in contemporary international law. For it involves not only legal disputes, but also a conflict of foreign, economic and even environmental policies, between independent states.

Under international law, as a corollary of the sovereignty, a state has the exclusive jurisdiction to enact and enforce its own law within its territory without any interference of other states.

---

* This paper was originally read under the title of Extraterritoriality and International Law in the Trilateral Symposium held by the American Society of International Law, the Canadian Council on International Law and the Japanese Association of International Law, in Tokyo on July 25-28, 1994. The author dedicates this paper to the memory of the late Professor Tatsuo Tanaka who passed away from a sudden heart attack on May 28, 1994, in deep appreciation of the friendly and mental support he afforded to the author in his lifetime.

Therefore, for instance, when a state unilaterally applies its own trade and economic measures against other states, such measures clash with the sovereignty of other states and affect the legitimate interests of persons and companies under their jurisdiction. In fact, there are a number of cases of conflicting jurisdiction in the field of economic and trade regulation. Today, states have become economically more interdependent. As a result, the importance of the extraterritoriality problems has particularly to grow in recent years.

The present paper is an attempt to examine briefly, for the convenience of this symposium, extraterritoriality problems with particular reference to the extraterritorial application of American competition and export control laws. To begin with, the paper will review the traditional bases of jurisdiction in international law. It will then deal with the United States assertion of extraterritorial jurisdiction in the field of economic and trade laws. The paper will go on to analyze some approaches in state practice with respect to the solution of conflicting claims of jurisdiction, and in conclusion, stress the increasing need for international cooperation to avoid or solve conflict of extraterritorial jurisdiction in the light of international law.

II. Jurisdictional Principles of International Law

Jurisdiction is a manifestation of state sovereignty. As a result, a state has exclusive jurisdiction to exercise its authority within its territory or with respect to its nationals abroad. In other words, each state has the authority to enact its law, to subject persons and things to adjudication in judicial organs, whether

courts or tribunals, and to enforce its law judiciallly or nonjudicially within its territory. Thus, in international law, the territorial principle of jurisdiction is of primary importance, but, as will be seen later, there are some other bases of jurisdiction, that provide exceptions to exclusive territorial jurisdiction: these are the nationality principle, the protective principle and the universality principle.(1)

1. The principle of territoriality

As just stated, under international law, in principle, a state has the right to prescribe and enforce law with respect to a person and property, or conduct taking place within its territory, to the exclusion of the jurisdiction of other states. No state can infringe the sovereignty of other states by its legislation and enforcement. Thus, the principle of territoriality is the most fundermental of all the jurisdictional principles of international law.

However, this principle has been extended to deal with a different situation, that is, the situation in which conduct transcends the boundaries of a state. In this context, a distinction is made between the objective territoriality principle and the subjective territoriality principle. In the former, a state has jurisdiction to prescribe a rule of law with respect to an offence that is begun within its territory,but completed abroad, whereas, in the latter, a state has jurisdiction to prescribe a rule of law with respect to conduct that, while it takes place outside of its territory, produces some effects within its territory, but then at least one constituent

(1) American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States (1987), pp.238-240.

element of the offence must take place within the territory of the prescribing state.

2. Exceptions to the principle of territoriality

As already indicated, the territoriality principle does not exclude other jurisdictional bases. In this respect, it is generally accepted that, under international law, a state has jurisdiction over its nationals wherever they may be for offences that they committed. Thus, in general, a state prescribes for the conduct of its nationals abroad on the basis of the nationality principle. This principle is the most widely recognized exception to the principle of territoriality: nevertheless, a state is not entitled to enforce that jurisdiction by requiring conduct which is illegal under the law of other states.

Nationality is a legal relationship between a state and its nationals. Therefore, the nationality principle is applicable to juridical persons as well. In this respect, a company is considered as a national of the state where it was incorporated, but it is said that there is no universally accepted test for the nationality of a company. Nevertheless, in principle, a state has jurisdiction to prescribe law with respect to its companies wherever their activities take place. In this context, a state is authorized to apply its law to the conduct of the subsidiaries of foreign companies within its territory. However, as will be seen, it is very controversial whether a state is authorized to apply the nationality principle on the basis of a corporate or personal link between a company and a subsidiary to subject to its law the conduct of the subsidiaries of domestic companies outside its territory.

On the other hand, the passive nationallity principle is the least

accepted basis of jurisdiction. This principle of jurisdiction is described as jurisdiction over offences committedd by anyone against a state's nationals. In recent years, however, a number of treaties authorize a state to apply criminal law to an act commited outside its territory by a person who is not its national where the victime of the act was its national. For instance, Article 5 (1) (d) of the International Convention against the Taking of Hostages provides that each state shall take such measures as may be necessary to exercise jurisdiction over all acts of hostage-taking, which are committed not only in its territory or by any of its nationals, but also with respect to a hostage who is a national of that state if that state considers it appropriate. As a result, the passive nationality principle has been increasingly accepted as a basis of jurisdiction in contemporary national legislation.(2)

Moreover, under international law, a state has the right to protect itself from any attack originating abroad by means of the exercise of its jurisdiction. This principle has been referred to as the protective principle of jurisdiction. And it is said to be justified on the ground of self-defence in international law. Thus, a state has jurisdiction over persons with respect to attacks on its security. In other words, a state is authorized to punish a certain number of ctimes committed outside its territory by persons who are not its nationals, but directed against the security of the state, such as counterfeiting of the state's currency.

Finally, a state is authorized to exercise jurisdiction with respect

(2) Cf., ibid., p.243.

to universally recognized offences such as piracy, regardless of where they were committed. This principle is also fully accepted as the universality principle in international law. In this respect, it does not matter whether such offences are viewed as crimes in international law or merely a matter of international concern. Rather, such a basis of jurisdiction is due to the fact that the offences are universally condemned by the community of nations and that all states need to cooperate to suppress them. Thus, under international law, a state is authorized to apply its law to punish such offences even if it has no links of territory with the offences, or of nationality with the offender or even the victim.

III. Assertion of Extraterritorial Jurisdiction-Conflicts of Jurisdiction

The United States has sought to apply its domestic laws extraterritorially to regulate conduct taking place outside its territory on the basis of either the so-called effects doctrine or the nationality principle. Thus, in recent years, especially in the field of economic and trade regulation, conflict over extraterritorial jurisdiction has occurred between the United States on the one hand, and Canada, Japan and even the European Union on the other hand.

1. Competition laws

A great number of states, including Japan, have adopted antitrust laws to prohibit restrictive business practices within their territory. And, in general, such laws have been traditionally applied mainly to restrictive business practices taking place within a

national territory. As stated above, however, the United States has sought to apply its competition laws to conduct taking place principally or even wholly outside its territory on the basis of the effects doctrine. Whether it is seen as a distinct basis of jurisdiction or as an extention of the objective territoriality principle, this doctrine is deemed to allow regulation of conduct or activity that has an effect of some kind on national commerce, although it took place outside a national territory. In United States legislation, such an effect has been formulated as a 'direct, substantial, and reasonably foreseeable effect'.(3)

In this respect, the Third Restatement of the American Law Institute takes the same position that a state may exercise jurisdiction on the basis of effects in the state, when the effects are substantial. And, in the view of the Third Restatement, jurisdiction with respect to activity outside a state, but having substantial effect within its territory, is an aspect of jurisdiction based on the territorial principle. Moreover, the validity of such jurisdiction is said to have found support through the adoption of the effects doctrine by the European Community.(4)

Indeed, the European Community has applied the EEC treaty's competition rules to foreign conduct that has the effect of restricting competition within the Community. And it is said that such extraterritorial application of European Community's competition

---

(3) 96 Statutes at Large (1982), p.1246.

(4) American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States (1987), pp.243-244, 250-251. Cf., European Communities, Sixth Report on Competition Policy (1977), p.32.

law has been partly grounded on the so-called effects doctrine. In fact, in the Beguelin Import Co. Case, the Community Court seems to have offered some support for the doctrine. However, the real issue was whether, under certain circumstances, a parent company and its subsidiary may be treated as a single economic unit for the purposes of EEC competition law.(5) Thus, in a number of subsequent cases, the Court has adopted the theory of enterprise unity to supplement the effects doctrine. To sum up, a foreign company and the European Community subsidiary which it controls are considered as a single economic enterprise that is subject to European Community jurisdiction, regardless of the fact that the two form separate legal entities. As a result, concerted conduct within the European Community by a subsidiary is imputed to the parent company on the basis of control.(6)

In this respect, there is considerable disagreement between states as to whether economic effect alone is enough to support extraterritorial jurisdiction. As just stated, the United States is very active in applying its competition laws extraterritorially, whereas other states are requiring a closer jurisdictional link between regulated conduct and a national territory. For instance, the United Kingdom has consistently taken the position that the extraterritorial application of domestic law is permissible only

(5) John K. Bentil, "Control of the Abuse of Monopoly Power in E.E.C. Business Law," 12 Common Market Law Review (1975), p.64; Beguelin Import Co. Case, 11 Common Market Law Report (1972), p.81.

(6) See, for instance, the ICI Case, European Court Report (1972 II), p.625; the Commercial Solvent Case, 12 Common Law Market Law Review (1974), p.339.

where a constituent element of an offence takes place within a national territory.(7)

In this respect, the Japanese antimonopoly law is strictly territorial in purpose and in scope. In general, it prohibits international contracts involving unreasonable restraint of trade or unfair business practices. Under article 6 of this law, the Fair Trade Commission (FTC) challenges a Japanese party to an international contract and orders it to delete the provisions that are held to be unreasonalble restraint of trade or unfair business practices. Hence, the said provisions in the contract can be effectively eliminated without involving the foreign party. Thus, this article is purportedly intended to avoid the jurisdictional problems which arise when Japan attempts to assert extraterritorial jurisdiction over foreign parties.(8)

In fact, for example, in the Novo Industri S.A. Case in 1971, the FTC formally intervened in the international contract with a Japanese company, Amano Pharmaceutical Co., in connection with the exclusive distribution right in Japan. The FTC decided that three provisions incorporated in the contract were in violation of the antimonopoly law, and issued a formal recommendation to Amano to delete the said three provisions from the contract. Then, Novo Industri S.A., a Danish company, filed a lawsuit against the FTC in the Tokyo High Court and sought to quash the FTC order. However, the court held that Novo had no standing before

(7) A.V. Lowe, Extraterritorial Jurisdiction (1983), p.145.

(8) Mitsuo Matsushita, Introduction to Japanese Monopoly Law (1990), pp.70-71. Cf., Makoto Yazawa, "International Transactions to Japanese Antimonopoly Law," 4 Lawasia (1973), p.171.

the court to bring the action. Novo appealed to the Supreme Court in Tokyo. In 1975, the Court also denied Novo's standing to sue before the court, and ruled that Novo, being a third party, was not bound by the FTC recommendation order. In these conditions, this case is often referred to as a case relating to the indirect extraterritorial application of the Japanese antimonopoly law.(9)

In this context, in April 1992, under a new antitrust enforcement policy, the United States announced that it would apply its antitrust laws to foreign restrictive business practices harmful to American exports. As a matter of course, Japan bitterly objected to the United States new policy on the grounds that any restrictive business practices should, in principle, be dealt with by the antitrust authorities of the state concerned.(10)

Moreover, in connection with one of features of United States laws and procedure, it should be noted that private antitrust treble damage actions are regarded as the primary cause of extraterritorial jurisdictional conflict. In fact, in the United States, under discovery rules, courts have sought to obtain documents located within the territory of other states. Consequently, a number of states, including Canada, but not Japan, have enacted the so-called blocking legislation, which specifically prohibits compliance with foreign discovery requests. Under the circumstances, certain courts have recently adopted a balancing-of-interest approach as a matter of international comity and fairness. As will be seen

(9) Cf., 16 Japanese Annual of International Law (1972), p.97; 20 Japanese Annual of International Law (1976), p.119

(10) Asahi Evening News, April 4, 1992.

later, this approach aims to avoid jurisdictional conflicts by taking into account foreign interests in the extraterritorial application of domestic laws.

2. Export control laws

Export control laws represent another type of extraterritoriality problems. To date, the United States has admimistred a variety of export controls. In general, export control measures, as a response to the policies of foreign countries, are implemented in the form of refusal of permission to export.

In this context, one of the major types of export control is the Trading with the Enemy Act. Under Section 5(b) of the Act, the President is authorized to prohibit any kind of economic activity with designated states by any person, or with respect to any kind of property, subject to the jurisdiction of the United States.[11] Thus, the United States has traditionally prohibited trade with a number of states such as North Korea (1950), China (1950), North Vietnam (1954), Cuba (1963), Cambodia (1975) and South Vietnam[12] (1975). Then, a question is raised as to the term 'person subject to the jurisdiction of the United States.' In United States legislation, the term has been defined as including (1) citizens or residents of the United States, (2) persons actually within the United States, (3) partnerships, companies or other entities organized under the law of the United States, and (4) companies or other entities wherever organized or doing business, owned or

(11) 50 U.S.C.App.(1917), p.415.

(12) Dieter Lange and Gary Born, The Extraterritorial Application of National Laws (1987), p.18.

controlled by any of the other categories of persons.

In this respect, for example, in 1963, four years after Fidel Castro seized power in Cuba, the United States prohibited all transactions with Cuba or its nationals by any person subject to the jurisdiction of the United States, including foreign subsidiaries of American companies. There was, indeed, an exception to the prohibition on trade with Cuba, which allowed licensing for certain transactions of foreign subsidiaries of American companies if the law or policy in the third state required or favored trade with Cuba. Under the circumstances, American companies traded with Cuba through their subsidiaries beyond the reach of American law. Thus, the trading raised questions about the effectiveness of one of the most visible tools of United States foreign policy. As a consequence, in 1992, under the Cuban Democracy Act, the United States revoked the exception to tighten the trade embargo against Cuba, and effectively prohibited trade between Cuba and foreign subsidiaries owned or controlled by American nationals.(13)

Such an extraterritorial application of United States law, that is, an extension of state jurisdiction beyond the boundaries of the United States, naturally generated vigorous protest by other states. For instance, in October 1992, under the Foreign Extraterritorial Measures Act of 1984, the Canadian government issued an order blocking the expansion of the Cuban Democracy Act to protect the primacy of its trade law and policy, and blocked compliance

(13) Allen DeLoach Stewart, "Comment: New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992," 53 Louisiana Law Review (1993), p.1389. Cf., New York Times, December 27, 1993.

by American owned subsidiaries based in Canada with the American economic embargo against Cuba.[14] The United Kingdom also prohibited under the Protection of the Trading Interests Act of 1980 British companies owned by American interests from complying with United States legislation banning them from trading with Cuba on the grounds that the British government, not the United States Congress, would determine the United Kingdom trade policy with Cuda.[15]

In this connection, in November 1992, the U.N. General Assembly adopted by 59 votes to 3 with 71 abstentions a resolution to demand the lifting of the United States economic embargo on trade with Cuba. Japan fully understood the concerns various countries expressed about the Cuban Democracy Act affecting the rights and interests of third nations, but abstained on tne grounds that the resolution did not in fact properly address the very complex nature of the question. The United Kingdom also abstained partly because it believed that the United States trade embargo against Cuba is primarily a bilateral matter for the governments of the United States and Cuba. Then, the United Kingdom stated on behalf of the European Community and its member states that the American unilateral extension of a reach of trade measures implementing its foreign or national security policies, including the Cuban Democracy Act, is considered as a violation of the general principles of international law and the sovereingty of

(14) Canadian Government Issues Order Blocking Cuban Democracy Act Expansion, 9 International Trade Reporter (October 14, 1992), p.1758.

(15) Financial Times, October 21, 1992.

independent nations. In its view, the United states is not authorized unilaterally to determine or restrict European Community economic and commercial relations with any foreign nation which has not been collectively determined by the U.N. Security Council to be a threat to international peace and security.(16)

In November 1995, the U.N.General Assembly, for the fourth year in a row, adopted by 117 votes to 3 with 38 abstentions a similar resolution calling overwhelmingly for an end to the three decade long United States embargo against Cuba, and reaffirmed among other principles the sovereign equality of states, non-intervention and non-interference in their internal affairs in particular.(17) The United States consistently took the position that the embargo was a bilateral issue not properly considered by the General Assembly, insisting that the United States, like other nations, has the sovereign right to determine its bilateral trading relationships, while reiterating the European Union's opposition to the extraterritorial application of restrictive domestic legislation in general, Spain rejected the United States actions intended to involve third states in the application of commercial measures that fall exclusively within the scope of the foreign or security policies of the United States. In the Spanish view, the European Union has opposed legislative initiatives designed to tighten even more the unilateral commercial embargo against Cuba by the extraterritorial enforcement of United States domestic law, in particular through

(16) U.N. Doc. A/47/PV.70 (9 December 1992)., pp.70-80 88; A/47/PV.71 (10 December 1992), p.8.

(17) Japan Times, November 4, 1995; U.N.Doc. GA/9049/ Part I (29 February 1996), pp.14-15, 18.

extraterritorial provisions designed to discourage companies in third countries from maintaining trade relations with Cuba, because such measures violate the general principles of international law and the sovereignty of independent states.[18]

Most recently, in March 1996, after the Cuban military shot down two Americn civilian planes, the United States enacted the Helms-Burton Act, that is, an amalgamation of decades of United States anti-Cuba laws to isolate the Cuban government by barring trade with Cuba. Among the most significant of provisions was a ban on entry to the United States of the executives of foreign companies using property expropriated by the Cuban government. However, the European Union did not accept that, through such unilateral legislation, the United States should determine and restrict the commercial relations of third countries with Cuba. Therefore, in July 1996, the European Union agreed on wide range of countermeasures against the American government if companies in its member countries are punished under the law. Japan also requested the American government to repeal the law.[19]

In November 1996, the U.N.General Assembly again adopted by a vote of 138-3 with 25 abstentions a resolution against the American ecomomic embargo on Cuba. Japan abstained, while all the 15 member states of the European Union, including the United Kingdom, voted for the first time in favor of the resolution. Although not binding, the resolution expressed concern about the

(18) U.N.Doc. A/50/PV.48 (2 November 1995), pp.14,16.

(19) Japan Times, March 14, 1996. Cf., Japan Times, July 12, 1996.

Helms-Burton Act which affects the sovereignty of other states, and requested all states to refrain from enacting laws that unilaterally apply economic and trade measures by one state against another.[20]

Apart from the Trading with the Enemy Act, the Export Administration Act of 1979 is said to be the most basic and comprehensive American export control law. Under Section 6 of the Act, likewise, the President is authorized to prohibit the exportation of any goods, technology, or the information subject to the jurisdiction of the United States, or exported by any person subject to the jurisdiction of the Unite States, to the extent necessary to further the foreign policy of the United States.[21]

In this respect, for instance, in December 1981, in response to the role allegedly played by the Soviet Union in the Polish crisis, the United States decided to cut off American supplies of machinary for the Soviet's Siberian natural gas pipeline to Western Europe, and, in June 1982, extended further the ban on American companies selling oil gas equipment to the Soviet Union. In particular, the United States expanded the sanction measures against the Soviet Union to include foreign subsidiaries and licensees of American companies.[22] Thus, the United Stated asserted jurisdiction over goods or technology located abroad on the basis of their origin in

(20) Japan Times, November 14, 1996. It was the fifth straight year that the General Assembly adopted the resolution against the American economic sanction. Israel and Uzbekistan joined the United States in opposition.

(21) The Export Administration Act of 1979, 18 International Legal Materials (1979), p.1513.

(22) Export of Oil and Gas Equipment to the Soviet Union, 21 International Legal Materials (1982), p.866.

the United States, to regulate the re-exportation to the Soviet Union of goods of American origin and the exportation or re-exportation to the Soviet Union of goods manufactured outside of the United States but directly derived from technical data of American origin.

However, such American jurisdictional claims have not been supported by other states. For example, the United Kingdom specifically issued an order under the Protection of the Trading Interests Act of 1980 to prohibit British companies from complying with the American embargo on supplies for the Soviet natural gas pipeline.[23] Likewise, Japan protested such American sanctions against the Soviet Union, and urged the United States to ease the sanctions in question on the grounds that as far as they unilaterally expand American administrative authority beyond its territory, they cannot be justified in the light of international law. In other words, by expanding the sanctions against the Soviet Union to cover exports of products manufactured outside the United States by American companies, subsidiaries or non American companies under American licenses, the United States was infringing on the sovereign rights of other states.[24]

As has already been said, in American legislation, for jurisdictional purposes, even if companies are incorporated abroad under the law of other states, they are categorized as one of the persons 'subject to the jurisdiction of the United States' if they are owned or controlled directly or indirectly by American nationals. However, in the so-called 'Pipeline' dispute, a number of states similarly

(23) New York Times, June 22, 1982.

(24) Japan Times, July 22, 1982.

protested such an American use of the nationality principle to justify application of its export control laws to foreign subsidiaries of American companies. For instance, the European Community objected to the application of American export control measures to companies incorporated in its member states' territories on the grounds that such measures are unacceptable under international law because they seek to regulate companies not of American nationality with respect to their conduct outside the United States. In the view of the Community, the nationality principle cannot be invoked as a basis for the extension of American jurisdiction over companies incorporated in the Community's member states on the basis of corporate affiliation.(25)

As a matter of law, indeed, whatever the nationality of its shareholders or managers is, a company has the nationality of the state in which it was incorporated and in whose territory it has its registered office. In the Barcelona Traction Case, the International Court of Justice ruled that the place of incorporation and the place of the registered office of a company had been traditionally considered as criteria for determining the nationality of the company concerned.(26) In this respect, the Third Restatement declares that, for the purpose of international law, a company has the nationality of the state under the law of which

(25) European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., 21 International Legal Materials (1982), p.893.

(26) Barcelona Traction Case, I.C.J. Report (1970), p.42. Cf., Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B. V., 22 International Legal Materials (1983), pp.66-74.

the company was incorporated. However, it affirmes that although a state does not ordinally regulate activities of foreign companies on the basis that they are owned or controlled by nationals of the regulating state, it may not be unreasonable for a state to exercise jurisdiction for certain purposes over such affiliated entities. But, as the Third Restatement itself asserts, even if the exercise of regislative jurisdiction over foreign companies can be justified in some cases on the basis of links of ownership or control of such companies, a state is not authorized to impose its export control upon foreign companies doing business in accordance with the law of policies of the state where it was incorporated.[27]

In this context, it should be noted that, since 1952, Japan, as a member of the Co-ordinating Committee (COCOM), had restricted the export of COCOM strategic items to prevent the flow of strategic Western technology products to the Soviet Union and its allies, and had imposed domestic penalties in case of violation of export controls promulgated by COCOM. Then in almost all instances, such export controls had been imposed under the Foreign Exchange and Foreign Trade Control Law as a statutory framework for economic controls in general.[28] Under Article 48 of the Law, any person desiring to export goods from Japan is required to obtain the approval of the Minister of International Trade and Industry for the 'types of export goods or areas of destination

(27) American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States (1987), p.124.

(28) Sinya Murase, "Trade versus Security: The COCOM Regulation in Japan," 31 Japanese Annual of International Law (1988), p.1.

and/or method of transactions or payment'.

In this regard, for instance, in March 1988, in the Toshiba Machine Co. Case, the Tokyo District Court fined the company two million yen for exporting to the Soviet Union a computer program and parts for propeller milling machines in violation of COCOM regulation and Japanese laws.(29) However, the court did not make any judgement on the question of whether as the United States charged, the particular milling machines were actually responsible for reducing the noise of Soviet submarines. In any circumstances, Japan itself penalized Toshiba Machine Co. for its illegal sales of high tech machine tools to the Soviet Union in accordance with Japanese laws, and so quite naturally criticized the decision of the United States to include in its omnibus trade bill a call for sanctions not only against Toshiba Co., but also against its parent company, Toshiba Corp., to ensure that foreign companies comply with COCOM export controls.(30)

(29) Cf., 31 Japanese Annual of International Law (1988), pp.206-211; Japan Times, March 23, 1988.

(30) Japan Times, March 24, 1988. However, COCOM was dissolved as of April 1, 1994. Thus, the United States eased controls on most exports to the former Soviet states and to China, effective April 1. In July 1996, over thirty countries agreed to implement the Wassenaar Agreement, and sketched the outlines of the first post-Cold War export-control forum for conventional weapons and military technology, that is to say, successor to the secretive COCOM body. Cf., Japan Times, July 14, 1996.

IV. Resolution of Jurisdictional Conflicts

As is previously indicated, conflicts of jurisdiction have frequently arisen out of the extraterritorial application of domestic laws. To resolve such jurisdictional conflicts, states, but not Japan, have adopted a confrontational rather than cooperative approach, that is, the enactment of so-called blocking legislation which provided them with a store of countermeasures. However, on the other hand, another approach of restraint or moderation has recently been adopted in state practice to avoid, minimize or resolve conflicting claims of jurisdiction over transnational economic activity in particular.

1. Unilateral conflict resolution

As is generally known, the balancing-of-interests approach has been adopted in American antitrust cases involving foreign parties. Then, in addition to a direct and substantial effect on the foreign commerce of the United States, which is necessary to the exercise of jurisdiction under the antitrust laws, American courts have evaluated and balanced the relevant interests in each case to determine whether American authority should be asserted as a matter of international comity and fairness. In this connection, for instance, in the Timberlane Lbr. Co. Case, the Court of Appeals, Ninth Circuit, stressed that a court in the United States should take into account a variety of elements such as the degree of conflict with foreign law or policy, the nationality of the parties, the location or principal places of business of corporations, to determine whethr American interests are sufficient to support

the exercise of extraterritorial jurisdiction.[31]

A like approach is adopted in Section 408 of the Third Restatement. In brief, a state is authorized to exercise legislative jurisdiction with respect to a person or activity abroad only when the exercise of such jurisdiction is considered reasonable in the light of all relevant factors such as the link of the activity to the territory of the regulating state, the connections between the state and the person responsible for the activity. And, in the view of the American Law Institute, such a principle of reasonableness is not only established in United States law, but also has emerged as a principle of international law as well.[32]

Thus, even in the international context, the balancing of interests is said to have become a standard to be used as a moderation or restraint on the assertion of jurisdiction by a state over commercial and economic activities outside its territory. In other words, as a matter of international law, a state balances the interests of the states concerned to decide whether to exercise extraterritorial jurisdiction, and refrains from exercising such jurisdiction if its interests are not sufficiently strong to justify such an assertion of jurisdiction. Thus, a state should refrain from applying its domestic laws extraterritorially when doing so would unreasonablly interfere with the interests of other states.

However, the matter is jurisdictional conflicts between sovereign states. In this respect, even if a court should permit in some form

(31) Timberlane Lbr. Co. v. Bank of America, N.T. & S.A., 549 F.2d (1977), p.613.

(32) American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States(1987), pp.244-245.

of interest balancing only a reasonable assertion of legislative jurisdiction to be implemented, such an approach becomes unsuitable especially when a court is obligated to reconcile two competing or mutually contradictory laws, each supported by recognized legislative jurisdiction, one of which is specifically intended to cancel out the other in order to protect its domestic interests as in the case of blocking statutes. In fact, in the Laker Airways Case, the Court of Appeals, District of Columbia Circuit, accepts that the balancing-of-interests approach becomes incomplete primarily because of substantial limitations on the court's ability to conduct a neutral balancing of competing interests.[33] Thus, it must be said to be an unsuitable solution to leave the matter to the domestic courts of either of the states concerned in the field of export control laws in particular.

2. Bilateral or multilateral conflict resolution

To date, no general agreement has been reached on the limits of domestic laws to be applied to transnational ecomomic activities. However, some efforts have been made to seek reasonable accommodation of the interests of the states concerned in the field of antitrust laws in particular. In this context, for exemple, in September 1979, the Council of the Organization for Economic Co-operation and Development (OECD) recommended that when a

(33) Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d (1984), pp.948-949. Cf., D.W. Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources," 53 British Year Book of International Law (1983), p.21; Dresser Industries, Inc. v. Baldridge, 549 F.Supp. 108 (1982), pp.108-110.

member country undertakes restrictive business practices investigations or proceedings affecting important interests of another member country, the latter country should transmit its view on the matter to or request consultation with the former country. If the countries could not reach any satisfactory solution, they should submit the case to the Committee of Experts on Restrictive Business Practices with a view to conciliation.[34] Moreover, in May 1984, the Council revised the recommendation, and set out guiding principles for notifications, consulations and conciliation on restrictive business practices affecting international trade in order to clarify the procedures laid down in the recommendation and thereby strengthen cooperation to minimise conflicts in the enforcement of competition laws.[35]

As a matter of fact, in accordance with the above-mentioned OECD recommendation of 1979, progress has been so far made in the direction of notification and consultation. Thus, to date, a number of bilateral antitrust cooperation agreements have been entered into between the United States and other states. In this respect, for instance, in 1984, the United States and Canada signed the Memorandum of Understanding as to notification, consultation and cooperation with respect to the application of national antitrust laws, which superseded the former cooperative arrangements relating to restrictive business practices or antitrust matters. For, in the past, the application of United States antitrust laws often

(34) OECD, Competition Law Enforcement (1984), pp.78-81.

(35) OECD: Council Recommendation Concerning Restrictive Business Practices Affecting International Trade, 25 International Legal Materials (1986), pp.1633-1635.

conflicted with Canadian policies and caused jurisdictional issues in Canada because of the close links between the economies of the two countries. Among the most significant of differences between the two countries are ones with respect to proper application of national antitrust laws to conduct taking place wholly or partly outside the territory of the applying country, including differences on the application or applicability of principles of international law in these situations. Thus, the Memorandum outlines arrengements for notification and consultation between the parties with respect to the application of their respective antitrust laws, which are intended to avoid or moderate conflicts of interests and policies between the parties.(36)

More recently, in September 1991, the United States entered into an antitrust cooperation agreement with the European Community. This agreement is said to be different from the earlier agreements in some respects. For instance, the agreement is clearly intended to facilitate cooperative, and in some cases coordinated, enforcement by antitrust authorities, particularly because such cooperation and coodination became necesary as a result of the European Community's implementation of its merger control regulation. Moreover, it provides that when one party perceives anticompetitive activity, which affects its economic interests, in another party, the former party will be able to request that the latter party take action to stop the anticompetitive activity. Then, although it remains free to decline such a request, the latter party is obligated to consider, and, if possible, to act

(36) 23 International Legal Materials (1984), p.275.

favorably upon the request.[37]

Thus, the United States has actively cooperated on a bilateral and multilateral basis, as appropriate, to resolve conflict of jurisdictional claims when its antitrust laws and policies come into conflict with the laws and policies of other states.

V. Conclusion

As mentioned above, in the field of antitrust laws in particular, in compliance with the OECD recommendation, states have closely cooperated as an alternative to unilateral action, although on a fully voluntary basis, to avoid, minimize or resolve conflicting claims of jurisdiction, that is, in the form of notification, exchange of information, coordination of action, consultation and conciliation.[38]

Such cooperation is said not to be construed to affect the legal positions of states with respect to questions of sovereignty and the extraterritorial application of antitrust laws in particular. However, as a matter of law, in applying domestic laws extraterritorially, states are legally bound to take regard to relevant principles of international law, and to take fully into account the sovereignty and other legitimate interests of other states.[39]

In this connection, the Third Restatement affirms in Section 441 the territorial preference with respect to foreign state compulsion, under which a state may not require a person, even one of

(37) 30 International Legal Materials (1991), pp.1488-1489.

(38) Ibid., p.1489.

(39) OECD, International Investment and Multinational Enterprises (1984), p.24.

its nationals, to do abroad what the territorial state prohibits.[40] In general, a state freely enacts its laws, but is not authorized to enforce such laws with respect to a person and activity outside of its territory. In the future, a closer cooperation should be encouraged to enter into bilateral or multilateral agreements, if appropriate, with a view to preventing conflicting claims of jurisdiction and to harmonizing applicable rules of domestic laws in the field of economic and trade regulation.[41]

(40) American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States (1987), P.341.

(41) Institut de Droit International, 57 Annuaire, Tome II (1977), p.343.