

Jurisdiction

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Part IV, "Jurisdiction and Judgments," of the *Restatement (Third) of the Foreign Relations Law of the United States* is by far the longest part and, during the lengthy consideration and formulation of the *Restatement*, proved to be by far the most controversial. The sheer comprehensiveness of Part IV at least partially explains both the controversy and the length of time consumed in its consideration. Moreover, the novelty of the *Restatement's* conceptual approach to jurisdiction and the lingering question as to whether the work is truly a restatement in all respects has engendered, and will continue to raise, dispute.¹

The conceptual approach to jurisdiction is troika-like. Thus, the *Restatement* suggests three jurisdictional categories: (1) jurisdiction to prescribe; (2) jurisdiction to adjudicate; and (3) jurisdiction to enforce.² The first category is described as making a state's law applicable to persons, things or activities;³ the second, the subjecting of particular persons or things to a state's judicial process;⁴ the third, inducing or compelling compliance with a state's law.⁵

The *Restatement* differs fundamentally from the previous *Restatement* in its conceptual approach to jurisdiction. The *Second Restatement* adopted a dual approach: jurisdiction to prescribe and jurisdiction to

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1. See, e.g., Justice Scalia's recent statement on sections of Part IV:

But despite the title of the work, this must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States Court, that has employed the practice. The current version of the *Restatement* provides no explanation for (or even acknowledgment of) this curiosity.

United States v. Stuart, 109 S.Ct. 1183, 1196 (1989) (Scalia, J., concurring).

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) [hereinafter RESTATEMENT (THIRD)].

3. *Id.* § 401(a). Application of the law can be made "by legislation, by executive act or order, by administrative rule, or regulation or by determination of a court." *Id.*

4. *Id.* § 401(b). Judicial process includes "courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings." *Id.*

5. *Id.* § 401(c). Compliance can be mandated "through the courts or by use of executive, administrative, police or other nonjudicial action." *Id.*

enforce a rule of law.⁶ There, prescriptive jurisdiction referred to a state's authority under international law to make a rule of law whether by legislation, regulation or other domestic governmental process.⁷ The *Third Restatement* seems to assume the existence of rules of law since nowhere does it refer to the jurisdiction of a state under international law to exercise the law-making process. Whereas the *Second Restatement* described the law-making process as jurisdiction to prescribe,⁸ the *Third Restatement* refers to such jurisdiction as making its law applicable.⁹ Under the earlier analysis, applying law to persons, things or conduct would constitute an exercise of enforcement jurisdiction.¹⁰ Conceivably, the Reporters of the *Third Restatement* view applying law to persons or their activities as making law. Should this be the case, it seems a strained meaning of jurisdiction to prescribe.

The *Third Restatement* also differs in another fundamental respect from the earlier *Restatement* by adding another category of jurisdiction, that is, jurisdiction "to adjudicate."¹¹ This category is described as a state's subjecting "persons or things to the process of its courts or administrative tribunals"¹² The third category is jurisdiction to enforce, that is, inducing or compelling compliance or punishing noncompliance with its laws or regulations.¹³ The previous *Restatement* subsumed under the jurisdiction-to-enforce category those functions referred to under the adjudication and enforcement categories of the *Third Restatement*.¹⁴ Indeed, the adjudicatory category is actually but a description of a specific exercise of enforcement jurisdiction, that is, enforcing a prescription through judicial or administrative processes. Whether the juris-

6. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 (1965) [hereinafter RESTATEMENT (SECOND)]. The *Third Restatement* refers to the concept of jurisdiction in the *Second Restatement*, i.e. jurisdiction to prescribe and enforce, as being "too simple," since increasingly prescription is a function of a variety of governmental agencies in addition to the legislature. RESTATEMENT (THIRD) pt. IV introductory note. Enforcement jurisdiction is said to involve agencies of government other than the judicial branch. *Id.* The *Third Restatement* gives the jurisdictional concepts of the *Second Restatement* a narrower construction than seems warranted. See RESTATEMENT (SECOND) § 6 and comment a. Simplicity of analysis may be a virtue rather than a fault respecting a subject as ambiguous as "jurisdiction."

7. RESTATEMENT (SECOND) § 6.

8. *Id.*

9. RESTATEMENT (THIRD) § 401(a).

10. RESTATEMENT (SECOND) § 6 comment a. The application of the laws prescribed is carried out by either the judicial or executive branch, in the case of the United States. *Id.*

11. RESTATEMENT (THIRD) § 401(b).

12. *Id.*

13. *Id.* § 401(c).

14. RESTATEMENT (SECOND) § 6 comment a states: "Examples of the exercise of jurisdiction to enforce are arrest, a criminal or civil trial, the entry of a judgment by a court, and the confiscation of contraband by customs officers."

diction-troika adds clarity or confusion to analysis must be for the reader or user of the *Third Restatement* to decide.

The treatment of bases of a state's jurisdiction to prescribe in the *Third Restatement* is traditional with one major exception: "conduct outside its territory that has *or is intended to have* substantial effect within its territory."¹⁵ This formulation is much broader than that of the *Second Restatement*, and most importantly appears to exceed judicial formulations of either U.S. or foreign courts.¹⁶ The previous *Restatement* took the position that there must be an effect within the territory of the prescribing state.¹⁷ A careful reading of section 402(1)(c) leads to the conclusion that a "no-effects" basis has been added to the "effects" basis of prescriptive jurisdiction. This conclusion results from the uncoupling of "has" and "is intended" by the disjunctive "or." Thus, an intended "effect" without a realized effect is said to authorize a state "to make its law applicable to the" activity abroad of the person having such an intent. Jurisdiction to prescribe based upon intent alone is said to be rare;¹⁸ reference is made to reporters' note 8 of section 403, where presumably support is to be found. The cases referred to there, however, do not appear generally to support a mere "intent" basis of jurisdiction.¹⁹

15. RESTATEMENT (THIRD) § 402(1)(c) (emphasis added).

16. See RESTATEMENT (SECOND) § 18; *infra* note 27 and accompanying text.

17. RESTATEMENT (SECOND) § 18. When there is conduct outside the territory of a state, the state can prescribe rules of law regulating such conduct only when there is an effect within the territory of the prescribing state. *Id.* at § 18 comment a. If the conduct was by a national of the state, there is no need for an effect in the territory since there is another basis of jurisdiction to prescribe. *Id.* In this latter aspect, the Second and Third Restatements are in agreement. Compare *id.* § 30 and RESTATEMENT (THIRD) § 402(2).

18. Subject to § 403, the RESTATEMENT (THIRD) § 402 comment d states:

When the intent to commit the proscribed act is clear and demonstrated by some activity, and the effect to be produced by the activity is substantial and foreseeable, the fact that the plan or conspiracy was thwarted does not deprive the target state of jurisdiction to make its law applicable.

19. See RESTATEMENT (THIRD) § 403 reporters' note 8. Captioned "Criminal and civil jurisdiction," this note fails to deal with intent without actual effect within the territory of the prescribing state. The cases referred to in that note, with one exception, which is discussed below, do not involve factual patterns of extraterritorial intent without actual effect. For example, *Rivard v. United States*, 375 F.2d 882 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967), involved conduct both within and outside the United States in that the conspirators smuggled narcotics into the United States while operating in Canada, the United States and other countries. *Id.* at 884. The court found "that the conspiracy was carried on partly in and partly out of this country; and that the overt acts were committed within the United States by co-conspirators." *Id.* at 886. *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961), and *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968), both cited in the reporters' note, did not involve exercises of prescriptive jurisdiction; they were cases of fraudulent attempts to gain immigrant or resident alien status in the United States. See *Rocha*, 288 F.2d at 546; *Pizzarusso*, 388 F.2d at 9. *United States v. King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977), was also a case of conspiracy to introduce narcotics into the United States. The court referred to the U.S. citizenship of the defendants as a basis of jurisdiction. *Id.* at 851. The facts also reflect that heroin was distributed in

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At a minimum, section 402(1)(c) should have made clear that the intent basis can at most exist only in criminal conspiracies where the purpose of a statutory prescription is clear, and that even in such cases support for such a prescriptive jurisdictional base is minimal. It should also have pointed out that there is no foreign support for such a basis, and that an exercise of such prescriptive jurisdiction by a state followed by its enforcement may well result in a violation of international law.

Interestingly, section 415, "Jurisdiction to Regulate Anti-Competitive Activities," leaves open the question of whether intent without actual effect provides a sufficient basis to prescribe regulations that apply to anti-competitive conduct abroad.²⁰ Since restrictive business activity abroad with intent or foreseeability to cause effect followed by actual and substantial effect within the United States gave birth to the "effects" doctrine of prescriptive jurisdiction in the United States, it seems anomalous to caveat the question of whether intent alone is sufficient in such cases.²¹

Since publication of the *Third Restatement*, the U.S. Department of Justice has issued its new *Antitrust Enforcement Guidelines for International Operations*.²² These guidelines provide that U.S. antitrust laws are not applicable to conduct or transactions taking place outside of the United States unless those activities have a "direct, substantial, and reasonably foreseeable effect on U.S. interstate commerce, on import trade

the United States. *Id.* at 852. *United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986), also involving a conspiracy by at least eight persons to introduce narcotics into the United States from a vessel on the high seas, some 200 miles off the New Jersey coast, interpreted a U.S. criminal statute as applying extraterritorially where 23 tons of marijuana were found secreted in the vessel's hold. *Id.* at 166-67. In its opinion, the court found support in an earlier draft of § 402 of *Third Restatement*, see RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402 (Tent. Draft No. 6, 1985), which included the "intent" basis. *Id.* at 168. The *Third Restatement* finding support for its intent-with-no-effects basis in *Wright-Barker* is simply mutual bootstrapping. See also *United States v. Stuart*, 109 S.Ct. 1183, 1197 n.* (1989) (Scalia, J., concurring):

The court relied in part upon testimony—reproduced in The ABM Treaty Interpretation Resolution of the Committee on Foreign Relations United States Senate, S. Rep. No. 100-164 p.49 (1987)—by none other than the reporter for the Restatement of the Foreign Relations Law, Professor Louis Henkin. Thus, by self-exertion, so to speak, there is now at least one case that the Restatement *almost* restates.

20. See RESTATEMENT (THIRD) § 415 comment d: "[T]his Restatement takes no position on the question whether intended or threatened effect (without actual effect) on the commerce of the United States satisfies the requirement of effect under Subsection (2)" of § 415.

21. See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). In this often-cited case, Judge Learned Hand stated that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *Id.* at 443 (citations omitted).

22. U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations*, reprinted in 24 TRADE REG. REP. (CCH) 1 (Nov. 10, 1988) [hereinafter *Antitrust Guidelines*].

or commerce or on the export trade or commerce of a person engaged in trade or commerce in the United States.”²³

An indication of the European view of extraterritorial jurisdiction to prescribe is found in the European Court of Justice’s recent judgment in the so-called “Wood Pulp case.”²⁴ The court held that for extraterritorial application of the Rome Treaty’s prescriptions on competition, principally article 85, there must be “conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. . . . The producers in this case implemented their pricing agreement within the Common Market.”²⁵ Thus the conduct abroad was coupled with “implementation” in the territory.

Support for section 402(1)(c) appears limited to *United States v. Wright-Barker*²⁶ and is dubious itself in the circumstances of that case. Surely, this paucity of support is insufficient to provide a foundation for such a controversial provision.²⁷

A somewhat similar desire to move the law in the direction the Reporters apparently prefer underlies section 403 as well. Desirable as its concepts may be, it seems implausible that section 403 rises to the level of having been “established in U.S. law” and having “emerged as a principle of international law,” as is stated in comment a to that section.²⁸

The *Second Restatement* approached the issue of conflicting prescriptions as a matter of moderating the exercise of the jurisdiction to enforce.²⁹ The approach of the *Third Restatement* is that a state may not exercise jurisdiction to prescribe even if a section 402 basis is present if the prescription would be “unreasonable” in the light of all “relevant” factors.³⁰ The differing conceptual approach to categories of jurisdiction,

23. *Id.* at 87-88. The policy is not aimed at “anticompetitive conduct that has no effect, or only a remote effect, on U.S. consumer welfare.” *Id.* at 1.

24. *See* A. Ahlstrom Osakeyio v. EC Commission, Case No. 89/85 (Ct. of Just. of the Eur. Communities, Sept. 27, 1988).

25. *Id.* at 14-15.

26. 784 F.2d 161 (3rd Cir. 1986).

27. The implications of this novel intent-without-effects basis of prescriptive jurisdiction can be demonstrated by a hypothetical set of facts involving individual action. A farmer in State X cultivates a crop of marijuana with the intent of harvesting the crop for export to the United States. Prior to harvest, the crop is destroyed by a flood and no marijuana is exported to the United States by the farmer. Although § 402(1)(c) would purport to provide a basis of prescriptive jurisdiction over that farmer, it seems extremely doubtful that a U.S. or any other court would agree, or that the Department of Justice would initiate enforcement proceedings. *See Antitrust Guidelines, supra* note 22.

28. *See* RESTATEMENT (THIRD) § 403 comment a. In fact, the D.C. Circuit rejected the interest balancing approach adopted by the *Third Restatement* in *Laker Airways v. Sabena, Belgian World Airways*, 731 F.2d 909, 948 (D.C. Cir. 1984).

29. *See* RESTATEMENT (SECOND) § 40.

30. RESTATEMENT (THIRD) § 403(1).

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discussed above,³¹ explains in part why the two restatements differ on the rationale for whether the moderation of conflicts is a matter of prescriptive or enforcement jurisdiction. While this difference is not highly significant here, the earlier *Restatement* did not state that the principles for moderation of conflicting commands were law of the United States or of international law. Rather it restated the principle that in a case of conflicting prescriptions “each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of” a non-exclusive list of enumerated factors.³² Since publication of the *Second Restatement*, its approach to conflicting exercise of jurisdiction has been reflected in decisions by courts in the United States.³³

Significantly, the Justice Department’s *Antitrust Guidelines*, in discussing factors affecting the Department’s discretion in deciding whether to assert jurisdiction in antitrust enforcement cases, do not refer to either section 40 of the earlier *Restatement* or section 403 of this new *Restatement*.³⁴ While comity is a consideration, the view is that antitrust suits prosecuted by the U.S. government should not be dismissed by U.S. courts on the basis of comity since the government weighs such matters prior to initiating the action.³⁵

Following presentation of the conceptual framework of jurisdiction to prescribe, the *Third Restatement* presents a number of illustrations of the application of the principles set out in that framework.³⁶ All of those illustrations are not reviewed here; rather sections 415 and 416 are treated briefly and section 414 is analyzed in more detail. The introductory note to subchapter B of Chapter IV calls attention to the controversy surrounding section 414, “Jurisdiction with Respect to Activities of Foreign Branches and Subsidiaries.”³⁷ Nonetheless, that section is included in subchapter B which is said to deal with applications by states

31. See *supra* notes 1-14 and accompanying text.

32. RESTATEMENT (SECOND) § 40.

33. See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 n.27 (9th Cir. 1976) (“‘jurisdictional’ forbearance in the international setting is more a question of comity and fairness than one of national power”); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3rd Cir. 1979) (various factors bear on whether to exercise jurisdiction.)

34. See *Antitrust Guidelines*, *supra* note 22.

35. *Id.* at 93 n.167.

36. See RESTATEMENT (THIRD) §§ 411-416. Sections 411-414 are concerned with the application of the principles of sections 402 and 403 by states in general to the specific areas of taxation and to foreign branches and subsidiaries. See *id.* pt. IV, subchapter B introductory note. Section 415, “Jurisdiction to Regulate Anti-Competitive Activities,” and section 416, “Jurisdiction to Regulate Activities Related to Securities” detail the *Restatement’s* view of the United States’ exercise of its jurisdiction to prescribe in these areas. See *id.* pt. IV subchapter C introductory note.

37. *Id.* pt. IV, subchapter B, introductory note.

generally;³⁸ presumably section 414 is put forward as a restatement of principles of international law.

Section 414 of the *Restatement* addresses situations in which a state exercises its jurisdiction to prescribe over a corporate national entity which owns a branch in another state or owns or controls a subsidiary incorporated in another state. Under international law, a corporation has the nationality of the state in which it is incorporated, and that nationality is an acceptable basis for a state to exercise jurisdiction to prescribe with respect to such a corporation.³⁹ Recognizing that there are situations in which two states may prescribe conflicting laws and regulations governing different elements of a corporate group, the *Third Restatement* advances proposals to resolve such conflicts.⁴⁰

The *Restatement's* general rule is that "[a] state may not ordinarily regulate activities of corporations organized under the laws of a foreign state on the basis that they are owned or controlled by nationals of the regulating state."⁴¹ However, this general principle may not be applied under certain circumstances.⁴² Hence, a subsidiary or other affiliate of a multinational corporation may be subjected to conflicting prescriptions if both the state of the parent and the state of the subsidiary claim a basis of jurisdiction.⁴³ The *Restatement* proposes a solution in which each such state must "evaluate its own as well as the other state's interest in exercising jurisdiction," and "a state should defer to the other state if that state's interest is clearly greater."⁴⁴

An inherent problem in conducting the balancing of factors as advanced in sections 414(2) and 403 is that the balance will normally have to be struck by a court.⁴⁵ Although the approach has apparent appeal as

38. *See id.*

39. *Cf.* *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932) (U.S. jurisdiction over natural persons who are U.S. citizens not disputed in international law).

40. *See* RESTATEMENT (THIRD) § 414(2). This section incorporates by reference sections 403 and 441. More particularly, section 403(3) provides a framework for resolving conflicts when two states have concurrent jurisdiction.

41. *Id.* § 414(2).

42. *Id.* §§ 414(2)(a), 414(2)(b)(i)-414(2)(b)(iii).

43. *Id.*

44. *Id.* § 403(3).

45. *See* *Laker Airways v. Sabena, Belgian World Airways*, 731 F.2d 909 (D.C. Cir. 1984). In *Laker*, the plaintiff filed an antitrust suit in the United States against various domestic, British and other foreign airlines. *Id.* at 915. Thereafter, the British defendants obtained injunctions in England restraining the plaintiff from proceeding with its suit against them in the United States. The plaintiff then obtained an injunction in the United States restraining the remaining defendants from getting an injunction similar to the one obtained by the British defendants. Both courts issued the injunctions in order to effect their respective legislative mandates. *Id.* at 945-46. The D.C. Circuit found that both the United States and England had concurrent prescriptive jurisdiction. *Id.* at 915-16. The court recognized that where the pre-

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a theoretical means of dealing with difficult conflicts arising from the nature of multinational corporate participation in a global economy, in practice the approach presents serious problems.⁴⁶

First, U.S. courts are faced with deciding two threshold issues: is there jurisdiction for the prescription and is there jurisdiction to enforce it in the context of the case.⁴⁷ Whether the prescription involved is based upon sound policy considerations and whether the enforcement would implicate political interests of other states are usually not questions for judicial determination.⁴⁸ Legislatures, or in some cases the executive, usually consider such issues in prescribing the law or regulation. A court is particularly ill-equipped to weigh the interests of another state.⁴⁹

Assuming that the weighing process is carried out by a court, it must then determine if one state's interest is "clearly greater."⁵⁰ The enforcing state's court can hardly be neutral in making such a determination.⁵¹ The practice of U.S. courts demonstrates that as long as the interests of the United States are more than *de minimis*, U.S. courts will not defer to other states.⁵² The burden that this process would impose on U.S. courts is one that they are not equipped to carry.⁵³

In light of the serious objections many foreign states have made to U.S. prescriptions respecting subsidiaries of U.S. companies incorporated under their laws and doing business there,⁵⁴ it seems highly doubtful that section 414 should have been included in subchapter B of Chapter 1 of Part IV which is said to include applications "by states generally."⁵⁵ If included at all, it should have been positioned in subchapter C, since that subchapter deals with "United States Applications." If the United States is to apply its prescriptions to foreign affiliates of U.S. companies, it is preferable that it do so by requiring the parent to order its foreign affiliate

prescriptions of two states are in direct conflict, the resolution often falls to the judiciary. *Id.* at 952 n.169.

46. *See id.* at 948. The balancing of interests of two states is practical for choosing a particular forum over another but "their usefulness breaks down when a court is faced with the task of selecting one forum's prescriptive jurisdiction over that of another."

47. *See id.* at 945-46 (court must determine through statutory interpretation and judicial precedent if its state should exercise jurisdiction).

48. *See id.* at 949 ("court cannot refuse to enforce a law its political branches have already determined is desirable and necessary").

49. *Id.* at 950.

50. *See* RESTATEMENT (THIRD) § 403(3).

51. *See Laker*, 731 F.2d at 951.

52. *Id.* at 950-51.

53. *Id.* at 949.

54. For example, in *Laker*, the court noted that the provisions of the British Protection of Trading Interest Act, 1980 were designed to frustrate the extraterritorial reach of U.S. anti-trust laws. *Id.* at 945-47.

55. *See supra* text accompanying notes 37-38.

to follow the prescribed course of conduct. While such an application will not eliminate controversy, it could serve as a mitigating factor.

Section 415, "Jurisdiction to Regulate Anti-Competitive Activities," discussed above with respect to jurisdiction to prescribe based on "intent" without any effect in the United States or on U.S. commerce,⁵⁶ provides in comment d that courts "have divided as to whether intent to interfere with the commerce of the United States without an actual anti-competitive effect on that commerce will support an exercise of jurisdiction under the antitrust law."⁵⁷ The reader is referred to reporters' notes 3 and 4 where presumably divided authority on the issue is to be found. However, neither of these notes includes any support for the "intent-without-effect" basis of jurisdiction.⁵⁸ As is abundantly clear from the recent Department of Justice *Antitrust Enforcement Guidelines for International Operations*, an actual effect is a requirement for U.S. enforcement.⁵⁹ Whether the intent basis is good policy is not the determinant for a restatement provision. If a proposed principle has not been accepted as law, it has no place in a restatement.

Section 416, "Jurisdiction to Regulate Activities Related to Securities," includes a specific application of the "intent-but-no-effects" basis of jurisdiction included in section 402(1)(c).⁶⁰ Sections 416(1)(b)(i), (ii) and (c) provide that the United States has jurisdiction to prescribe with respect to securities transactions based upon intent without more.⁶¹ Comment a states: "Under this section, the United States may exercise jurisdiction to prohibit and punish not only acts that have resulted in harmful effects in the United States, but also attempts or conspiracies even if thwarted before they are realized."⁶² These provisions suffer from similar lack of authority as has been discussed earlier.⁶³ It is obvious that an "intent" can be that of a single individual where no conspiracy is

56. See *supra* notes 19-20 and accompanying text.

57. RESTATEMENT (THIRD) § 415 comment d.

58. See *supra* note 15.

59. See *supra* note 23 and accompanying text.

60. See *supra* notes 15-19 and accompanying text.

61. Section 416(1) states in pertinent part:

(1) The United States may generally exercise jurisdiction to prescribe with respect to . . .

(b) any transaction in securities

(i) carried out, or intended to be carried out, on an organized securities market in the United States, or

(ii) carried out, or intended to be carried out, predominantly in the United States, although not on an organized securities market;

(c) conduct, regardless of where it occurs, significantly related to a transaction described in Subsection (1)(b), if the conduct was, or is intended to have, a substantial effect in the United States

62. *Id.* § 416 comment a.

63. See *supra* notes 15-19 and accompanying text.

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present. The intent basis specified in section 402 causes difficulties throughout the sections dealing with specific applications.⁶⁴

Chapter 2, “Jurisdiction to Adjudicate,” as discussed earlier, is often viewed as enforcement jurisdiction since some prescription—valid under international law—is to be applied or enforced with respect to a person, thing or conduct.⁶⁵ The enforcing function of a court in the particular case may also result in the articulation of a prescription. This result is not unusual in common law systems of jurisprudence.⁶⁶

While delineating judicial adjudication as a special category of jurisdiction, as is done in Chapter 2,⁶⁷ may not be of great significance, it is somewhat confusing to find that judicial adjudication is also categorized as jurisdiction to enforce.⁶⁸ The *Restatement* states that jurisdiction to enforce through the courts is dependent upon the court’s having jurisdiction to adjudicate.⁶⁹ Thus, judicial enforcement is dependent upon two conditions: jurisdiction to prescribe and jurisdiction to adjudicate. This three step analysis adds one unnecessary step—jurisdiction to adjudicate—particularly since adjudicatory jurisdiction and judicial enforcement often occur in the same proceeding.

It is interesting to note that jurisdiction to adjudicate with respect to conduct outside the state requires an actual effect within the state.⁷⁰ This is in marked contrast to section 402(1)(c) which provides jurisdiction to prescribe based upon the theory of “intent-but-no-effect” basis.⁷¹ This combination appears to lead to the anomalous result that even though a state has jurisdiction to prescribe, it would lack jurisdiction to adjudicate if intent but no actual effect had occurred.

Chapter 3, “Jurisdiction to Enforce,” introduces novel concepts as to enforcement measures requiring jurisdiction to prescribe as a condition to a state’s taking enforcement action.⁷² Illustrations in comment c in-

64. See, e.g., RESTATEMENT (THIRD) § 415.

65. See *supra* notes 8 and 9 and accompanying text.

66. See M. EISENBERG, THE NATURE OF THE COMMON LAW (1988) (“The common law . . . is that part of the law that is within the province of the courts themselves to establish.”).

67. See RESTATEMENT (THIRD), pt. IV, ch. 2, introductory note.

68. See *id.* § 431(3)(c): “A state may employ enforcement measures against a person located outside its territory . . . when enforcement is through the courts, if the state has jurisdiction to adjudicate.”

69. *Id.*

70. See RESTATEMENT (THIRD) § 421(2)(j). Section 421(2) lists various situations in which a state’s jurisdiction to adjudicate would be reasonable including when “the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct and foreseeable effect within the state”

71. See *supra* notes 15-19 and accompanying text.

72. See RESTATEMENT (THIRD) § 431(1). This section states that “[a] state may employ judicial or nonjudicial measures to induce or compel compliance or punish non-compliance

clude the "denial of the right to engage in export or import transactions" and the "removal from a list of persons eligible to bid on government contracts."⁷³ In the absence of an international agreement providing such rights for nationals of a foreign country, it is inconceivable that the U.S. government would have to demonstrate jurisdiction to prescribe in order to deny trade and bidding participation to foreign persons. Neither would the government need to have jurisdiction to prescribe in order to place a non-resident alien on a U.S. export blacklist. While an enforcing state does restrain itself in the circumstances described in comment c, such restraint derives from the threat of retaliatory treatment by other states for arbitrary action rather than from restraint premised on an absence of jurisdiction to prescribe.⁷⁴ The flaw in the concept of jurisdiction to enforce lies in the effort to subsume too many illustrations of discretionary governmental action under such a principle. Although it is not suggested here that a state act arbitrarily with respect to the illustrations referred to in comment c, there is no international law restraint upon such action as to aliens with the possible exception of blocking the transfer of an alien's assets located in the United States.⁷⁵ Indeed, comment e(iv), "[c]onditions of exigency," inferentially admits that a state may act without reference to jurisdiction to prescribe.⁷⁶ In comment f, reference is made to denial of a visa because of a fraudulent application as presumably an exercise of jurisdiction to enforce. Surely, this denial is not the kind of government action requiring a showing of jurisdiction to prescribe since the alien applying for a visa to enter the United States has no right to it which is protected by a reasonableness concept. In the absence of an international agreement, a state may determine its own standards or criteria for entry of aliens. Again, too much is sought to be packaged in the jurisdictional bag.

Chapter 4, "Jurisdiction and the Law of Other States," is made up of two subchapters: Subchapter A, "Foreign State Compulsion,"⁷⁷ and

with its laws or regulations, provided it has jurisdiction to prescribe in accordance with §§ 402 and 403."

73. See *id.* § 431 comment c.

74. *Id.* For example, in 1982, the United States prohibited the supplying of equipment and technology for use in the Soviet gas pipeline to Western Europe by various foreign entities, some of which were affiliates of U.S. companies. Because of the international dispute as to jurisdiction created by the prohibitions, the controls were lifted. See DeSouza, *The Soviet Gas Pipeline Incident: Extension of Collective Security Responsibilities to Peacetime Commercial Trade*, 10 YALE J. INT'L L. 92 (1984).

75. See RESTATEMENT (THIRD) § 431 reporters' note 4.

76. *Id.* § 431 comment e states: "In situations requiring urgent action, enforcement measures may be implemented prior to opportunity to be heard, and in exceptional circumstances even without prior notice."

77. RESTATEMENT (THIRD) §§ 441, 442.

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Subchapter B, “The Act of State Doctrine.”⁷⁸ Section 441, “Foreign State Compulsion,” is set forth as a prescription of international law. It may, however, prove difficult to find practice and jurisprudence of foreign countries treating the doctrine since it is usually invoked only by a defendant in a U.S. enforcement action arising out of a U.S. prescription asserted to have extraterritorial effect conflicting with a prescription of the foreign territorial state. Section 441 restates the doctrine except that it prefaces both subsections with the words “in general.”⁷⁹ Such a preface introduces an element of uncertainty regarding the effectiveness of the doctrine as a defense in the United States.

Comment a implicates section 403(3) in that it provides for recognition of the defense in cases in which the territorial state asserts an exercise of its prescription and enforcement jurisdiction “over any person, including a foreign national,” if the exercise would be unreasonable under that section.⁸⁰ This reference to section 403 is fraught with the problems and vagaries discussed earlier in determining whether a state should generally exercise jurisdiction.⁸¹

Cases in which the foreign sovereign compulsion defense would likely be raised are those involving governmental enforcement proceedings.⁸² The new Justice Department *Antitrust Enforcement Guidelines* recognize foreign sovereign compulsion as a defense⁸³ thereby giving that doctrine much greater status than had been the case earlier.⁸⁴ The “denial of specific substantial benefits” is now included as a basis for the defense.⁸⁵ On

78. *Id.* §§ 443, 444.

79. *Id.* 441

80. *Id.* § 441 comment a.

81. *See supra* notes 28-35 and accompanying text.

82. *See* RESTATEMENT (THIRD) § 441 comment a.

83. *See Antitrust Guidelines, supra* note 22, at 95. “Where the private anticompetitive conduct is actually compelled by the foreign sovereign, the defense of foreign sovereign compulsion may prevent challenge under the U.S. antitrust laws.” The United States filed a brief as *amicus curiae* in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 471 U.S. 1348 (1986), arguing that the alleged anticompetitive conduct by certain Japanese companies (the defendants) was compelled by the Japanese Government. The Supreme Court did not reach the sovereign compulsion defense.

84. *See Antitrust Guidelines, supra* note 22, at 97-102. A sensible approach to the antitrust laws supports the implication that foreign state compulsion is a valid defense. To carry out the legislative intent of Congress, the U.S. Department of Justice will not conduct antitrust enforcement actions if certain conditions are met. First, the anticompetitive act must have been compelled by a foreign state and “a refusal to comply . . . would give rise to the imposition of significant penalties or to the denial of specific substantial benefits.” *Id.* at 98-99. Second, the foreign compulsion defense will not be recognized if the activity, even if compelled by a foreign state, “has occurred wholly or primarily in the United States.” *Id.* at 99.

85. *Id.* The *Restatement* in comment c states that exposure to a severe sanction, either criminal or civil, is normally required for foreign-sovereign compulsion to be a valid defense. RESTATEMENT (THIRD) § 441 comment c. The “denial of opportunity for new [business] arrangements would probably” not be sufficient.

the other hand, foreign government encouragement will not provide a basis for the defense, although the guidelines suggest that it may be considered in a comity analysis in deciding whether to exercise enforcement jurisdiction.⁸⁶ These Guidelines greatly reinforce the usefulness of the defense and should result in a strengthened reading of section 441; the words “[i]n general” should be read out of the black letter law.

Section 442 of the *Restatement* deals with disclosure of information located in foreign states by persons subject to the (presumably enforcement) jurisdiction of the United States.⁸⁷ One disturbing aspect of this section is that adverse findings of fact may be made against “a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.”⁸⁸ In comment f, the *Restatement* states that this is not a penalty but rather it is a means to induce compliance.⁸⁹

An adverse finding of fact for noncompliance goes beyond U.S. law. In *Société Internationale v. Rogers*⁹⁰ (the “Interhandel Case”) the Supreme Court, in reversing a dismissal of the plaintiff’s suit for noncompliance with an order to produce certain documents located in Switzerland because of that country’s bank secrecy laws, stated that despite the party’s good faith effort to comply with the order, the district court on remand “may. . . be justified in drawing inferences unfavorable” to the plaintiff.⁹¹ The difference between an adverse finding of fact and an adverse inference is substantial; the former is conclusive as to the facts found while the latter is subject to rebuttal.

The discussion in the reporters’ notes to this section fails to provide support for the black letter “adverse finding of fact” position. In the reporters’ discussion of *Société Internationale*, it is stated that some courts “have applied the [Supreme] Court’s suggestion that inferences unfavorable to the nonproducing party may be drawn even if that party

86. See *Antitrust Guidelines*, *supra* note 22, at 99.

87. See RESTATEMENT (THIRD) § 442(1)(a). Disclosure may be ordered by “[a] court or agency in the United States, when authorized by statute or rule of court . . .” Comment a of this section also states that disclosure can result from a demand of a party.

88. *Id.* § 442(2)(c).

89. *Id.* § 442 comment f. The adverse finding should only be made when it is believed “that the information, if disclosed, would support a finding adverse to the noncomplying party and if . . . the request was made in good faith, not simply as a way of obtaining the adverse finding.” *Id.*

90. 357 U.S. 197 (1958). The International Court of Justice refused to hear the case on the ground that the exhaustion of local remedies applied during the pendency of local proceedings. *Interhandel Case (Switz. v. U.S.)*, 1957 I.C.J. 105 (Order of Oct. 24, 1957).

91. 357 U.S. at 213.

is not at fault”⁹² Whether this is a matter of semantics is left to the reader to decide. What is clear is that the Court made no reference to “findings of fact.”

Blocking statutes prohibiting the disclosure or removal of documents from the territory of the state, usually upon pain of severe sanction, have become increasingly prevalent in recent years.⁹³ It would be unjust indeed to make an adverse finding of fact against a party prevented from compliance with a disclosure order by such a statute. An adverse finding of fact in these circumstances would amount to a “penalty” and not a “means” to force compliance since compliance would be impossible.

The formulation of section 443, “The Act of State Doctrine: Law of the United States” accurately reflects the often-quoted passage of Justice Harlan in *Banco Nacional de Cuba v. Sabbatino*.⁹⁴ The commentary to that section, however, fails to make clear what courts in subsequent cases have concluded are exceptions to the act of state doctrine. The phrasing of this passage strongly supports the position that exceptions to the doctrine were carved out by Justice Harlan. Thus, cases in which the property was outside the territory of the taking state, or takings by unrecognized governments, or where agreements were unambiguous in expressing controlling legal principles were intended to be excepted from application of the doctrine.

Although comment b to section 443 discusses cases since *Sabbatino*, it treats them in a questioning manner as though they have not established U.S. foreign relations law. That treatment draws down an iron curtain on the doctrine after *Sabbatino*. Two apparently non-controversial exceptions, the non-territorial exception⁹⁵ and the international agreement exception,⁹⁶ should have been elevated to the status of black letter law.

92. RESTATEMENT (THIRD) § 442 reporters’ note 6. Subsequent cases cited by the reporters’ notes only indicate one case in which an adverse finding for noncompliance with disclosure was made but this was in the context of determining whether the court had jurisdiction over the party. *See id.* § 442 reporters’ note 11.

93. *See generally* A. LOWE, EXTRATERRITORIAL JURISDICTION xviii (1983).

94. 376 U.S. 398 (1964). In the opinion, Justice Harlan stated:

[R]ather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id. at 428.

95. *See, e.g., Republic of Iraq v. First National City Bank*, 241 F. Supp. 567 (S.D.N.Y.), *aff’d*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

96. *See Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) (language of *Sabbatino* postulates a treaty exception to the act of state doctrine).

This could have been made clear by adding a section or sections as was done with section 444—the Statutory Limitation. It may be that the draftsman sought to compress too many propositions into too concise a statement. However, the complexity of the act of state doctrine deserves a fuller restatement.

While the Supreme Court is the final authority in the U.S. legal system, it does not follow that it must, or indeed can, rule on every legal issue, including those in which the act of state doctrine is involved, to determine U.S. law on matters differing in their facts and circumstances from an earlier Supreme Court decision. The reluctance of the *Restatement* to give authoritative weight to lower court decisions stands in marked contrast to its use of lower court decisions in other sections.⁹⁷

The *Restatement* is more conclusive in carving out an exception for human rights violations.⁹⁸ Although from a policy perspective there may be no objection to prescribing an exception to the act of state doctrine for human rights violations, legal authority is lacking for support of such an exception as foreign relations law of the United States. If the rationale for the doctrine, at least in part, remains to avoid embarrassment in U.S. foreign relations by not examining the validity or propriety of foreign governmental conduct, alleged human rights violations would seem to provoke greater sensitivity than allegations of economic deprivation by a government.⁹⁹ The case of *Filartiga v. Pena-Irala*¹⁰⁰ (which involved se-

97. For example, section 456 on waivers of immunity, provides in subsection (2)(b) that an agreement of a state to arbitrate constitutes a waiver of immunity in actions both to compel arbitration and to enforce an award. Although no Supreme Court decision exists supporting that principle, nonetheless, the black letter provision is based upon lower federal court decisions. See cases cited in *id.* reporters' note 3. See also *id.* § 402(1)(c), where the *Restatement* provides that a state has prescriptive jurisdiction based upon conduct outside its territory that is intended to have substantial effect within its territory but where no effect results. See *supra* notes 15-19 and accompanying text. Similarly, section 433(2) modifies the Supreme Court decision in *Ker v. Illinois*, 119 U.S. 436 (1886), by stating that forcible apprehension of a person in a foreign country who is brought into the United States may prevent prosecution in the United States if the "apprehension or delivery was carried out in such reprehensible manner as to shock the conscience of civilized society." This exception was not recognized in the *Ker* case where the Court clearly left undecided any such limitation on prosecution in the circumstances of that case. See also *Frisbie v. Collins*, 342 U.S. 519 (1952), a case of alleged interstate abduction later followed by prosecution where the Court affirmed the rule of *Ker*. The *Restatement* bases the exception of subsection (2) on a lower court decision, *United States v. Toscanino*, 500 F.2d 267, *reh'g denied*, 504 F.2d. 1380 (2d Cir. 1974). RESTATEMENT (THIRD) § 433 reporters' note 3.

98. See RESTATEMENT (THIRD) § 443 comment c.

99. The relationship between economic and human rights violations can be illustrated by the following hypothetical situation. A foreign state incarcerates an alien in violation of international law, torturing him and stealing his valuable gold watch. The *Restatement's* formulation would preclude the use of the act of state doctrine as a defense in an action for the torture as a violation of human rights, but would allow its use to dismiss an action to recover the gold watch or its value after it entered the United States.

100. 630 F.2d 876 (2d Cir. 1980).

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vere human rights deprivation and which is discussed in reporters' note 3) is properly described as not involving an act of state since the acts of torture were not ratified by the foreign government.¹⁰¹ No authority for a human rights exception is advanced in either the commentary or the reporters' notes.

Controversy has arisen over whether there is an exception to the act of state doctrine for the commercial acts of foreign states.¹⁰² The *Restatement* takes the position that such an exception has not been decided.¹⁰³ The ambiguity of the *Dunhill*¹⁰⁴ decision could suggest such a conclusion. Since the decision in that case, lower federal courts have demonstrated considerable confusion as to whether a "commercial act" exception has been established.¹⁰⁵

A rational policy analysis of the interplay of the restrictive doctrine of sovereign immunity as expressed by Congress in the commercial act exceptions of the Foreign Sovereign Immunities Act (FSIA)¹⁰⁶ and the act of state doctrine strongly supports the view that Congress did not intend that claims against a foreign state arising out of commercial acts be denied judicial consideration on their merits. The House Report made it clear that it did not intend that foreign state's commercial acts be elevated "to the protected status of 'acts of states'" thus "permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine."¹⁰⁷

101. RESTATEMENT (THIRD) § 443 reporters' note 3.

102. *See id.*, § 443 comment c and reporters' notes 2, 3 and 6.

103. *Id.* § 443 comment c.

104. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). The policy rationale for the act of state doctrine was the subject of sharp debate among the justices.

105. *See, e.g., Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988) (court discussed whether commercial exception existed but denied application of act of state doctrine on other grounds); *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F.Supp. 896 (E.D. Mich. 1981) (in denying application of act of state doctrine, court drew upon the definition of commercial activity in the Foreign Sovereign Immunities Act and the intent of Congress that such activity not be shielded from decision on the merits).

106. Pub L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332 (a)(2)(3)(4), 1391(f), 1441(d), 1602-1611(1982)) [hereinafter FSIA].

107. *See HOUSE REPORT ON THE FOREIGN SOVEREIGN IMMUNITIES ACT*, H.R. Rep. 94-1487, 94th Cong., 2d Sess. 20 (1976), reprinted in 1976 U.S. CODE & ADMIN. NEWS 6604, 6619 n.1 [hereinafter HOUSE REPORT], which provides:

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's

It is clear that lower federal courts continue to circumvent the act of state doctrine as the rationale for its application has shifted from embarrassment in the conduct of foreign relations to a proper relationship between branches of government based upon "'constitutional' underpinnings."¹⁰⁸ A recent decision denied application of the act of state doctrine and permitted determination as a factual matter whether an award of a contract by a foreign government was motivated by alleged bribery.¹⁰⁹ The Legal Adviser of the Department of State furnished a letter to the District Court stating: "If the adjudication of this suit were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine would bar the Court from adjudicating this dispute."¹¹⁰ Although the court discussed the commercial act exception, it found that the contract in the case was not a commercial act. Nonetheless, confusion remains among the lower federal courts as to the proper application of the act of state doctrine. Whether a further act of Congress would be helpful in clarifying the role of the doctrine is a question members of Congress should consider.

Chapter 5 of Part IV is captioned "Immunity of States From Jurisdiction" and is composed of three subchapters.¹¹¹ This review deals only with subchapter A, "Immunity of Foreign States from Jurisdiction to Adjudicate."¹¹² Thus, pursuant to the *Restatement's* categorization of jurisdiction, adjudication involves a state's subjecting "persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings."¹¹³ This categorization of state immunity differs from the Supreme Court's analysis in *Verlinden B.V. v. Central Bank of Nigeria*.¹¹⁴ There, the Court viewed the FSIA as creating substantive federal law; other analyses categorize this as a prescribing function, pursuant to the "arising under" clause of Article III, Section 2 of the Constitution.

commercial acts to the protected status of "acts of state" would frustrate this modern development by permitting sovereign immunity to reenter through the back door; under the guise of the act of state doctrine. (Amicus Brief of United States, p. 41.)

108. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

109. See *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988).

110. *Id.* at 1067-69 (text of Legal Adviser's letter is appended to the opinion).

111. RESTATEMENT (THIRD) §§ 451-463.

112. *Id.* §§ 451-460.

113. *Id.* § 401(b).

114. 461 U.S. 480 (1983).

By definition a restatement is designed to reflect the law and not speculate as to what might be desirable. The latter is the function of commentators and authors of books and articles. Consistent with the restatement function, subchapter A reflects the foreign relations law of the United States in the area of sovereign immunity, including customary international law, and more particularly the FSIA. The comments of this author are not intended to be critical of subchapter A, but rather are intended to be suggestive for clarification of, and it is hoped, improvement in, the FSIA through statutory amendment.

Although not an easy task, consideration should be given to providing more guidance as to what constitutes a commercial act or transaction. The present lack of specificity regarding that meaning has resulted in U.S. courts differing as to what constitutes a commercial transaction.¹¹⁵ In contrast to the FSIA, the British State Immunity Act of 1978 provides more definitive guidance to parties and courts as to what is meant by commercial conduct¹¹⁶ and could serve as a departure point for consideration by Congress.

Section 1605(a)(3) of the FSIA represents a halting step in the right direction. In several respects, however, it falls short of its goal of subjecting foreign states to decisions on the merits for violations of international-law-protected rights in property. The requirement that the property present in the United States be "in connection with a commercial activity carried on in the United States by the foreign state" is self-defeating and in no way related to international law principles concerning unlawful state-taking of alien-owned property. Moreover, this requirement invites abuse by a foreign state since it may readily transfer the expropriated property to itself in circumstances in which it is not engaged in commercial activity. Clearly the requirement that the expropriated property present in the United States be in connection with a commercial activity should be eliminated. Section 1330 of the FSIA provides for *in personam* jurisdiction over the foreign state. Thus, there is no rational basis for a requirement that the property be present in any

115. Compare *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988) with *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

116. British State Immunity Act 1978, Ch. 33, 3 pt. I, 3.3, *reprinted in* 17 I.L.M. 1123-29 (1978). The Act provides that a commercial transaction includes:

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority:

particular mode—commercial or otherwise. Presence of the property in the United States should be sufficient.

In regard to foreign takings of U.S. nationals' property, revision of the FSIA should also spell out the applicable principles of international law as was done in the Hickenlooper Amendment.¹¹⁷ A simple cross-reference to that amendment would serve that purpose. Until there is clarification and limitation of the applicability of the act of state doctrine, it will remain the "Catch-22" of section 1605(a)(3) of the FSIA.¹¹⁸

Section 1610 of the Act, exceptions to the immunity from attachment or execution, is structured similarly to section 1605, in that it provides a general rule of immunity followed by exceptions. The most glaring deficiency in this section appears in section 1610(d) which prohibits prejudgment attachments against a foreign state in the absence of an explicit waiver. Moreover, even in case of such a waiver, the attachment must be for "the purpose of" securing "satisfaction of a judgment that has been or may ultimately be entered against the foreign state . . ."¹¹⁹ If a purpose of the FSIA was to place private parties and foreign states in a position of equality with respect to litigation arising out of commercial transactions, this denial of prejudgment attachment significantly defeats that purpose. Foreign states obviously remain unfettered in securing prejudgment attachment against private parties under the forum's procedural rules. There is no reason to believe that foreign states engaged in commercial conduct and subject to the FSIA immunity exceptions would be alarmed or sensitive if strict rules were adopted to authorize conservatory prejudgment attachment where there is a clear threat of removal of assets so as to frustrate execution of a judgment that might be rendered in a party's favor. Section 6201 of the New York Civil Practice Law and Rules could serve as a model.¹²⁰ These rules are quite strict in that the party seeking prejudgment attachment must provide evidence that the claim will probably succeed on the merits and that there are grounds for

117. See Foreign Assistance Act of 1964, Pub. L. No. 88-6333, § 301(d), 78 Stat. 1009 (1964) (codified as amended at 22 U.S.C. § 2370(e)(2) (1982)).

118. See *supra* notes 106-10 and accompanying text.

119. HOUSE REPORT, *supra* note 107, at 30.

120. Section 6201 provides:

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

....

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property or removed it from the state or is about to do any of these acts

....

N.Y. CIV. PRAC. L. & R. 6201 (1978).

the attachment. The *Restatement* reports that some foreign states have provided for prejudgment attachment as a conservatory or security measure.¹²¹ Such provisions do not appear to have unduly alarmed other states.

The recent Supreme Court decision in the case of *Argentine Republic v. Amerada Hess Ship. Corp.*¹²² illustrates a gap in prescription which a revision of the FSIA should close. There the Court found that the FSIA provided the sole basis for securing jurisdiction over a foreign state in U.S. courts and that the Alien Tort Statute was inapplicable.¹²³ Plaintiff's vessel, while on the high seas and well away from designated areas of hostilities during the Falkland Islands war, was bombed by Argentine military aircraft with the result that the vessel was ultimately lost. Plaintiffs contended that this action was in violation of international law. The Court found that the FSIA authorized the only exceptions to immunity for foreign states, and that section 1605 failed to provide an exception in the circumstances of plaintiffs' injuries. After more than a decade of experience with the FSIA, Congress should review its effectiveness in providing a level playing field for private parties and foreign states engaging in commercial transactions as well as in cases of state violations of international law prescriptions. In that review process, Congress should consider providing a further exception to immunity for violations of international law such as that which occurred in the *Amerada Hess* case. Such an exception would be in accord with the Supreme Court's repeated position that international law forms a part of U.S. law.¹²⁴

Conclusion

The Reporters of the *Third Restatement* are to be commended for the enormity of the task they undertook in restating the foreign relations law of the United States in the closing years of the twentieth century. There is no more complex and changing area of the law. This review of Part IV suggests both the complexity and changing nature of our foreign rela-

121. See RESTATEMENT (THIRD), § 460 reporters' note 1, where there is a discussion of the following foreign decisions: Decision of April 12, 1983, 64 BVerfGE, reprinted in 22 I.L.M. 1279 (1983) (West German Constitutional Court permitted security attachments in advance of judgment against state property on claim not entitled to immunity, provided property was used for commercial purpose); *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529, 561, 579-80 (prejudgment injunctions permitted against transfer of state funds provided property was used for commercial purposes).

122. 109 S. Ct. 683 (1989).

123. *Id.* at 689-90.

124. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Ware v. Hylton*, 3 U.S. (3 Dall.) 198, 281 (1796); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 884-87 (2d Cir. 1980).

tions law in the difficult area of jurisdiction. Although this review takes issue with some aspects of that Part, these differences in no way detract from this reviewer's high regard and appreciation for the work of the Reporters. Difference in analysis and conclusion in no way diminishes respect for their work.