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RAM S. JAKHU* suggested that the so-called politicization of the ITU negotiations was merely a reflection of current realities, and an indication of the ITU's dynamic nature and responsiveness to change. Furthermore, he insisted that the ITU should not be characterized only as a "technical body," but as an international organization of sovereign states, the principal function of which was regulation of technical matters.

CHARLES OKOLIE** disagreed with earlier statements regarding the geostationary orbit. In his view, it was a limited natural resource, the use of which should be regulated in accordance with its natural limitations. This was particularly important in consideration of the problem of equal access by developing countries.

The panel was adjourned by the Chairman at 6:25 p.m.; it was followed by a business meeting of the Association of U.S. Members of the International Institute of Space Law.

NANCY J. KELLNER***
Reporter

ANNUAL DINNER

EXTRATERRITORIALITY AND CONFLICTS OF JURISDICTION

by Kenneth W. Dam†

On December 13, 1981, the regime of General Jaruzelski imposed martial law in Poland. The Solidarity labor union was suppressed; its leaders interned. A ruling Military Council began mass arrests and set up detention camps. President Reagan denounced the Polish regime for "trampl[ing] underfoot its solemn commitments to the U.N. Charter and the Helsinki Accords." He denounced the Soviet Union for its threats and pressures which bore a major share of the blame for the repression in Poland. On December 29, he unveiled a series of economic sanctions against the Soviet and Polish Governments. The steps included the suspension of licenses for the export or reexport to the Soviet Union of equipment and technology for transmission and refining of petroleum and natural gas. On June 18, 1982, the sanctions were further extended to prohibit any such exports by U.S. subsidiaries or licensees abroad.

There followed, through the rest of 1982, a major dispute between the United States and its most important allies over the effect and legality of the sanctions we had imposed. The usually dry and esoteric issues of international law suddenly became dramatic issues of political conflict, grand strategy, and global diplomacy. International law, instead of mitigating conflict, became a battleground until the underlying dispute was eased by diplomacy.

The legal dispute was over what is sometimes called extraterritoriality. I prefer the term "conflicts of jurisdiction," which describes the issue more neutrally and analytically. In a wide variety of situations the United States and other countries attempt to apply their laws or regulations to conduct or property beyond their national boundaries. The resulting international disputes can become particularly serious when the

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legal arguments embody major disagreements over foreign policy, as in the Polish sanctions case. Thus conflicts of jurisdiction are at the intersection of law and diplomacy, making the topic especially appropriate for a Deputy Secretary of State to discuss before this learned society.

One of the aims of the American Society of International Law has been "to promote the establishment and maintenance of international relations on the basis of law and justice." That is a good statement of one of our principal national objectives in both international law and foreign policy.

Let me give you a brief survey of the conflicts problem, and then I shall outline the program of concrete steps that the U.S. Government is taking to show its willingness to resolve, or ease, the kinds of difficulties that have arisen.

Roots of the Problem

The international problem of conflicts of jurisdiction has an ancient history. The concept of extraterritoriality antedated the nation-state as we now know it. Through Roman and medieval times, a citizen was subject to the jurisdiction of his sovereign wherever he traveled. More recently, for centuries, consuls of some powerful states were able to exercise criminal and civil jurisdiction over their nationals in foreign countries. As early as the 15th century, Venetians traveling in the Ottoman Empire gained exemption from Ottoman jurisdiction. Soon Sardinians, Tuscans, Austrians, Russians, and others carved out similar privileges in Ottoman domains. The other most famous case is China in the 19th century. Many European colonial powers gained the right to apply their own laws to their nationals in China through diplomatic or consular courts.

The United States engaged in the practice as well. We gained extraterritorial rights in regions of the Ottoman Empire by the 1830 Treaty of Commerce and Navigation with Turkey. These rights lasted until 1949. In China, the United States obtained extraterritorial jurisdiction through the 1844 Treaty of Peace, Amity and Commerce and did not terminate it until 1943.

When the treaty to relinquish extraterritorial rights in China was before the U.S. Senate in 1943, the Foreign Relations Committee somewhat nostalgically observed that the practice of extraterritoriality had had a benign purpose. It had been intended, the committee said, "to diminish friction, minimize causes of conflict, and contribute to the maintenance of conditions of law and order." As we now know, the practice had the opposite effect. The Chinese today view it as a symbol of the humiliations imposed on them by the colonial powers during the period of their national weakness. The issue had quite literally revolutionary implications.

In this modern age of nationalism, every nation is extraordinarily sensitive to other countries' assertions of jurisdiction that seem to impinge on the sacred domain of national sovereignty. The irony is that the modern world also generates its own, almost unavoidable, conditions of jurisdictional conflict.

We live in a world of increasing economic interdependence. The rapidly growing scale of international trade and investment in the postwar period has brought with it a vast expansion of law, regulation, and legal complexity. The result is that even among the closest allies, claims of jurisdiction are bound frequently to collide. Consider the enormous expansion of world trade: The decade of the 1970s was a period of oil shocks and recessions; nevertheless, between 1970 and 1980 world exports increased from $328 billion to over $2 trillion. American exports alone increased from $43 billion to over $220 billion. Foreign direct investment in the United States increased almost fivefold.

In this modern environment of commercial expansion and interaction, the United States and other nations often judge that their civil and criminal law must reach conduct abroad that has substantial and direct effects on their economies, their interests, and their citizens. Needless to say, one nation's assessment of its legal necessity often runs up against another nation's conception of its national sovereignty.

Problems of conflicting jurisdiction can take many forms. Some conflicts arise from relatively routine applications of domestic law and regulation which do not mesh with other countries' practice. Other conflicts arise from basic clashes of national policy—deeply held convictions, expressed in either domestic or foreign policy, which conflict with the views of other countries. Let me discuss both kinds of cases.

Conflicts of Procedure

In all our countries, expanding bodies of statutory and regulatory law may impel governments or courts to attempt to reach beyond the confines of the national territory. Our Internal Revenue Service, for example, may seek documents in the possession of an enterprise abroad in order to enforce the proper allocation of taxable income among affiliated companies. Our Securities and Exchange Commission may seek the identity of Swiss bank depositors suspected of insider trading in U.S. securities markets. Our courts may attempt to serve process overseas or to attach sanctions to the failure of foreign witnesses to testify. Our laws prohibiting compliance with foreign economic boycotts against friendly countries apply—by statute—to overseas subsidiaries of American companies.

We in the United States have a long domestic experience with the differing laws of 50 states. Perhaps for that reason we seem to be more comfortable with multiple claims of jurisdiction and much less deferential to the idea of absolute territorial sovereignty. But the United States is not alone in applying its law to foreign entities or transactions. The Commission of the European Communities (EC) is now developing a series of regulations which would affect the operations of transnational corporations. One such regulation—the so-called Vredeling proposal—would require subsidiaries in the EC to disclose to their local employees certain decisions and actions of the corporate parent abroad which have direct effects on those employees. This regulation would apply, for example, to investment and plant-closing decisions. In another area, the European Commission's antitrust authorities are considering remedies in a proceeding against IBM that would require IBM to disclose what it considers trade secrets.

Both the Vredeling and the IBM developments have a large potential impact on American firms and their operations outside the EC. The U.S. Government is watching them closely. Some, of course, may savor the prospect of American discomfiture at other countries' attempts to exert an extraterritorial reach. The larger lesson, however, is that the conditions impelling countries to move in this direction are universal, powerful and troublesome for all countries.

Perhaps the classic modern area of conflicts of jurisdiction is antitrust law. The United Kingdom, Australia, and some other important friendly countries simply do not accept the "effects test" as a legitimate basis of jurisdiction to regulate economic conduct under international law. The effects test was initially enunciated in Judge Learned Hand's 1945 *Alcoa* decision and is the first step in the jurisdictional analysis performed by Federal courts today. It applies U.S. antitrust law to conduct abroad having substantial, direct, and foreseeable effects on U.S. domestic or foreign commerce.

The United States is not alone in its adherence to the effects test. In the *Philip Morris* case, the Federal Republic of Germany has claimed jurisdiction over a multinational merger on the basis of effects—albeit indirect—on the West German market. The EC Commission has claimed jurisdiction to investigate alleged conspiratorial conduct in the wood pulp industry—conduct occurring outside the EC—on the basis of effects within the EC. Ironically this growing parallel use of the effects test only increases the inherent potential for conflict; it raises the prospect of proliferating challenges to multinational enterprises by both the United States and the European Communities.

Particularly acute conflicts have arisen from private treble-damage actions brought against foreign companies in American courts. The treble-damage remedy was designed in American law to bring about more effective antitrust enforcement, encouraging "private attorneys general" by use of a financial incentive. Our public enforcement authorities—the Antitrust Division of the Justice Department and the Federal Trade Commission—can balance a broad range of public interests when they make enforcement decisions (though foreign governments may still be unhappy with the outcome). Private parties in antitrust litigation have no such responsibility. They may even have an incentive to maximize the detrimental effect on our foreign relations in order to promote a favorable settlement. This has led some foreign governments to criticize private treble-damage actions as "rogue elephants."

Conflicts of Policy

The problem of conflicts of jurisdiction is heightened where there is a conflict of substantive doctrine as well as competing procedural claims. Indeed, antitrust law provides several examples of significant disputes over broad public and international policy.

With only limited exceptions, U.S. law and policy reflect our belief that the marketplace should decide what price to set for goods and services and which competitors will survive the cycles of economic fortune. As the Supreme Court said in the *Brown Shoe* and *Brunswick* cases, antitrust regulation of the marketplace is meant "to protect competition, not competitors." By contrast, many of our trading partners favor—indeed, often encourage—the creation of cartels, particularly for export of products and natural resources. These differing views over the role of the marketplace were manifested in the *Swiss Watchmakers* case.

The Swiss Government, starting at least in 1951, authorized and encouraged the formation of a watch export cartel involving both Swiss and U.S. companies. In 1962, the U.S. Department of Justice challenged the cartel under the Sherman Act because it had anticompetitive effects in the U.S. market. The U.S. District Court subsequently entered a consent decree barring the challenged conduct.

The *Swiss Watchmakers* case demonstrates that where an activity has an impact on two or more jurisdictions, conflict will arise if they are pursuing contrary policies. And the mechanical application of the principle of territoriality will not either satisfactorily or permanently resolve that conflict.

These differing conceptions of the international order bring us to the realm of foreign policy, where some of the most dramatic cases of conflicts of jurisdiction have occurred. The United States has resorted to economic controls in several instances as an instrument of foreign or national security policy. In the case of our export controls over trade with communist countries, there have been many instances of disagreement with our trading partners. In a famous example in the mid-1960s, French President de Gaulle reopened trade relations with China at a time when U.S.-China relations were still locked in bitter hostility. This action quickly found its way into court in the *Fruehauf* case.

In 1965, the United States attempted to prevent the French subsidiary of Freuhauf, an American manufacturer of tractor trailers, from selling trailers to China. The subsidiary sought relief from a French court, which took over operation of the subsidiary and appointed a receiver who required delivery of the trailers to China. In the end, the territorial sovereign—in this case, France—was allowed to control the enterprise at issue. But the underlying policy conflict endured, at least until 1971, when one of the jurisdictions involved—that is, the United States—began to harmonize its China policy with that of the other.

The dispute over Polish sanctions was an even more vivid example of a legal dispute that was in its essence a dispute over policy. We and our allies condemned the Soviet-backed declaration of martial law in Poland and the suppression of human rights. To signify that "business as usual" could not continue with those who oppressed the Polish people, the President imposed economic sanctions against the Soviet and Polish Governments. These sanctions included, inter alia, controls over exports of oil and gas equipment and technology to the U.S.S.R.

The President imposed the sanctions under the Export Administration Act of 1979. That Act authorizes controls over goods or technology "subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States" where necessary to further our national security or foreign policy objectives. Where "national security" controls are involved, fewer disputes arise between the United States and its allies. Goods and technology which make a direct and significant contribution to Soviet military potential are prohibited by all allied countries. When the controls are imposed on "foreign policy" grounds, however—such as in the Polish case—different perspectives are more likely to exist.

The legal dispute with our allies over Polish sanctions focused on the American effort to reach conduct abroad and on the issue of sanctity of contracts. The sanctions announced on December 29, 1981 prohibited exports and reexports of oil and gas equipment and technology to the Soviet Union regardless of preexisting contractual obligations; the sanctions extended to goods of U.S. origin already in foreign hands. On June 18, 1982, the controls were extended to prohibit the export by foreign subsidiaries of wholly foreign-made goods and the export by licensees of foreign products incorporating previously obtained U.S. technology. Our allies objected to the interruption of contracts already signed. They further objected to the so-called "extraterritorial" reach of the sanctions.

American parents of the foreign subsidiaries, such as Dresser Industries, and licensees of American technology brought numerous administrative proceedings and lawsuits against the U.S. Department of Commerce. In response, this government took the same position that administration after administration, and Congress after Congress, have taken—namely, that the relationship between a parent and a subsidiary, or the use of American technology by a licensee, justifies the assertion of American jurisdiction when substantial American interests are involved.

But the issue was not resolved in the courts. It was settled by diplomacy. The underlying dispute was on the broader question of economic relations with the Soviet Union. Events in Poland demonstrated that East-West trade has not had a moderating effect on Soviet behavior as some—in the United States and elsewhere in the alliance—had thought it would.

The original theory of East-West trade was that the Soviet Union would be restrained in its international behavior for fear of jeopardizing its trade with the West.

However, dependence on East-West trade may have added to the inhibitions on Western responses to Soviet misconduct.

It has also become clear since the late 1970s that the Soviet Union is gaining considerable benefit from access to Western high technology, both for direct military application and for upgrading the economic base which supports the Soviet military establishment.

For these reasons, the United States, since at least the Ottawa summit of 1981, had questioned the wisdom of providing the Soviets with advanced equipment—and particularly with subsidized credits—to construct the natural gas pipeline from Siberia to Western Europe. Such a project would provide the Soviets with foreign exchange, enhance their technological capability, and create what we viewed as an unfortunate degree of dependence on energy trade with the Soviet Union.

The dispute over the Polish sanctions highlighted the need for a new consensus within the alliance on East-West economic relations. Our sanctions on oil and gas equipment, as you know, were lifted on November 13, 1982. On that day the President also announced that the major industrial nations of the West recognized "the necessity of conducting their relations with the U.S.S.R. and Eastern Europe on the basis of a global and comprehensive policy designed to serve their common fundamental interests." As a result, a consensus was reached with our allies:

First, not to engage in trade arrangements which contribute to the military or strategic advantage of the Soviet Union;

Second, not to give preferential aid to the heavily militarized Soviet economy; and

Third, not to sign any new natural gas contracts with the Soviet Union, pending a new alliance study on energy alternatives.

We also agreed to strengthen existing controls on the transfer of strategic items to the U.S.S.R. and to examine whether our collective security requires new controls on certain kinds of high technology not currently controlled, including oil and gas equipment. And we agreed to work toward harmonizing our export credit policies.

There is an important lesson here, and, indeed, it is the main theme I want to put before you tonight. When these disputes over jurisdiction turn out to be grounded in disputes over policy, the most effective solution is a major effort to harmonize our policies. This may not make the legal disputes go away, but it will surely make them less divisive. The democratic nations have an even deeper interest in resolving these policy conflicts—not only to make lawyers' lives easier but to preserve the political unity of the Western alliance. And that alliance is, without exaggeration, the foundation of the legal, economic, and political system of the democratic West.

In the coming decades, the problem of maintaining allied cohesion over foreign policy will not necessarily become easier. In the early years of the postwar period, American power was so preponderant within the alliance that our prescriptions often received ready acceptance from allies weakened by the war and dependent on American economic aid and military protection. Today, our allies are strong, self-confident, and independent minded. Unanimity will hardly be automatic. The United States still has the responsibility to state its convictions, and act on them, on matters of vital importance to free world security. Harmonizing policies will require determined effort on the part of all.

Measures for the Future

The United States is prepared to do its part in finding cooperative solutions to the problems I have discussed. We are prepared to be responsive to the concerns of others. If our allies join with us in the same spirit, much can be done.

First of all, the United States will continue to seek to resolve the policy differences that underlie many of these conflicts of jurisdiction. Thus, for example, we will work with our allies toward the goal of a new consensus on the important strategic issue of East-West trade.

Second, the United States can seek to minimize conflicts by shaping and applying appropriate guidelines to govern assertions of authority over conduct abroad where those assertions conflict with foreign law. The American Law Institute is now considering a third draft *Restatement of Foreign Relations Law.* The draft now gives a prominent place to the balancing of competing state interests in determining the existence of jurisdiction over foreign conduct. We in the Department of State are not altogether satisfied with making a balancing test the prerequisite to the existence of jurisdiction. As a practical matter, however, a careful weighing of the interests of the states concerned is obviously a useful procedure and a deterrent to unwarranted conflicts. We welcome the Federal courts' use of a general balancing analysis in private cases like *Timberlane, Mannington Mills,* and *Mitsui.* Balancing can certainly help to ensure that decisions affecting significant foreign concerns are not taken lightly.

Third, the United States is making clear its intention to avoid further problems of retroactive application of economic controls. We know that the reliability of contracts is essential to the health and growth of commerce. Last week the President transmitted to Congress legislation to amend and extend the Export Administration Act of 1979. The administration bill strengthens the national security export controls and their enforcement while at the same time easing some of the problems we have had in the past over foreign policy controls.

- The bill declares explicitly that "it is the policy of the United States, when imposing new foreign policy controls, to minimize the impact on pre-existing contracts and on business activities in allied or other friendly countries to the extent consistent with the underlying purpose of the controls."
- The bill also explicitly recognizes the sanctity of contracts as a limitation which will insulate many existing contracts from disruption by new foreign policy export controls. Specifically, the bill protects existing sales contracts that require delivery within 270 days from the imposition of controls, unless the President determines that a prohibition of such exports is required by the "over-riding national interest" of the United States.
- To strengthen enforcement of the national security export controls, the bill authorizes restrictions on future imports into the United States of goods or technology from persons abroad who violate these controls. Controls on imports into the United States by particular foreign violators are obviously territorial and therefore are clearly within our jurisdiction under international law.

Fourth, the administration is seeking other legislative changes that will indirectly, but we hope effectively, reduce the significance of conflicts of jurisdiction. The Justice Department, for example, has recently proposed amendments to the Clayton Antitrust Act to allow treble damages only in cases of per se violations. While these amendments would continue to permit treble-damages suits in cases of cartelization, they would reduce friction concerning U.S. policy in such areas as regulation of vertical relationships, including supplier/purchaser relationships.

Fifth, the Departments of State and Justice are considering further statutory proposals to address problems arising in the international context from private treble-damage actions. I do not mean to criticize any particular past cases or to suggest any outcome for any cases now before the courts. Nevertheless, we are exploring ways of ensuring that private antitrust cases posing conflicts of jurisdiction are indeed conso-