

**GLOBALIZED BUSINESS ACTIVITY  
& CONCURRENT JURISDICTION  
FOR PRIMARILY  
EXTRATERRITORIAL ACTS**

**THE U.S. RULE**

AIBL  
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# OUTLINE

- 1. ECONOMIC SANCTIONS
- 2. FISCAL TERRITORIALISM
- 3. EXTRATERRITORIAL REACH
- 4. WORLD-WIDE INTERCEPTIONS
- 5. A NEW U.S. PROTECTIONISM?

# 1. ECONOMIC SANCTIONS

- U.S. TRADE ACT OF 1977
- ILSA
- LIBERTAD

## **2. FISCAL TERRITORIALISM**

- § 6038 IRC
- UNITARY TAXATION

# 3. EXTRATERRITORIAL REACH

- FILARTIGA
- EMPAGRAN
- LEU BANK LUXEMBOURG
- FCPA/IAFCA
- CLASS ACTIONS
- SECURITIES REGULATION

# FILARTIGA v. PENA-IRALA

- 2d CIR. AFFIRMED JURISDICTION OVER A FOREIGNER (PARAGUAY POLICE INSPECTOR) VISITING THE U.S. SOLELY ON THE GROUND OF SERVICE IN THE U.S. ALL CONTACTS WERE FOREIGN

- VICTIM
- PLAINTIFF
- DEFENDANT
- PLACE WHERE EVENT OCCURRED

- ▶ WAS A CASE OF TORTURE

- <http://antiwar.com/news/?articleid=8560>
- [http://www.wired.com/science/discoveries/multimedia/2008/02/gallery\\_abu\\_ghraib](http://www.wired.com/science/discoveries/multimedia/2008/02/gallery_abu_ghraib)

# EMPAGRAN v. HOFFMANN LAROUCHE

- D.C. CIR. AFFIRMED JURISDICTION WHERE ANTITRUST PLAINTIFF (A FOREIGNER) HAD SUFFERED DAMAGE IN A FOREIGN COUNTRY DUE TO CONDUCT IN THE FOREIGN COUNTRY
  - “IF FOREIGN PLAINTIFFS COULD NOT ENFORCE ANTITRUST LAWS WITH RESPECT TO FOREIGN EFFECTS OF ANTICOMPETITIVE BEHAVIOR GLOBAL CONSPIRACY WOULD BE UNDETERRED.”

## EMPAGRAN, CONT'D

- U.S. SUPREME COURT QUASHED BUT HINTED AT POSSIBILITY THAT IN A GLOBALIZED WORLD, ANTI-COMPETITIVE AGREEMENTS INVOLVING GLOBALLY SOLD PRODUCTS OR SERVICES WOULD ALWAYS HAVE A DOMESTIC U.S. EFFECT, AND THEREFORE A U.S. COURT WOULD ALWAYS HAVE JURISDICTION EVEN IF THE PARTIES WERE FOREIGNERS AND CONDUCT AND DAMAGES OCCURRED ABROAD

# **BANK LEU**

- **ACCEPTANCE OF U.S. -DOLLAR NEGOTIABLE INSTRUMENTS BY A BANK ANYWHERE IN THE WORLD OUTSIDE OF THE U.S. RENDERS THE BANK SUSCEPTIBLE TO U.S. CRIMINAL JURISDICTION**

# FCPA/IAFCA

## ■ STATEOIL

- PROSECUTED IN NORWAY
- PROSECUTED IN U.S.
  - BY SEC AS “ISSUER” UNDER FCPA, AND
  - BY DoJ AND SEC BECAUSE WIRE TRANSFER PAYMENTS THROUGH N.Y. BANK ACCOUNT

## ■ BODMER

- 1998 AMENDMENTS WRONGLY APPLIED
  - 15 USC sec.78dd-3
    - “ANY PERSON”
    - “WHILE IN THE TERRITORY OF THE U.S.”
  - PERSONAL JURISDICTION OVER FOREIGNERS ON TRANSITORY CONNECTION TO THE U.S.

## ■ U.S. VIOLATIONS OF FCPA

- PAITON, BOEING (SAUDI ARABIA), HALLIBURTON, IBM (ARGENTINA)

# U.S. CLASS ACTION: LEX MUNDI

## THE DEADLY MATRIX OF STRATEGIES

- ▶ CONCURRENT CLASS ACTIONS –  
GOVERNMENT PRESSURE – COMMITTEES OF  
AUDITORS – THREAT OF ECONOMIC  
SANCTION
- ▶ ALL OF THE ABOVE APPLIED TO THE SHOAH  
CLASS ACTIONS – THE “VICTIM’S FORTUNE”
  - SWITZERLAND
  - ITALY
  - FRANCE
  - GERMANY
- ▶ “STRIVING FOR JUSTICE . . . SQUABBLING  
OVER MONEY”

# SECURITIES

## ■ MORRISON

- ▶ NO EXTRATERRITORIAL REACH OF S.E.A.
  - BUT “CONDUCTS AND EFFECTS” DOCTRINE
    - “EFFECTS”: VIOLATION OF 10(B) SEA AMERICANS BUYING FOREIGN SECURITIES ON FOREIGN STOCK EXCHANGE (F SQUARED)
    - “CONDUCTS”: 10(B) VIOLATION DAMAGING FOREIGNERS BUYING FOREIGN SECURITIES ON FOREIGN EXCHANGE (F CUBED)
- ▶ MORRISON REPLACED “C&E” WITH “TRANSACTION BASED TEST”
  - ONLY SECURITIES TRANSACTED IN U.S.
- ▶ RE-INTRODUCED THROUGH DODD-FRANK ACT §929P(b) IF SEC IS PLAINTIFF

# 4. WORLDWIDE INTERCEPTIONS

- ECHELON (SCHMID REPORT)
  - ▶ VIOLATION OF ECHR ART. 8
    - 8(1) RESPECT OF PRIVATE LIFE
    - 8(2) NO INTERFERENCE EXCEPT FOR NAT'L SECURITY AND TO PREVENT CRIMES
  - ▶ UK: MORWENSTOW, MENWITH HILLS
  - ▶ GERMANY: BAD AIBLING, THEN GRIESHEIM AFTER AMEND. OF TREATY (UK EXEMPT)
  - ▶ USED ESSENTIALLY FOR INDUSTRIAL ESPIONAGE
  - ▶ CANNOT BE USED IN USA (4TH AMEND.) EXCEPT NOW UNDER PATRIOT ACT
  - ▶ WOOLSAY, WSJ MARCH 22, 2000
- WHAT ABOUT A EUROPEAN ECHELON?

# 5. A NEW OUTLOOK OF PROTECTIONISM

DID NOT PASS (7 VOTES SHORT)

- CREATING AMERICAN JOBS & ENDING OFFSHORINGAL ACT (S. 3816), 2010
  - FISCAL PRESSURE
  - CUSTOMS DUTIES
  - CURRENCY CONTROLS

# CONCLUSION

## CONCURRENT JURISDICTIONS

- CONCURRENT JURISDICTIONS ARE BECOMING COMMONPLACE
  - ▶ HOW TO AVOID MULTIPLE PROSECUTION?
  - ▶ HOW TO AVOID CHAOS?
- EXAMPLE: FCPA
  - ▶ UNILATERAL U.S. ASSERTION OF JURISDICTION OVER EXTRATERRITORIAL CONDUCT
    - INCLUDING ACCOUNTING REQUIREMENTS FOR ISSUERS
  - ▶ REAL AIM OF FCPA: NOT TO COMBAT CORRUPTION BUT TO PROTECT U.S. BUSINESS