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The Extraterritorial Application of the Economic Espionage Act of 1996

By J. Thomas Coffin*

I. Introduction

On October 11, 1996, President Clinton was "pleased"1 to sign into law H.R. 3723, the Economic Espionage Act of 1996 (EEA), which took effect on January 1, 1997.2 In his statement accompanying the signing of the bill, the President noted that "[e]conomic espionage and trade secret theft threaten our Nation's national security and economic well-being.... This Act will protect the trade secrets of all businesses operating in the United States, foreign and domestic alike, from economic espionage and trade secret theft...."3 In a post-Cold War United States in which the nation's security is increasingly linked to its economic strength, the EEA had sailed through Congress with broad bi-partisan support.

The EEA, though a meager nine sections of the Federal Code,4 packs a significant punch, at least on paper. Section 1832 imposes a fine of up to five million dollars and imprisonment for up to ten years for the "theft of trade secrets."5 If the theft is on behalf of a foreign government, or on behalf of a foreign "agent" or "instrumentality" (as defined in 18 U.S.C. section 1839), then section 1831 labels it "economic espionage" and the maximum prison term and fine are

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* J.D., Hastings College of the Law, 2000. The author is currently an associate at the San Francisco office of Morrison & Foerster, LLP and may be reached at tcoffin@mofo.com.

3. Clinton Statement, supra note 1, at 4034.
5. 18 U.S.C. § 1832.
increased to fifteen years and ten million dollars, respectively.\textsuperscript{6} However, the legislative history indicates that the stiffer penalties of section 1831 do not apply to foreign corporations unless they are "substantially controlled" by a foreign government.\textsuperscript{7}

Both section 1831 and section 1832 contain the same broad definition of what actions potentially constitute criminal theft of a trade secret\textsuperscript{8} — with "trade secret" itself also broadly defined by the statute.\textsuperscript{9} Given the relatively spare — yet broad — terms of the EEA, Congress clearly intended a significant role for the federal courts to fill in the gaps. Indeed, some people within high-tech industries, despite their interest in protecting trade secrets, worried that the EEA was too vague — perhaps even unconstitutionally vague.\textsuperscript{10} Given the highly technical nature of many of the disputes, the EEA provisions — and the possibility of an inexperienced federal court applying them — might inject a level of uncertainty in business relationships.

To further broaden the reach of the EEA, Congress specified the same penalties for conspiracy to steal trade secrets.\textsuperscript{11} And although the EEA does not provide a private cause of action by its terms, it does allow the Attorney General to file a civil action to obtain injunctive relief.\textsuperscript{12} (The EEA, however, is specifically intended not to preempt any pre-existing civil remedies.\textsuperscript{13}) Finally, perhaps anticipating some concerns with the potential criminal scope of the EEA, Congress provided that the district courts may take "into

\begin{itemize}
  \item \textsuperscript{6} 18 U.S.C. § 1831.
  \item \textsuperscript{7} 142 CONG. RECD. S12201-03 (Oct. 2, 1996) (Manager’s Statement) ("Enforcement agencies . . . should not apply section 1831 to foreign corporations when there is no evidence of foreign government sponsored or coordinated intelligence activity. . . . [T]he pertinent inquiry is whether the activities of the company are, from a practical and substantive standpoint, foreign government directed.")
  \item \textsuperscript{8} 18 U.S.C. § 1831(a)(2) and § 1832(a)(2) (both apply the statute to one who “without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret”).
  \item \textsuperscript{9} See 18 U.S.C. § 1839(4), which generally adopts the common law definition of “trade secret.”
  \item \textsuperscript{10} Stephen C. Glazier, Secret Snares: Beware the New Federal Trade Secrets Act, for it May Criminalize Unauthorized Use in Highly Ambiguous Cases, LEGAL TIMES, Dec. 9, 1996, at B25.
  \item \textsuperscript{11} 18 U.S.C. § 1831(a)(5) and § 1832(a)(5).
  \item \textsuperscript{12} 18 U.S.C. § 1836(a).
  \item \textsuperscript{13} 18 U.S.C. § 1838.
\end{itemize}
consideration the nature, scope and proportionality of the use of the property in the offense" when imposing its sentence. Of course, this provision only comes into play once criminal liability has already been established. Thus, overall, the EEA provided very broad and potentially very tough new criminal sanctions to a field previously dominated by civil remedies. Commentators at the time of the EEA's passage almost uniformly recognized the bill's significance, at least on paper: "The only remaining question is whether Federal authorities will be inclined to prosecute as criminal violations those matters that were traditionally resolved as private commercial disputes."

Against the background of those sweeping measures, Congress went one step further: it stated categorically that it intended the act to apply to extraterritorial conduct. Section 1837 states:

This chapter also applies to conduct occurring outside the United States if – (1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a state or political subdivision thereof; or (2) an act in furtherance of the offense was committed in the United States.

The ramifications and scope of this provision of the EEA will be the focus of this Note. As will be detailed below, where the legislative branch is silent, courts have traditionally applied a presumption against the extraterritorial application of the terms of a statute. This does not, of course, mean that the courts have been unwilling to give extraterritorial effect to statutory terms. But it does mean that, where a statute is silent on the matter, the prosecution would have the burden of showing that the statute should be construed to cover conduct beyond the borders of the U.S. in a criminal case. However, in an action under the EEA, Congress has intentionally relieved the prosecution of that burden. Still, the broad terms of section 1837 make it very clear that the courts will be necessary to delimit the scope and application of the EEA as it relates to conduct outside the United States.

This Note represents an attempt to address the latter issue. The ultimate goal here is to provide a guide to U.S. persons (corporate and individual) operating abroad as well as foreign persons who may

be subject to personal jurisdiction within the U.S. Section 1837 of the EEA, liberally construed, has the potential to cover conduct abroad whose perpetrators may be entirely unaware of the EEA, may not consciously consider themselves subject to U.S. law, and may in fact not be doing anything illegal within their country of operation. Given the relatively recent enactment of the EEA, this Note will, of necessity, be largely extrapolatory and theoretical in nature. Through March of 2000, while the U.S. had filed charges in at least eighteen cases under the EEA, there were only two cases which had produced published decisions in criminal prosecutions under the EEA—and only one of those two even tangentially involved an issue of extraterritorial conduct. Hence, the issue of the extraterritorial scope of the EEA remains largely unresolved today.

Part II of this Note will focus on the Congressional intent behind the EEA, as well as enforcement actions to date under the statute. However, neither Congress nor the courts have satisfactorily outlined the extent of the extraterritorial application of the EEA to date. Thus, following Part II will commence the analysis of the potential scope of the EEA abroad, beginning in Part III with a discussion of the theories behind the extraterritorial reach of U.S. federal law. Because the extraterritorial reach of the EEA has yet to be invoked in practice, Part III will provide a fairly detailed theoretical background to set the stage for Parts IV and V. Part IV will provide a brief comparison of the application overseas of the statutes in two areas of federal criminal law: antitrust and securities law. In both of these areas of law, the courts have had substantial opportunities to apply statutory provisions to conduct occurring abroad, and the common law which has developed in these areas may be instructive in predicting the extraterritorial scope of the EEA. Finally, in light of the discussion in the prior three sections, Part V will provide guidelines to interested parties regarding conduct that may potentially subject its perpetrators to criminal or civil sanctions under the terms of the EEA.

II. The Extraterritorial Application of the EEA to Date

A. Congressional Intent Regarding the Extraterritorial Reach of the EEA

The Economic Espionage Act of 1996 in some ways represented a very sudden shift in the level of federal protection of one form of intellectual property: trade secrets. After all, prior to the EEA’s passage, there was no criminal legislation aimed directly at trade secrets, and civil protection of trade secrets in court was more unpredictable and erratic than it was for other forms of intellectual property, such as patents and trademarks. Suddenly, after the EEA’s passage, the pilfering of trade secrets subjects the defendant to far stiffer criminal sanctions than does the “theft” of any other form of intellectual property.

In its statement of purpose accompanying the final bill, the House made very clear its intent that a prime target of the EEA was the foreign agent who would appropriate trade secrets of an American company. While acknowledging that the theft of trade secrets may be perpetrated by one U.S. company against another, or simply by a disgruntled employee, the House stated a greater concern: “[m]ore disturbingly, there is considerable evidence that foreign governments are using their espionage capabilities against American companies.”\(^{18}\) Indeed, it is worth noting that the bill as originally submitted by Congressman McCollum only applied to trade secret theft on behalf of a foreign government or its representative.\(^{19}\) It was only as a result of concerns that such a bill might violate certain treaty obligations that the EEA was later altered to cover theft on behalf of domestic entities as well.\(^ {20}\)

The House Report incorporated FBI director Louis Freeh’s testimony that the FBI had investigated allegations of economic espionage activities by agents or organizations from 23 different countries – many of which are traditional American allies.\(^ {21}\) The House also cited a survey which indicated that 21 percent of identified participants in economic espionage were foreign nationals and which estimated losses of $63 billion annually to U.S. industry.

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20. See id.
due to foreign economic espionage.\textsuperscript{22} (The latter number is actually lower than some other estimates not cited to Congress.\textsuperscript{23})

Section 1831 of the EEA states that anyone who intends or knows that a "benefit" will be conferred upon a foreign party via the theft of a trade secret is subject to criminal sanctions.\textsuperscript{24} Congress specified that "benefit" is to be interpreted broadly:

The defendant did not have to intend to confer an economic benefit to the foreign government, instrumentality, or agent in any way. Rather, the government need only prove that the actor intended that his actions in copying or otherwise controlling the trade secret would benefit the foreign government, instrumentality, or agent in any way. Therefore, in this circumstance, benefit means not only an economic benefit but also reputational, strategic, or tactical benefit.\textsuperscript{25}

This obviously is an unintimidating burden for the prosecution to clear, and in fact, it is a lower burden of proof than the case in which the defendant does not act on behalf of foreign governmental interests: "when the defendant does not act with the intent to benefit a foreign government, instrumentality, or agent, the government must also show that the defendant intended to disadvantage the rightful owner of the information."\textsuperscript{26} To the extent that actions taken abroad that are covered by the extraterritorial application of the EEA in section 1837 are more likely to be on behalf of a foreign interest, this lower standard of proof under section 1831 has the effect of broadening the extraterritorial reach of the EEA. As for section 1837, Congress specifically stated that it was inserted to "rebut the general presumption against the extraterritoriality of U.S. criminal laws."\textsuperscript{27} To curb the potential extraterritorial reach of the EEA somewhat, Congress also provided that personal jurisdiction would be lacking unless a natural person defendant is a U.S. citizen or permanent resident; if the defendant is a corporate person, personal jurisdiction requires that the company be owned or controlled by U.S. citizens or permanent residents or that it be incorporated within the

\textsuperscript{22} See id.

\textsuperscript{23} Another estimate attributed $105 billion in losses from economic espionage to Japan alone. See Neal R. Brendel & Lucas G. Paglia, The Economic Espionage Act, PA. L. WKLY., July 7, 1997 at 12.

\textsuperscript{24} See H.R. REP. NO. 104-788, at 4030.

\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} Id. at 4033.
United States. However, to cover individual offenders not under the above rubric, Congress prescribed extraterritorial jurisdiction if "an act in furtherance of the offense was committed in the United States" – which has the effect of limiting the limitations of extraterritorial jurisdiction.

The broad criminal application of the EEA even to events overseas has multiple advantages to U.S. companies, particularly smaller U.S. companies. The latter often do not possess sufficient resources to challenge large multinational defendants in a civil action, especially where extensive discovery abroad is necessary. The EEA as written could also be a particularly important asset, for example, to a small U.S. company which exposes some of its trade secrets in a joint venture overseas (assuming U.S. courts can obtain jurisdiction). A criminal conviction under the EEA could go a long way toward proving the plaintiff's case in a civil action for trade secret misappropriation. However, the Department of Justice alerted U.S. industry at the outset that federal prosecutors would not be filing EEA charges at the drop of a hat. In a letter to the Senate Judiciary Committee immediately prior to the bill's passage, Attorney General Janet Reno stated that, at least during the initial five years of the EEA, no charges under the Act would be filed absent the direct approval of the Attorney General or two specified representatives.

As at least one set of commentators has noted, the invocation of the extraterritorial application of U.S. criminal law under section 1837 would presumably require some definable national interest. Otherwise, as those commentators point out, the EEA would apply in a case where the Algerian government acquired through espionage the trade secrets of a Tunisian company, so long as at least one act in furtherance of the crime occurred within the U.S. – or even if all the acts occurred abroad, so long as the perpetrator was a U.S. national or permanent resident. Such a hypothetical vividly illustrates the

28. Id.
29. Id.
31. See Brendel & Paglia, supra note 23.
32. Lorin L. Reisner, Criminal Prosecution of Trade Secret Theft, 219 N.Y.L.J. 1, 4 (1998). The other two DOJ officials who may approve an indictment under the EEA are the Deputy Attorney General and the Assistant Attorney General for the Criminal Division.
33. See Pooley, supra note 19, at 204.
34. See id.
need for prediction as to where the DOJ will draw the line in prosecuting under the EEA, as well as where the courts will draw the line in applying the EEA to extraterritorial conduct.

B. The Economic Espionage Act in the Courts: Federal Criminal Actions Under the EEA to Date

Through March of 2000, only two actions filed pursuant to the EEA had proceeded sufficiently far in the court system to generate published decisions, though quite a few other cases were pending or had settled quickly.35 Most likely, as many commentators had predicted, this was a result of the DOJ’s pursuing only clear-cut cases of trade secret theft in the early years after the passage of the EEA. Thus, not surprisingly, to this point, the prosecution’s rate of success in EEA actions has been very high – apparently 100 percent.36 Also, despite the fact that the EEA as originally proposed only covered trade secret theft on behalf of a foreign governmental entity, there has, through early 2000, yet to be a single case prosecuted under section 1831’s economic espionage provisions.37 Overall, though, the DOJ appears to be falling short of its estimate during Congressional hearings that it would prosecute about fifty cases under the EEA during its first six years.38

The only case under the EEA so far to have reached a published decision with any international implications whatsoever is that of United States v. Hsu. It was originally filed in the Eastern District of Pennsylvania39 and was then subject to an interlocutory appeal to the Third Circuit.40 In this case, the government charged three Taiwanese nationals with attempting to steal the formula and method of production of Bristol-Myers Squibb’s anti-cancer drug Taxol.41 Two of the defendants were arrested when they went to meet with an FBI agent posing as a courier of the technical information sought.42

A third defendant indicted in the case, one Jessica Chou, apparently remains in Taiwan, which has no extradition treaty with

35. See Halligan, supra note 17.
36. See id.
37. See id.
38. H. R. REP., supra note 18, at 4028.
40. See United States v. Hsu, 155 F.3d 189 (3d Cir. 1998).
42. See id.
Because the three defendants were evidently attempting to pilfer the trade secrets in question solely for their Taiwanese employer, there was no intimation that the Taiwanese government was in any way involved. Hence, the action was filed only under 18 U.S.C. § 1832 (1996). As for the extraterritoriality provisions of section 1837, it was unnecessary for the court to address the issue since the majority of the conduct in furtherance of the trade secret theft – including the ultimate meeting at which the two defendants were arrested – occurred on U.S. soil. However, if Ms. Chou is ever indicted in this country, the provisions of section 1837 may apply, since the facts as related by the court seem to indicate that her participation was limited to phone calls and e-mail from Taiwan.

After remand, Mr. Hsu eventually pled guilty on March 31, 1999; there remains an outstanding warrant for Ms. Chou.

Only two other cases with international implications have been filed under the EEA through March of 2000. In United States v. Pin Yen Yang, et al., two Taiwanese nationals were accused of stealing documents containing the trade secrets of Avery Dennison, a California-based adhesive products manufacturer – having been supplied with said documents by an employee of Avery Dennison. In United States v. Huang Dao Pei, the defendant, a Chinese-born naturalized U.S. citizen and a former employee of Roche Diagnostics in New Jersey, was indicted under the EEA for allegedly attempting to purchase trade secret information from his former employer for use in his own business operations in China. Neither case involved an indictment under section 1831 of the EEA since no foreign governmental entity was involved in the alleged trade secret theft. Indeed, through March of 2000 there has not been a single indictment under the “economic espionage” section of the Economic Espionage Act, despite the fact that, as noted above, the initial impetus for the EEA was to combat economic spying perpetrated by foreign governments.

43. See id. at 383.
44. See United States v. Hsu, 155 F.3d at 191-92.
45. See id. at 193.
46. See id. at 191-92.
47. See Halligan, supra note 17.
48. See id.
49. See id.
50. See id.
51. See Pooley, supra note 19.
Thus, apparently, there has not been a single case filed to date which has necessitated the invocation of the extraterritoriality provisions of section 1837. Given the complete dearth of case law on the subject, in order to estimate the limits of the EEA’s application overseas, it will be necessary to look at the theories underlying the extension of U.S. law abroad – and then examine the extraterritorial exercise of select federal criminal statutes possessing more detailed common law development. This will be the focus of Parts III and IV.

III. The Territorial Bases for the Extraterritorial Application of U.S. Law

The federal courts have been defining and refining the scope of the extraterritorial application of U.S. law for the better part of the twentieth century. For the most part, they have been doing so in the context of evaluating whether or not to apply an American statute abroad – where Congress has not specifically provided for extraterritorial jurisdiction. Nonetheless, the discussion below is equally applicable to the EEA since Congress in section 1837 has only instructed the courts generally that the reach of EEA extends overseas – it made little attempt to influence the courts as to the scope of that section. The background treatment in this Part will of necessity be somewhat truncated, given that it could be, and has been, the subject of entire books. The goal here is to provide a general outline of the different theoretical bases for extending the application of U.S. law abroad. One or more of them almost certainly will be invoked when the time comes to apply the EEA extraterritorially, and they will form the background to the predictions and issues discussed in Part V of this note.

Though different sources sometimes apply different labels, there are five general bases for prescribing U.S. jurisdiction over events abroad which the federal courts have cited. The first is nationality: a state may assert jurisdiction over its citizens wherever they are located. The second basis is effects: a nation may potentially claim jurisdiction where there is conduct abroad which produces substantial effect within the territory of that nation. The third basis is

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53. See id.
54. See id.

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protective: there is potential jurisdiction when an act abroad impacts a nation's national security.\(^5\) The fourth basis is universality: any nation may claim jurisdiction over events universally considered to be "crimes against humanity," whether or not they had any impact on that nation or its citizens.\(^6\) The fifth basis is passive personality: a nation may claim jurisdiction whenever the victim of an act is one of its citizens.\(^7\) U.S. courts have, at one time or another, invoked each of the above bases of extraterritorial jurisdiction, and all are now embedded within the Restatement (Third) of Foreign Relations Law (Restatement).\(^8\) With the exception of the universality principle, which is disregarded in the discussion below, each of the above bases of jurisdiction could potentially apply under section 1837 of the EEA.

A. The "Nationality" Basis of Jurisdiction

This principle of jurisdiction, ensconced in § 402 of the Restatement,\(^9\) is a relatively uncontroversial basis for the assertion of extraterritorial jurisdiction, at least when applied to natural persons. In its sparest form, it simply states that "[a] state may . . . punish acts, wherever committed, by nationals of such state."\(^10\) It is probably safe to say that most nations have an interest in asserting jurisdiction over their citizens wherever they are.\(^11\) This, of course, does not imply that a nation's interest is superior in any given case simply due to the involvement of its citizen. Indeed, such nation's interest is often inferior to the interest of the nation in which the events occurred, and the invocation of the nationality principle alone has rarely been sufficient to justify prosecution.\(^12\) While the U.S. traditionally has enforced the nationality principle most stringently in the area of tax law,\(^13\) it has never confined its application to that area.\(^14\)

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55. See id.
56. See id.
57. See id.
59. See id. § 402(2).
62. See Restatement, supra note 58, § 402, reporters' Note 1.
63. See id.; see also Estey, supra note 52, at 182.
64. See Restatement, supra note 58, § 402, reporters' Note 1.
The seminal case in this area of jurisdiction as applied in the U.S. is *Blackmer v. United States*. In this case, the Supreme Court upheld a subpoena directed to a U.S. national residing in France, stating that the "jurisdiction of the United States over its absent citizen . . . is a jurisdiction in personam" wherever that citizen may be located. The application of the nationality principle in that case was simplified by several facts: it was the U.S. citizen himself who contested the principle's application; the country in which the resident was located did not have a strong interest in the matter; and Congress specifically provided for the extraterritorial application of the statute in question. Nonetheless, it set a U.S. precedent for applying the nationality principle which was later extended to other areas of law.

The basis under international law for applying the nationality principle to parties other than natural persons is more questionable. The U.S. specifically claims that the nationality principle does apply to "juridical" as well as natural persons. Generally speaking, the "nationality" of a corporation or similar entity is that of the nation under whose laws it is organized. Nonetheless, section 414 of the Restatement notes the U.S. view that "it may not be unreasonable for a state to exercise jurisdiction for limited purposes with respect to activities of affiliated foreign entities" in certain enumerated situations. Many other developed countries, including Great Britain, reject even a limited application of jurisdiction in such a case, leaving the jurisdiction of foreign subsidiaries solely under the control of the state of incorporation.

**B. The Effects Basis of Jurisdiction**

The effects basis of extraterritorial jurisdiction, which in principle is generally accepted by the international community, simply states that a nation has a valid claim of jurisdiction over

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66. *Id.* at 438.
67. *See id.*
68. *See Restatement, supra* note 58, § 402 cmt. e.
69. *See id.*
70. *Restatement, supra* note 58, § 414(2), and cmts. c through e of section 414 for examples of the potential exercise of jurisdiction over affiliated foreign entities.
73. *See Restatement, supra* note 58, § 402, cmt. d.
"conduct outside its territory that has or is intended to have substantial effect within its territory." The paradigmatic situation to which most countries would be willing to allow "effects" jurisdiction is the case in which a defendant in country A has fired a gun across the border and injured a party in country B. The U.S., however, views the effects basis of jurisdiction as extending significantly beyond such obvious scenarios – including, controversially, economic effects within this country.

The effects basis of jurisdiction has often been viewed as a subset of a more general jurisdictional basis: territoriality. This is the universally recognized principle that a nation has jurisdiction over any conduct which occurs within its borders without regard to the nationality of the actors. The U.S. Supreme Court at the beginning of this century applied a literal view toward the territorial principle. In American Banana Co. v. United Fruit Co., the first case which presented an attempt to apply American law extraterritorially, the Court refused to apply statutory provisions to actions which took place entirely beyond U.S. borders. Writing for the Court, Justice Holmes stated that "[t]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."

This application of "strict" territoriality, though influential for some forty years (most notably in the field of antitrust law), would not survive long without modifications. Ironically enough, it was Justice Holmes himself who, only two years after American Banana, articulated what would come to be known as the "objective territoriality" principle in Strassheim v. Daily. Here Holmes stated

74. See RESTATEMENT, supra note 58, § 402(c).
76. See RESTATEMENT, supra note 58, § 402, cmt. d.
77. See id.
78. See Petersen, supra note 61, at 783.
83. 221 U.S. 280 (1911).
that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." 84 Although the facts of the Strassheim case were limited to a jurisdictional dispute among two American states, federal courts thereafter would not be reluctant to apply Justice Holmes' reasoning to events overseas. 85 Indeed, in more recent times, that very quote from Strassheim was cited by the district court in applying extraterritorial jurisdiction in the drug trafficking case against Manuel Noriega. 86

The principle of "objective territoriality" as initiated by Justice Holmes continues to hold force in federal courts today, though it sometimes receives different labels. 87 However, a formal "effects" test for extraterritorial jurisdiction did not come into being until Judge Hand's landmark 1945 opinion in the Alcoa case. 88 In the case of United States v. Aluminum Company of America 89 (Alcoa), Judge Hand proclaimed that "it is settled law ... that any state may impose liabilities, even upon persons not within its allegiance, for conduct

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84. Id. at 285. In a further irony, Justice Holmes cited his own opinion in American Banana for this proposition, even though he refused to apply it in practice in that case.

85. See Petersen, supra note 61, at 787-88; see also Mark Womack, Extraterritorial Jurisdiction — Mere Intent to Violate Criminal Statute Is Sufficient to Maintain Jurisdiction Under the Objective Territorial Principle, 16 TEX. INT'L L. J. 149, 153 (1981).


87. See, e.g., Brilmayer & Norchi, supra note 85, at 1257-58 (applying the label "impact territoriality").

88. The scholarly literature does not seem to be consistent in its treatment of the "effects" versus "objective territoriality" principles. Some sources seem to indicate that they are essentially the same, or at most that the "effects" doctrine is a subset of "objective territoriality." See, e.g., Estey, supra note 52, at 186; see also Turley, supra note 80, at 615; see also Brilmayer & Norchi, supra note 86, at 1245 (though, as noted above in footnote 86, they substitute "impact territoriality" for "objective territoriality"). Other sources seem to indicate that the two doctrines are in fact separate, albeit similar theories. See, e.g., Joseph P. Griffin & Michael R. Calabrese, Coping with Extraterritoriality Disputes, J. WORLD TRADE, June 1988, at 16. The Restatement acknowledges the confusion, but does nothing to resolve it: "Jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state's territory, is an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category." RESTATEMENT, supra note 58, § 402, cmt. d.

89. 148 F.2d 416 (2d Cir. 1945).
outside its borders that has consequences within its borders which the state reprehends.\textsuperscript{90} This was not the first case to mention effects, but it was the first to make such effects the central question in the analysis of the extraterritorial jurisdiction of a federal statute.\textsuperscript{91} \textit{Alcoa} was particularly significant in that the defendant was a foreign entity and all the actions allegedly violating the Sherman Act occurred entirely outside the United States.\textsuperscript{92} Thus, there was no theory upon which to base jurisdiction other than something akin to an effects test. Though Hand cited prior Supreme Court cases purporting to espouse an effects test – including \textit{Strassheim}\textsuperscript{93} – none of those involved a fact pattern containing a foreign defendant and entirely extraterritorial conduct.\textsuperscript{94}

In many ways the legacy and influence of \textit{Alcoa} in the area of extraterritorial jurisdiction came to parallel that of \textit{International Shoe}\textsuperscript{95} in the area of personal jurisdiction (decided in the same year as \textit{Alcoa}).\textsuperscript{96} In the years since Judge Hand’s opinion, the effects test of \textit{Alcoa} has undergone various modifications and has been the subject of multiple, sometimes inconsistent, interpretations by the lower courts.\textsuperscript{97} Though it is beyond the scope of this paper to address all the permutations of the effects test which have arisen over the years, a couple of developments are worth noting.

One source of criticism (or praise, depending on the speaker’s perspective) flowing from \textit{Alcoa} has been the fact that Judge Hand’s methodology takes a “unilateral” approach to extraterritorial jurisdiction – i.e. it focuses only on the applicability of U.S. law without regard to the comparative applicability of the foreign state’s law.\textsuperscript{98} In response, the 1970s saw a pair of Circuit courts adopt what came to be known as the “balancing approach.”\textsuperscript{99} In the Ninth Circuit

\textsuperscript{90} \textit{Id.} at 443.
\textsuperscript{92} See \textit{id.} at 124.
\textsuperscript{93} See \textit{Alcoa}, 148 F.2d at 443.
\textsuperscript{94} See Dodge, \textit{supra} note 90, at 126.
\textsuperscript{96} Though a decision of the Second Circuit, \textit{Alcoa} essentially had the weight of a Supreme Court decision. The case had been directly appealed to the Supreme Court, but the Court “assigned” the case to the Second Circuit after six Justices disqualified themselves from hearing the case. See Sabalot, \textit{supra} note 82, at 218, n. 30.
\textsuperscript{97} See, e.g., Turley, \textit{supra} note 80, at 611-12, n. 87-89.
\textsuperscript{98} See Dodge, \textit{supra} note 91, at 126-27.
\textsuperscript{99} See \textit{id.} at 127.
case of *Timberlane Lumber Co. v. Bank of America*, the court, though not dismissive of the effects test, stated that this test "by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country." Writing for the Court, Judge Choy substituted a test which has variously been labeled a "conflicts," or more commonly, a "balancing" test. This test includes an "intended effects analysis" but goes further in asking "whether American authority should be asserted in a given case as a matter of international comity and fairness." This test was still not satisfactory in the view of some countries since it continued to assume that the U.S. may establish valid jurisdiction based solely upon the effect in the U.S. of actions abroad – though it should choose not to do so when the facts indicate a stronger foreign interest. Nonetheless, the balancing approach represented a major modification from *Alcoa's* effects test and addressed some concerns from abroad.

Three years later, the Third Circuit essentially followed *Timberlane* in yet another antitrust case, *Mannington Mills, Inc. v. Congoleum Corp.* Writing for the Court, Judge Weis declared the Third Circuit test to be in "substantial agreement" with Judge Choy's in *Timberlane*. In fact, Judge Weis went further and proffered a laundry list of ten factors which "should be considered" by a court in deciding whether to exercise extraterritorial jurisdiction. Despite the fact that the courts were certainly not unanimous in their adoption of this "balancing" test over the next decade, it was incorporated into section 403 of the Restatement in 1987. The pure

100. 549 F.2d 597 (9th Cir. 1976).
101.  Id. at 611-12.
102.  See Turley, supra note 80, at 612.
103.  See, e.g., Dodge, supra note 90, at 129; see also Sabalot, supra note 81, at 222-23.
104.  See Sabalot, supra note 81, at 221-22.
105.  *Timberlane*, 549 F.2d at 613, 615 (emphasis omitted).
107.  595 F.2d 1287 (3d Cir. 1979).
108.  Id. at 1297.
109.  For decisions which specifically rejected this approach, see *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255 (7th Cir. 1980), as well as *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949 (D.C. Cir. 1984).
110.  See RESTATEMENT, supra note 58, § 403, which lists a number of factors similar in substance to those adopted in *Timberlane and Mannington Mills*; see also
effects test from *Alcoa*, though never explicitly overruled, appeared to be fairly moribund by the late 1980s.\footnote{111}

However, in 1993, the Supreme Court abruptly curtailed whatever momentum the balancing approach may have had with its decision in *Hartford Fire Insurance Co. v. California*.\footnote{112} "With a few qualifications, Justice Souter's majority opinion in *Hartford* adopted the effects approach articulated by Judge Hand in *Alcoa*, not *Timberlane*'s balancing approach."\footnote{113} Though Justice Souter cited both section 402 and 403 of the Restatement in support of his position, the majority functionally stresses section 402(c) over section 403's balancing factors\footnote{114} (even though section 402 specifically states that its terms are "subject to" the limitations of section 403).\footnote{115} For Justice Souter, extraterritorial jurisdiction will apply so long as the U.S. has a sufficient interest in the matter and so long as the extraterritorial conduct is intended to produce effects within the U.S.; if this is satisfied, a court may essentially disregard the interest of the other nation(s) in asserting U.S. jurisdiction.\footnote{117} Whether or not *Hartford* spells the "demise"\footnote{118} of the balancing test embodied in Restatement § 403 remains to be seen, but it certainly represents the clear re-establishment of an effects test which is largely at odds with that approach.

As it currently stands, then, the effects basis for asserting extraterritorial jurisdiction remains perhaps the most far-reaching, and most controversial theory underlying the extension of U.S. law to events abroad. Nonetheless, it is no longer a uniquely American theory; other developed nations, notably Germany,\footnote{119} have adopted it

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111. See Dodge, *supra* note 90, at 134.


113. See Dodge, *supra* note 90, at 135.

114. See Estey, *supra* note 52, at 192.

115. See Restatement, *supra* note 58, § 402.


117. Without elaborating greatly, the Court does suggest that if an actor were compelled by foreign law to take certain action which produces effects within the U.S., this may validly serve as a reason to decline U.S. jurisdiction. See Hartford Fire Insurance, 509 U.S. at 798-99.


in a modified form, particularly in the restraint of trade area. And while the genesis of the effects theory in this country was in antitrust cases, as noted below,\(^\text{120}\) it has since spread to other fields, particularly in the area of securities law.

C. The "Protective" Basis of Jurisdiction

The final two bases of extraterritorial jurisdiction of interest, the "protective" and "passive personality" principles, will receive a more limited treatment here – partly because they are invoked more infrequently and partly because there is some overlap with the effects basis of jurisdiction.

In general terms, the protective basis of jurisdiction permits the assertion of extraterritorial jurisdiction when acts committed abroad are directed at the United States and in some manner threaten the security or integrity of this country.\(^\text{121}\) The Restatement has incorporated this principle into section 402(3), which permits a state to assert jurisdiction over "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."\(^\text{122}\) Just exactly how far that "limited class of state interests" extends is unclear.\(^\text{123}\) While the paradigmatic activities covered by the protective principle are probably espionage and terrorism,\(^\text{124}\) it has been construed to cover areas which are less obviously vital to national security.\(^\text{125}\) Thus, it would not be hard to imagine a court using this basis to extend jurisdiction over "economic espionage" under the EEA, particularly in cases involving high technology.

In practice, U.S. courts have fairly infrequently invoked the protective basis to extend jurisdiction to acts committed abroad, perhaps because it has variously been seen as a sub-category of the effects\(^\text{126}\) and objective territorial\(^\text{127}\) principles. It has been subject to

\[^\text{120}\] See infra Part IV.B.
\[^\text{121}\] See Petersen, supra note 61, at 784.
\[^\text{122}\] See RESTATEMENT, supra note 58, § 402(3).
\[^\text{123}\] See Feinberg, supra note 60, at 389.
\[^\text{124}\] See Petersen, supra note 61, at 793.
\[^\text{125}\] The comments to the Restatement list – in addition to espionage – counterfeiting, falsification of official documents, perjury before a consular officer, and violations of immigration law as crimes for which the protective principle may supply jurisdiction. Specifically excluded are acts of political expression, such as libel of a state. See RESTATEMENT, supra note 58, § 402, cmt. f.
\[^\text{126}\] See id.
severe criticism on the basis that its inherent vagueness allows a given state to define what its vital interests are without any clear guidelines. Nonetheless, in recent years, a few appellate courts, notably the Ninth and Second Circuits, have demonstrated a willingness to cite the protective principle in justifying extraterritorial jurisdiction.

D. The "Passive Personality" Basis of Jurisdiction

Under this theory, a state may assert extraterritorial jurisdiction over conduct based solely upon the nationality of the victim of such conduct. On the surface, it appears to be simply a natural extension of the nationality principle; after all, if a state has an interest in conduct by its nationals, then it would presumably have an interest in conduct committed against its nationals. Not surprisingly, however, its invocation is often controversial, and even the United States has challenged its application. Currently included within the language of Restatement section 402(2), the passive personality principle applies prototypically in the case of terrorist acts committed against Americans abroad.

As a general rule, the passive personality principle may apply only to the most serious of crimes. Furthermore, while not theoretically precluded under its terms, this principle apparently has rarely, if ever, been applied to economic crimes committed abroad, nor does it appear to apply to crimes committed against corporate rather than natural persons. Hence, it is highly unlikely that it could ever serve as the basis for extraterritorial jurisdiction under the EEA. Indeed, some commentators believe it is an inappropriate doctrine for any crime: "[i]t is hard to argue that it is fair to subject citizens of

127. See Petersen, supra note 61, at 791.
128. See id. at 792.
129. See, e.g., United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994); see also United States v. Felix-Gutierrez, 940 F.2d 1200, 1205-06 (9th Cir. 1991); see also Chua Han Mow v. United States 730 F.2d 1308, 1311 (9th Cir. 1984).
130. See, e.g., United States v. Khalje, 658 F.2d 90, 92 (2d Cir. 1981); see generally Estey, supra note 52, at 202-03.
131. See Feinberg, supra note 60, at 389.
132. See id.
133. See RESTATEMENT, supra note 58, § 402, cmt. g; and reporters' note 3. Indeed, Congress based extraterritorial jurisdiction upon the passive personality principle under the Omnibus Diplomatic Security and Antiterrorism Act of 1986. See id.
134. See RESTATEMENT, supra note 58, § 402, cmt. g.
foreign nations to United States law simply because Americans choose to travel abroad, yet the ... passive personality theory allows precisely this result.”\textsuperscript{135} Still, in conjunction with other theories, notably the protective theory, it could serve as a factor in favor of U.S. jurisdiction.\textsuperscript{136}

IV. The Extraterritorial Reach of Selected Federal Criminal Laws

Given the complete dearth of cases to date construing the extent of the EEA’s extraterritorial reach, it would be useful to compare the courts’ willingness to apply jurisdiction to conduct abroad under other federal criminal laws. Thus, against the theoretical background discussed in Part III, this section will briefly outline the current law regarding extraterritorial jurisdiction in the fields of antitrust and securities law. Since these represent the two most prominent areas of economic crime applied extraterritorially, they are particularly pertinent to our EEA analysis here. From these comparisons, we will be able to draw a general outline of the extent of the EEA’s application to conduct abroad in Part V.

A. Antitrust Law Applied Extraterritorially

As should be evident from the theoretical discussion in Part III above, much of the common law development with regard to the jurisdictional limits of U.S. law abroad has occurred in the context of antitrust litigation. Rather than rehash the historical development of the extraterritorial application of antitrust law, this section will confine itself to an appraisal of the reach of U.S. antitrust law abroad as it stands today.

The application of U.S. antitrust law to the entirely extraterritorial conduct of foreign actors remains the most common – and commonly criticized – example of the American imposition of its extraterritorial jurisdiction.\textsuperscript{137} The antitrust jurisdictional bases covering conduct abroad have shifted back and forth this century from a narrow territorial refusal to extend antitrust law under \textit{American Banana}, to the adoption of the effects test under \textit{Alcoa}, to

\begin{itemize}
\item \textsuperscript{135} Brilmayer \& Norchi, supra note 86, at 1255.
\item \textsuperscript{136} See Petersen, supra note 61, at 797.
\end{itemize}
the balancing approach under *Timberlane/Mannington Mills* and the Restatement (3d), to the re-emergence of the effects test most recently under *Hartford Fire Insurance*. In light of all this, the following represents an outline of the current law on the subject.

Pursuant to *Hartford*, we start with the general rule that if actions taken abroad produce a substantial anti-competitive effect within this country, the assertion of jurisdiction over such conduct by an American court is proper. Need the resulting effect have been intended by its perpetrators? Under the original effects doctrine in *Alcoa*, the answer was yes— but there was no liability unless the intended conduct actually produced the desired result. *Alcoa* did not address the alternative scenario: where the foreign perpetrators produced the effect without the intent. Cases subsequent to *Alcoa* tended to relax the intent requirement such that once the effects were demonstrably linked to the defendant, intent was presumed. It does not appear as though *Hartford* has altered the intent requirement. The facts of *Hartford* clearly indicated the intent of the foreign defendants to violate U.S. antitrust law; hence, the Court did not have to go further than to say that “it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.” Thus, it remains unclear to what extent the courts would be willing to extend jurisdiction in the (concededly rare) case of unintended anti-competitive effects within the U.S. In this regard the U.S. Justice Department has stated in its Antitrust Enforcement Guidelines that “the presence or absence of a purpose to affect U.S. consumers, markets, or exporters” is one factor to consider in deciding whether it will prosecute a foreign defendant.

This brings us to one last question concerning extraterritorial jurisdiction under U.S. antitrust law: Does *Hartford* render the balancing approach of *Timberlane* and the Restatement obsolete? The answer, in a nutshell, is that *Hartford* certainly weakened but did not altogether gut the balancing approach. The *Hartford* majority did

140. See id.
141. See id. at 59.
143. See Lytle, *supra* note 138, at 70.
ignore most of the balancing factors enshrined in Restatement §403, but it never specifically rejected §403’s utility either. In fact, Justice Souter selectively cited §403 for the proposition that “where a person subject to regulation by two states can comply with the laws of both,” either state may legitimately assert jurisdiction. Further, the Court did not apply an entirely “pure” effects test: it did consider the factors of “substantiality of effect” and “likelihood of conflict with another nation.” With regard to the latter factor, the Court essentially fashioned an escape from extraterritorial jurisdiction if the foreign defendant were required by local law to take certain positive action which in turn violates U.S. law. In other words, the mere legality of conduct abroad will not per se spare a foreign defendant from U.S. jurisdiction.

If nothing else, Hartford reversed a trend from the seventies and eighties toward the reining in of American antitrust jurisdiction, and it instead contributed to the trend over the last decade of expanding the extraterritorial application of the Sherman Act. The next question then is to what extent the courts’ approach under antitrust law has carried over to other types of federal economic crimes, most notably in the area of securities law.

B. Federal Securities Law Applied Extraterritorially

Since the legislative histories of the twin bases of securities law – the Securities Act of 1933 and the Securities Exchange Act of 1934 – were silent as to application abroad, the courts originally relied upon the presumption against extraterritoriality in refusing to assert jurisdiction over conduct overseas. The extension of antitrust

144. See Hartford Fire Insurance, 509 U.S. at 799.
145. See id.
146. Quite possibly, the Hartford decision has, in the years since its issuance, had the effect of emboldening the circuit courts to uphold jurisdiction in antitrust cases where they would not have previously. For example, the First Circuit in United States v. Nippon Paper Industries Co., 109 F.3d 1 (1997), approved jurisdiction in a criminal antitrust action against a Japanese defendant even though all of the allegedly criminal acts occurred overseas. For a detailed discussion of this case, see Michael Bishop, Note, United States v. Nippon Paper Industries Co. Criminal Application of the Sherman Act Abroad, 32 GEO. WASH. J. INT’L. L. & ECON. 271 (1999); see also Leigh Robin Lamendola, Note, The Continuing Transformation of International Antitrust Law and Policy: Criminal Extraterritorial Application of the Sherman Act in United States v. Nippon Paper Industries, 22 SUFFOLK TRANSNAT’L L. REV. 663 (1999).
147. See Trimble, supra note 118, at 56.
148. See Estey, supra note 52, at 186. Some courts also felt constrained by a
extraterritorial jurisdiction in *Alcoa* did not immediately have an impact on the securities laws. But by the late 1960s, courts began to apply the effects doctrine to federal securities cases. The effects doctrine in the securities law context, which is often applied in antifraud cases, is based on the assumption that Congress really intended to legislate against any conduct calculated to violate securities laws within the U.S., wherever perpetrated. The first appellate court to adopt the effects doctrine in a securities law case was the Second Circuit in *Schoenbaum v. Firstbrook*; other circuits followed soon thereafter.

The effects doctrine remains the cornerstone of extraterritorial jurisdiction today and is probably the only one of the traditional theories discussed above in Part III which per se justifies the assertion of extraterritorial jurisdiction under the securities laws. The passive personality principle in rare cases has served as a supplemental basis for jurisdiction, probably in fewer cases even than under antitrust law. Likewise, the protective principle, while not theoretically precluded, has had almost no role in the assertion of securities law jurisdiction to events abroad. After all, "capital transactions or regulation occurring abroad almost never prejudice national security...."

Finally, the nationality basis of extraterritorial jurisdiction, while valid in a securities law setting, is not often invoked, except perhaps as a supplemental basis to the effects doctrine. If a U.S. national takes action abroad which produces no breach of American securities laws, the U.S. has no interest in the matter; if such national's actions abroad do violate U.S. law, then normally the foreign country has no objection to U.S. assertion of provision in the Exchange Act which stated that the act did not apply to business transactions "without the jurisdiction of the United States." See Turley, *supra* note 80, at 614 n.100. Of course, since the courts themselves set the limits of U.S. jurisdiction, it is probably not surprising that a court determined to extend the Exchange Act to events abroad would not find the above provision to be a major obstacle.

149. See Estey, *supra* note 52, at 186-87.

150. The courts have rarely, if ever, applied any other provisions of the Exchange Act, such as its registration requirements, extraterritorially. See Turley, *supra* note 80, at 614 n.103.

151. See *Predictability and Comity, supra* note 136, at 1315 n.29.

152. 405 F.2d 200 (2d Cir. 1968).

153. See *Predictability and Comity, supra* note 136, at 1315 n.29.


155. *Id.* at 188.
jurisdiction (unless, perhaps, the national works for a subsidiary incorporated abroad). 156

Hence, we are again left with the effects basis of jurisdiction as the primary foundation for extraterritorial jurisdiction under U.S. securities laws. Most federal courts are willing to assert extraterritorial jurisdiction under an effects test which substantially mirrors the "intended effects" test as originally developed under Alcoa in the antitrust setting. 157

In addition, however, the Second Circuit in the 1970's developed a secondary test specifically for securities law cases: the conduct test. Announced in Leasco Data Processing Equipment Corp. v. Maxwell, 158 and refined in Bersch v. Drexel Firestone, Inc., 159 this test generally supplements rather than substitutes for the effects test. Under this doctrine, a court examines that part of the fraudulent conduct which occurred within the U.S.; if such conduct represents an "essential link in the preparation of a fraudulent scheme," U.S. jurisdiction will generally be proper even if the majority of the activity took place abroad. 160 "Under the conduct test, therefore, a securities transaction might have little effect within the United States, but still trigger extraterritorial application." 161 More recently, the Second Circuit clarified the conduct test by stating that a U.S. court will have jurisdiction if (1) defendant's activities were more than merely preparatory to securities fraud conducted elsewhere, and (2) such activities or failures to act within the U.S. directly caused the losses in question. 162

Following the lead of the Second Circuit, at least four other circuits have considered and adopted a conduct test for the extraterritorial application of U.S. securities law, although a couple of those circuits require a less substantial amount of "conduct" to occur within the U.S. to assert jurisdiction. 163 Still, it is the rare securities

156. See id. at 185-86.
157. See Turley, supra note 80, at 613-14.
158. 468 F.2d 1326 (2d Cir. 1972).
159. 519 F.2d 974 (2d Cir. 1975).
161. See Turley, supra note 80, at 616.
162. See Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122 (2d Cir. 1995); see also Estey, supra note 52, at 188-89.
163. See generally Michael J. Calhoun, Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction, 30 LOY. U. CHI. L.J. 679 (1999) (discussing more recent refinements of the effects and conduct tests
law case in which the court asserts jurisdiction even though the effect within the U.S. is negligible or non-existent. Unfortunately, there has been no securities law equivalent of the Supreme Court antitrust decision in *Hartford*. Hence, the extent to which the conduct test supplements the effects test in applying U.S. securities law extraterritorially depends to some measure upon the circuit in which the complaint is filed. But then again, unlike the antitrust setting, over the last three decades there has been fairly little debate about the scope and the applicability of the effects test itself in securities law cases: if the fraudulent effect occurs within the U.S., American securities law will apply.

V. Potential Extraterritorial Jurisdiction Issues Under the EEA

On the surface, given Congress' clear intent to apply the statute extraterritorially, and given the above theoretical and common law bases for applying U.S. law to conduct abroad, it would seem that the potential application of the EEA to events overseas is almost limitless. After all, under an expansive reading of the passive personality principle, any act committed anywhere for the purpose of stealing an American trade secret produces an American victim, upon which jurisdiction could theoretically be based. Alternatively, one could argue that the theft of American trade secrets anywhere in the world is intended to produce an effect within the U.S. Finally, under the protective principle, the U.S. could claim that the theft of important high-tech trade secrets anywhere represents a national security threat (though this option most likely would require a charge of foreign governmental involvement under section 1831).

In reality, all of these expansive assertions of extraterritoriality are tempered by Congress' stated requirement that there be "an act in furtherance of the offense" committed within the U.S.\(^{164}\) Nonetheless, depending on the alleged offense, it is easy to foresee the courts applying the above requirement loosely. This section explores which events might trigger jurisdiction under section 1837 of the EEA, which case scenarios present the highest probability of prosecution under that section, and then offers some suggestions

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by a number of the circuit courts of appeals); see also Hermann, *supra* note 160, at 220-22.

about certain precautionary measures that companies may take.

For American companies operating abroad, the extraterritorial application of the EEA is a double-edged sword. On the one hand, it has the potential to provide a remedy in U.S. courts for a theft of trade secrets occurring almost entirely outside the U.S. (subject to the "act in furtherance" requirement as well as the necessity of establishing in personam jurisdiction). On the other hand, there is no "act in furtherance" requirement whatsoever for U.S. entities: any U.S. national, permanent resident, U.S. corporate entity, or U.S. organization "substantially owned or controlled" by U.S. citizens or permanent residents is subject to the terms of the EEA worldwide. Thus, a U.S. permanent resident employed abroad who attempts to unlawfully appropriate the trade secret of an American company (or, at least in theory, a foreign company) located abroad is subject to criminal prosecution under the EEA. This, of course, is founded upon the nationality basis of jurisdiction. With the possible exception of jurisdictional assertions against entities "substantially owned or controlled by" U.S. citizens, this represents an internationally recognized basis for jurisdiction. In reality, however, it is highly unlikely that the government would attempt to assert jurisdiction over U.S. nationals abroad under the EEA where the target of their thievery is not also a U.S. national.

What steps then should American companies with subsidiaries or joint ventures abroad pursue? Without doubt, such companies — particularly in high-tech fields — should educate their employees regarding the severe criminal sanctions which may apply for theft of trade secrets both in the U.S. and abroad. Such education, which should take place upon the hiring and departure of employees, can serve multiple purposes: first, to make clear that (assuming they are U.S. nationals) the statute will follow them wherever they go; and secondly, it will reinforce the need to maintain the secrecy of the company's trade secrets, without which there can be no prosecution under the EEA (and often no civil remedy either). Indeed, the

165. See id.
168. See id. at 205-06.
employer should also instruct its employees to report any trade secret theft immediately in order to prevent the information from becoming public in any way. In addition, such education must stress the potential personal and corporate criminal liability which can result from any use of the trade secrets of other companies – even if such information was offered officiously by an employee of a rival company (i.e. without any active solicitation or other misbehavior). As a result, employers (both U.S. and foreign) should assiduously screen any new employees who arrive bearing documents or materials from previous employers (assuming their prior employer was a U.S. person). Perhaps one final piece of advice for U.S. entities operating abroad is appropriate: don’t relax now that the EEA is in force. The EEA simply will not help if the perpetrator of trade secret theft abroad is not a U.S. national. Even if such perpetrator in some way committed an act in furtherance within the U.S. (e.g. a phone call or an e-mail), if he is not physically within the U.S., he may be immune from prosecution. Even if the country in which the defendant is located has an extradition treaty with the U.S., it is highly questionable whether it would extradite a defendant to face charges under such a uniquely American criminal statute.

As for foreign corporations, the EEA will affect different entities differently. If a foreign company possesses no operations in the U.S. and engages in trade secret theft against a U.S. entity entirely outside the U.S., then the EEA cannot apply. In that respect, the extraterritorial jurisdiction under the EEA may fall short of the jurisdictional reach applied under a “pure” effects test in antitrust law – where the Sherman Act can reach conduct entirely extraterritorial

169. See Mark Grossman, Keeping Your Data Safe from Spies, LEGAL TIMES, Sept. 21, 1998, at 57; see also Savage & Bauer, supra note 30, at 21.

170. Such a scenario is covered by sections 1831(a)(3) and 1832(a)(3) of the EEA, which impose criminal penalties on a person who “receives” trade secret information knowing that it was stolen or obtained without authorization.


172. Even if such a foreign corporation does have a U.S. presence, the EEA will not apply if every act in furtherance of the alleged trade secret theft from an American corporation occurs outside the U.S. The problem is that a substantial U.S. presence would greatly increase the chance that some small act in furtherance of the crime, such as use of the telephone or e-mail, could occur within the U.S. – which may be enough to grant jurisdiction under § 1837. See, e.g., Simon, supra note 166, at 314.
in nature. The "act in furtherance" requirement imposed by Congress more closely resembles the conduct test developed by the Second Circuit in the securities law cases, with a couple of twists. First, though there is some disagreement among the circuits which apply the conduct test, the "act in furtherance" in the securities case likely needs to be more substantive than under the EEA. Secondly, many of the circuit courts in a securities case will disregard the conduct test (i.e. will not require U.S.-based conduct) if the effect within the U.S. is significant enough, something the courts applying the EEA will not be able to do.

So what steps should foreign entities take under the EEA to avoid liability? Much of the advice to U.S. persons above may potentially apply to foreign entities as well. Certainly, if such an entity has any significant presence in the U.S., even in the form of a joint venture with a U.S. entity, education regarding the EEA similar to that specified above would be wise. Many other nations do not provide civil remedies, much less criminal sanctions, for trade secret misappropriation. Thus, many foreign employees working abroad, and even some working within the U.S., may be unaware that such misappropriation is broadly defined under U.S. law and that it may subject themselves and their employers to criminal liability. It remains to be seen how quickly they will learn the lesson and how willing the DOJ will be to punish them if they do not.

VI. Conclusion

Though there is relatively little evidence on the point to date, the Economic Espionage Act of 1996 by its terms has the potential to join the antitrust and securities laws as one of the most important and effective federal statutes in the area of economic crimes. Given the theoretical and practical issues outlined above, in conjunction with the clear Congressional mandate under section 1837 of the Act, the jurisdictional reach of the EEA also has the potential to rival that of the above-mentioned areas of law.

173. See supra, Part IV.B.

However, even if federal prosecutors come to use the EEA extensively, it could be quite a few years before there is a developed common law which limits its extraterritorial scope (after all, it took decades for such law to develop under the antitrust and securities statutes). In the meantime, there will be much uncertainty in this area. Counsel here and abroad will need to pay attention to the courts and the actions of the Justice Department, but they will also have to recommend certain precautionary actions in anticipation of the courts' decisions — thus ensuring that it is not their client in court setting the precedent!