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Territory, Territoriality, and the Resolution of Jurisdictional Conflict

Ever-increasing gaps and overlaps in the national regulation of cross-border events challenge territorial sovereignty as the conceptual basis for rules on legislative jurisdiction. At the same time, the work of scholars in a range of disciplines, including international relations and critical geography, has complicated our understanding of the relationship between territory and power in the age of globalization. As a result, emerging models of jurisdictional theory are moving away from territory, and territorially based concepts of regulatory power, as the basis for defining legislative authority. What risks being overlooked in this shift is the critical step between re-thinking the construction of territory *and rejecting the salience of* territoriality *to jurisdictional frameworks. While territorial contacts may function as simple factual inputs in jurisdictional analysis, "territoriality" and "extraterritoriality" are legal constructs—claims made by particular actors, and assessed by particular institutions, within particular legal systems. The meaning of such claims is therefore dependent upon the local practices and understandings of specific regimes. This Article uses a case study of the role of territory in U.S. and German competition law to uncover differences in those systems that affect their respective constructions of territoriality. It argues that local legal and institutional frameworks remain relevant in the transition from traditional conflicts models to newer regulatory strategies, and that the process of integrating critical reconceptualizations of territory into jurisdictional theories must account for differences in those frameworks across regimes.*

INTRODUCTION

In his 1964 Hague lectures, F.A. Mann sketched out the foundation of modern jurisdictional law in the following terms:

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> Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State's sovereignty. As Lord Macmillan said, "it is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits". If a State assumed jurisdiction outside the limits of its sovereignty, it would come into conflict with other States which need not suffer any encroachment upon their own sovereignty . . . . Such a system seems to establish a satisfactory regime for the whole world. It divides the world into compartments within each of which a sovereign State has jurisdiction. Moreover, the connection between jurisdiction and sovereignty is, up to a point, obvious, inevitable, and almost platitudinous, for to the extent of its sovereignty a State necessarily has jurisdiction.[1]

This passage captures the triangular relationship of three concepts: territory, sovereignty, and jurisdiction. Statehood is articulated by reference to a particular geographic territory; jurisdiction, in the sense of a sovereign's authority over persons or events, by reference to their location within that territory. This model long served as the basis for rules on legislative, or prescriptive, jurisdiction. The factual links between particular conduct and a given territory, or between the effects of that conduct and a given territory, determined a state's lawmaking authority over the conduct.

In the current era, the reliance on territorial factors in determining the scope of a country's legislative jurisdiction has been called into question. This is due primarily to the increasing complexity and diffusion of the transactions and events that trigger jurisdictional inquiry. Regulators and courts must grapple not only with cross-border transactions, or with acts of multinational enterprises, but also with events that can be characterized as occurring nowhere (in cyberspace) or everywhere (on interconnected global markets). The resulting gaps and overlaps in transnational regulation have led scholars working in a variety of substantive areas to propose alternative methods of regulating cross-border commerce—methods that reject territorial contacts as the basis for allocating regulatory jurisdiction. For instance, in the area of securities regulation and insolvency, some authors have advocated increased deference to party autonomy, arguing that companies should be free to choose the

1. Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 30 (1964-I) (internal citations omitted).

regulatory regime governing their conduct.[2] In the area of corporate social responsibility, scholars have promoted the Alien Tort Claims Act, which vests U.S. courts with jurisdiction over certain acts despite their lack of territorial connection with the United States, as a means of addressing egregious human rights violations.[3] And an early article on the topic of cyberspace regulation argued that "[s]eparated from doctrine tied to territorial jurisdictions, new rules will emerge to govern a wide range of new phenomena . . . ."[4]

Many of these proposals focus primarily on the lack of functionality of territory-based jurisdictional theories in today's economy. Some commentators, however, have engaged more broadly with the project of re-theorizing the relationship between territory and jurisdictional authority in the age of globalization.[5] That project connects with the work of scholars in a wide range of other disciplines—work that questions traditional conceptions of territoriality and sovereignty. International relations theorists, for instance, have challenged the continuing viability of the Westphalian model of sovereignty, arguing that defining sovereignty primarily as exclusive control over particular territory fails accurately to capture the source and extent of governmental power.[6] Similarly, sociologists and critical geographers have inspected the meaning of territory, questioning its construction

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2. *See* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation,* 71 S. CAL. L. REV. 903 (1998) (legislative jurisdiction in securities regulation); ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION 48-50 (2002) (same); Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997) (insolvency).

3. *See, e.g.*, Mayo Moran, *An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law*, *in* TORTURE AS TORT 661 (Craig Scott ed. 2001).

4. David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace,* 48 STAN. L. REV. 1367, 1367 (1996).

5. *See, e.g.*, Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005) (challenging the idea "that American law is somehow tethered to territory," *id.* at 2550, and arguing for the adoption of a presumption against a spatialized reading of laws' scope); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? TERRITORIALITY AND EXTRATERRITORIALITY IN AMERICAN LAW (2009 forthcoming); Ralf Michaels, *Territorial Jurisdiction After Territoriality*, *in* GLOBALISATION AND JURISDICTION 105 (Piet Jan Slot & Mielle Bulterman eds., 2004) (describing globalization's challenges to territoriality and considering a variety of possible responses in jurisdictional theory); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) (hereinafter Berman, *Globalization of Jurisdiction*) (noting that "the idea of legal jurisdiction both reflects and reinforces social conceptions of space, distance, and identity," *id.* at 319, and proposing a "cosmopolitan pluralist" theory of jurisdiction based on community definition). *See also* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999).

6. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH REGULATORY AGREEMENTS (1995); STEVEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); POLITICAL SPACE: FRONTIERS OF CHANGE AND GOVERNANCE IN A GLOBALIZING WORLD (Yale H. Ferguson & R.J. Barry Jones eds., 2002) (including essays addressing the adaptation of regulatory power in the age of globalization).

in exclusively physical-geographic terms.[7] These studies disrupt settled understandings of the individual components on which the traditional model of legislative jurisdiction is based, and therefore intersect with legal scholarship that questions the role of territory in that model. Such scholarship goes beyond calls to reject formalistic approaches based on territorial factors and makes a second, more radical move, seeking to ground the concept of jurisdiction in an entirely different theoretical foundation. Paul Berman, characterizing an assertion of jurisdiction as "part of an international process of community definition and norm creation," presents a "cosmopolitan" model of jurisdiction:

> A cosmopolitan approach allows us to think of community not as a geographically determined territory circumscribed by fixed boundaries, but as "articulated moments in networks of social relations and understandings." This dynamic understanding of the relationship between the "local" community and other forms of community affiliation (regional, national, transnational, international, cosmopolitan) permits us to conceptualize legal jurisdiction in terms of social interactions that are fluid processes, not motionless demarcations frozen in time and space. A court in one country might therefore appropriately assert community dominion over a legal dispute even if the court's territorially based contacts with the dispute are minimal. Conversely, a country that has certain "contacts" with a dispute might nevertheless be unable to establish a tie between a local community and a distant defendant sufficient to justify asserting its dominion.[8]

In fundamental ways, then, the growing literature on jurisdiction and globalization moves away from territory, and territory-based concepts of regulatory power, as the basis for defining the scope of lawmaking authority.

What risks being overlooked in this project of reassessing the theory of legislative jurisdiction is what happens in the critical step between re-thinking the construction of *territory* and rejecting the salience of *territoriality* to jurisdictional frameworks. In traditional

7. *See, e.g.*, SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006); Saskia Sassen, *Territory and Territoriality in the Global Economy*, 15 INT'L SOC. 372 (2000) (distinguishing globalization's impact on national territory from its impact on the exclusive territoriality of nation-states); NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER (1994); Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 STUD. L. POL. & SOC'Y 149 (2008); Andrea Brighenti, *On Territory as Relationship and Law as Territory*, 21 NO. 2 CAN. J.L. & SOC'Y 65 (2006) (advocating a relational rather than spatial conception of territory).

8. Berman, *Globalization of Jurisdiction, supra* note 5, at 322.

jurisdictional analysis, territory figures simply as a factual input in the process of identifying the links between certain states and certain acts or actors. "Territoriality" and "extraterritoriality," though, are legal constructs. They are claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote. Thus, those harmed by anti-competitive conduct may invoke the concept of "objective territoriality" to argue that the location of that conduct's effects within a particular country is sufficient to give that country jurisdiction to regulate; the government of a nation in which defendant corporations are located, conversely, may invoke the concept of "extraterritoriality" to argue that the regulating country would overstep its authority if it applied its laws to foreign conduct. Moreover, these claims of authority or resistance are heard, and acted upon, by particular institutions within particular states. In some cases, that might be a national court considering legislative jurisdiction in the context of a private lawsuit; in others, a regulatory authority weighing a possible penalty on unlawful conduct. The meaning of such claims is therefore constructed within individual legal regimes, and must be understood as contingent upon the specific legal and institutional frameworks in which they are embedded. The risk in the move away from territory-based jurisdictional standards is that territoriality may be cast in monolithic terms, eliding the various localized practices and understandings that inform its content.

This Article proceeds by means of a case study of U.S. and German law on legislative jurisdiction in the antitrust arena. It has two primary aims. The first is to provide a rich account of a particular substantive context in which claims of territoriality or extraterritoriality are relevant, in order to identify more specifically the role those claims play in jurisdictional analysis and the purposes for which they are deployed in regulatory contests. Thus, Part I begins by examining both systems' traditional doctrinal reliance on territoriality as the basis of jurisdiction over competition law claims. Part II then turns to the question of how to resolve the conflicts that arise when more than one country has a jurisdictional basis to regulate certain conduct. This part examines more closely the sources from which the respective systems draw the norms that delimit the scope of regulatory authority.

The Article's second aim is to uncover some of the specific conceptual and institutional features of the two systems that affect their respective understandings of territoriality. Here, the analysis focuses on aspects such as the role of public international law in the two systems, and the balance of public and private enforcement mechanisms within the respective regimes. The Article concludes that territory, and territorial limits, are quite differently constructed in the two le-

gal systems. While the U.S. approach relies heavily on private international law concepts in defining the scope of prescriptive jurisdiction, German courts and commentators view the problem through two very different lenses—public international law and international enforcement law. As a result, claims of territoriality and extraterritoriality resonate differently in the two systems.

The Article concludes by emphasizing the importance of local norms and local institutions to jurisdictional analysis. That local context informs the significance of territoriality, and therefore remains salient in the transition from traditional conflicts models to more effective global regulatory strategies. In addition, the process of integrating critical reconceptualizations of territory into theories of jurisdiction must account for local context if those theories are to acquire normative power in the international arena.

I. Doctrinal Foundations: Territoriality as a Basis for Legislative Jurisdiction

In the first instance, territoriality functions within the jurisdictional context as the conceptual foundation of regulatory authority over transactions or conduct.[9] Historically, in its strictest sense, the concept referred to the exclusive authority of a state to regulate events occurring within its borders.[10] On this understanding, a claim of territorial jurisdiction was irrefutable and unproblematic in that it rested on conduct occurring within the regulating state and, by definition, could not overlap with a competing claim by another country.[11] Over the course of the twentieth century, the concept expanded to include authority over certain conduct that took place elsewhere but whose effects were felt within the regulating state. As the analysis below suggests, this expansion was recognized in substantially similar ways in most systems; thus, while the content of "territoriality" changed, it did so in a way that remained more or less compatible in most legal regimes.[12]

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9. While international law recognizes other bases of jurisdiction, including nationality, territoriality was traditionally recognized as the primary basis, particularly in the area of economic regulation. Ian Brownlie, Principles of Public International Law 299 (7th ed. 2008).

10. *See* Joseph Story, Commentaries on the Conflict of Laws 19, 21 (Arno Press ed. 1972) (1834) ("[E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory;" "[I]t would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories.").

11. *But see* Michaels, *supra* note 5, at 110-11 (noting that this principle was never so strictly construed).

12. The major outlier was the United Kingdom, which continued to insist that territorial jurisdiction was present only when the conduct in question itself took place within the regulating state. *See* A. Vaughan Lowe, *Extraterritorial Jurisdiction: The British Practice*, 50 Rabels Zeitschrift für ausländisches und internationales Privatrecht 157, 203 (1988): (". . . United Kingdom practice is based upon the en-

A. *U.S. Law*

In the United States, the law regarding legislative jurisdiction has developed almost exclusively in judicial decisions, as the relevant statutes are silent on the question of scope. The Sherman Act does not contain a provision specifically addressing its jurisdictional reach in cases with cross-border elements,[13] and the Clayton Act, which authorizes private lawsuits based on violations of the antitrust laws, refers back to the Sherman Act for jurisdictional purposes.[14] While the Foreign Trade Antitrust Improvements Act of 1982[15] (FTAIA) does address directly the question of legislative reach, it applies only to export trade from the United States and therefore is not relevant to many kinds of antitrust violations.[16]

As within other systems, the traditional approach was to limit legislative jurisdiction to conduct that took place within the borders of the United States.[17] In the antitrust context, this view was best captured in the early *American Banana* decision, in which Justice Holmes discussed the territorial nature of law and then defined jurisdiction in terms of the location on particular territory of the relevant conduct:

> Law is a statement of the circumstances, in which the public force will be brought to bear upon men through the courts . . . . The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power . . .

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tirely proper perception that the world is made up of independent sovereign states in each of which the government of the state is entitled to assert that it is its right, and not that of any other state, to regulate the economy of the state concerned. The primacy of the territorial principle of jurisdiction asserted in British practice is a logical, and arguably a necessary, inference from the fact of the co-existence of independent states.")

13. Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . with foreign nations." Section 2 states that it is illegal for any person, including entities organized under the laws of a foreign country, "to monopolize any part of the trade of commerce . . . with foreign nations." 15 U.S.C. §§ 1-2.

14. 15 U.S.C. § 15(a).

15. Pub. L. 97-290, codified in part as 15 U.S.C. § 6(a).

16. The FTAIA does not address import trade or import commerce. It essentially excludes from the Sherman Act's coverage export activities, and other activities taking place abroad, unless they adversely affect U.S. markets.

17. In 1812, Chief Justice Marshall stated that:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . . All exceptions therefore to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself.

The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812).

> [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.[18]

In the watershed 1945 opinion in *Alcoa*,[19] the Second Circuit, sitting as the court of final appeal, adopted a more expansive view of territoriality. Judge Hand stated that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[20] The "settled law" to which he referred, as extrapolated from the references he cited in that passage, was not specific to the antitrust context. He drew primarily on a handful of criminal cases, most of which addressed the circumstances under which a principal could be found guilty of a crime whose component elements occurred partly within the regulating state, through an accessory, and partly without.[21] It should be noted that these cases involved local conduct that was seen to consummate the criminal act in question—and that therefore, following the terminology of the 1935 Harvard Report on Jurisdiction,[22] justified jurisdiction on the basis of "objective territoriality." This principle "establishes the jurisdiction of the state to prosecute and punish for crimes commenced without the state but consummated within its territory."[23]

18. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356-57 (1909).

19. U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

20. *Id.* at 443.

21. Judge Hand cited Strassheim v. Daily, 221 U.S. 280 (1911) (defendant indicted in Michigan for bribery where acts in question were carried out there by an accessory), Lamar v. U.S., 240 U.S. 60 (1916) (defendant indicted for fraudulent impersonation carried out by telephone), and Ford v. U.S., 273 U.S. 593 (1927) (defendants indicted for conspiracy to smuggle liquor into the United States where acts in question were carried out in part within the United States by accessories and in part by defendants on the high seas). The Strassheim case itself, interestingly, cited *American Banana* for the proposition that a state can punish the cause of harm "as if [the defendant] had been present at the effect." In the cited passage of *American Banana*, however, the court referred only to universal jurisdiction, as in the case of pirates, and jurisdiction in cases involving national interests. *See generally* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 125-26 (1998) (discussing *Alcoa* as an example of unilateral conflicts analysis).

22. *Codification of International Law: Part II – Jurisdiction With Respect to Crime* (Harvard Report on Jurisdiction), 29 AM. J. INT'L L. SUP 437 (1935).

23. *Id.* at 484-87. *See also id.* at 488 (recognizing "subjective" and "objective" territoriality as two parts of a single concept, and stating that recognizing objective territoriality "in no sense affirms or implies an extension of our laws beyond the territorial limits of the state."); David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 195 (1984) (distinguishing objective territoriality from the effects test, noting that objective territoriality applies only when an act was consummated in the country in question).

As one commentator noted in the 1950s, a difficulty arises in applying the "objective territoriality" doctrine outside of the criminal area:

> In relation to elementary cases of direct physical injury, such as homicide, . . . the "effect" which is meant is an essential ingredient of the crime. Once we move out of the sphere of direct physical consequences, however, to employ the formula of "effects" is to enter upon a very slippery slope; for here the effects within the territory may be no more than an element of alleged consequential damage which may be more or less remote . . . . [I]t is clear from the authorities that the objective application of the territorial principle is limited to [situations in which] the crime was "consummated", viz. completed, in the territory claiming jurisdiction . . . . [A] different conclusion would permit a practically unlimited extension of the principle to cover almost any conceivable situation.[24]

Nevertheless, *Alcoa* did not distinguish between "local consequences" and a consummating act in violation of the antitrust laws, in this sense. In introducing the notion that territorial jurisdiction could rest simply on local effects,[25] it therefore laid the foundation for the later development of an expansive effects doctrine.

Alcoa itself said little regarding the contours of the effects test, but recognized that some limits must be present (in other words, not every effect within the United States could be sufficient as a basis of jurisdiction).[26] Later cases refined this approach, analyzing the quantum of local effects necessary to permit jurisdiction. The FTAIA, while it does not apply directly to all forms of competition, includes a provision that has been read as a general codification of the standard in this area: effects on U.S. commerce must be "direct, substantial and reasonably foreseeable."[27] Under U.S. law, then, a claim of "territoriality" can be based either on local conduct or on sufficient local effects.

24. *See* R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159-60 (1957).

25. *See id.* at 165 (describing this as a "startling projection of the objective test of territoriality").

26. *Alcoa*, 148 F.2d at 443.

27. 15 U.S.C. § 6a(1) (2004). The guidelines governing public enforcement of antitrust law in cross-border cases also confirm that the antitrust laws will be enforced in cases involving "direct, substantial and reasonably foreseeable" effects. U.S. Dept. of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/guidelin.htm.

B. *German Law*

Unlike the Sherman and Clayton Acts, the German competition statute speaks directly to the question of its own scope. The Law Against Restraints on Competition (GWB) provides that the act "applies to all restraints of competition having an effect within the territorial scope of this Act, even if they are caused outside the territorial scope of this act."[28] This provision expresses the legislative intent to adopt anti-competitive effects within Germany as a sufficient basis for prescriptive jurisdiction—indeed, to adopt effects as the *only* acceptable basis for jurisdiction.[29] Modern German competition law therefore begins approximately where the *Alcoa* case begins in the U.S. system.

The seemingly unlimited nature of the effects principle articulated in § 130 (2) necessitates further interpretation of the legislative intent concerning its application. As David Gerber has pointed out, the provision sets forth a "pure" effects doctrine: it contains no limitations on the nature or significance of the effects necessary to support the exercise of jurisdiction.[30] The foundational studies of German law on international competition, by Ivo Schwartz[31] and Eckard Rehbinder,[32] recognized that some limits would be necessary in order to prevent insignificant effects from triggering the application of German law. German lawmakers thus embarked on the same project as their counterparts in the United States: seeking to establish more concretely the quantity or quality of effects that would be sufficient to trigger legislative jurisdiction.

Early scholarship argued for a form of statutory interpretation that focused on the specific protection of competition articulated in

28. GWB § 130(2). *See generally* IMMENGA/MESTMÄCKER, GWB: KOMMENTAR ZUM KARTELLGESETZ § 130 Abs. 2, ¶ 2-6 (discussing the legislative history of the section). The provision was originally adopted as § 98(2), and was renumbered as § 130(2) in the Sixth Amendment of the GWB in 1998. Sechstes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, Gazette of the Federal Council (Bundesratsdrucksache) 418 (May 8, 1998). The GWB has since been further amended; see *infra* note 169 and accompanying text.

29. In other words, anti-competitive conduct that takes place within Germany but does not create adverse effects there would not fall within the statute's scope. In the *Oilfield Pipes* case, BGH 12 July 1973, WuW/E BGH 1276, the Bundesgerichtshof verified that § 130(2) rested only on the basis of effects—that conduct within the territory of Germany was an insufficient jurisdictional basis in the absence of anti-competitive effect within the country. See discussion in Helmut Steinberger, *The German Approach, in* EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 77, 81-82 (Cecil J. Olmstead ed., 1984).

30. David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws,* 77 AM. J. INT'L L. 756, 761 (1983) (hereinafter Gerber, *German Antitrust*).

31. IVO E. SCHWARTZ, DEUTSCHES INTERNATIONALES KARTELLRECHT (1962).

32. ECKARD REHBINDER, EXTRATERRITORIALE WIRKUNGEN DES DEUTSCHEN KARTELLRECHTS (1965).

each particular provision of the GWB.[33] Thus, rather than trying to define a single threshold for effects jurisdiction, this method suggested a more particularized analysis in which the quantum of effects necessary to trigger regulation would differ according to the particular kind of competition violation involved.[34] A 1973 decision of the Bundesgerichtshof adopted this approach, clearing the way for a more differentiated application of the GWB in cases involving foreign conduct.[35] Subsequently, in the various areas of competition regulation (horizontal restraints, vertical restraints, abuse of dominant position, and later merger control),[36] cases and commentary developed specific thresholds to define effects that were substantial enough to support jurisdiction.[37] In a case involving merger control, for instance, the Bundesgerichtshof held that the effect of a planned merger on local competitive conditions must be "direct" and "substantial" in order to justify the application of German law.[38] To generalize from the tests developed in different areas of competition law, domestic effects must be direct, considerable, actual, and foreseeable in order to support legislative jurisdiction.[39]

The legal landscape in Germany has of course been affected by the communitarization of competition law. EU competition law has to a significant extent displaced the national competition regimes of European Union member states, although national law does remain applicable to transactions and events that do not have a community dimension. EU law too recognizes legislative jurisdiction based on the local consequences of foreign conduct, as indicated in the 1993 *Wood Pulp* decision.[40] That case involved price-fixing agreements among

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33. *See, e.g., id.* For fuller discussion of this method, see Gerber, *German Antitrust, supra* note 30, at 764.

34. Thus, where the U.S. system refers to "general economic effects caused by the anticompetitive conduct," the German approach looks for effects that interfere with specific protections of competition. Gerber, *German Antitrust, supra* note 30, at 780-81.

35. BGH 12 July 1973, WuW/E BGH 11276 (*Oilfield Pipes*) (concluding that only domestic effects which actually violate the "scope of protection" of the particular substantive provision in question would trigger application of the GWB).

36. DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 279 (1998).

37. *See, e.g.,* SCHWARTZ, *supra* note 31.

38. BGH 29 May 1979, WuW/E BGH 1613 (*Organic Pigments*). *See also* Gerber, *German Antitrust, supra* note 30, at 768-69 (discussing the decision and noting that the court did not provide additional guidance on the interpretation of these limits).

39. IMMENGA/MESTMÄCKER, *supra* note 28, at § 130 Abs. 2 2708 (n.27); *see also* WERNER MENG, EXTRATERRITORIALE JURISDIKTION IM ÖFFENTLICHEN WIRTSCHAFTSRECHT 403-04 (1993) (discussing the level of effects necessary to trigger application of various provisions of the GWB). Guidelines later adopted by the Federal Cartel Office for use in merger approvals reflected this approach as well. *See also* Steinberger, *supra* note 29, at 93, characterizing § 130(2) as requiring "considerable and foreseeable" effects on the German market.

40. Case 89/85, A. Ahlström Osakeyhtiö v. Comm'n, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988).

producers of wood pulp; the agreements were made outside the European Community, but their result was to affect the market for the product within the Community. The defendants had argued that any application of EU competition law in the case would rest "exclusively [on the basis of] the economic repercussions within the common market of conduct . . . adopted outside the Community," and would therefore exceed that law's jurisdictional scope.[41] The Court responded by characterizing the conduct in question as involving two separate elements: the formation of the relevant agreement and its implementation. The "decisive factor," it held, was the place of implementation;[42] and applying European competition law to conduct implemented within the Community "is covered by the territoriality principle as universally recognized in public international law."[43] In this manner, the European Court of Justice framed the issue as one of objective territoriality, requiring a consummating act occurring within the Union. Because it took a very broad view of what constituted implementation, however, the decision has been widely read as accepting, albeit on the basis of a different rationale than that adopted in the United States, effects-based jurisdiction over foreign conduct.[44]

Up to this point, while the method used in Germany to define adequate effects differs from that used in the United States, the results are analogous. Both systems recognize local effects as a valid basis for jurisdiction over anti-competitive conduct. Both systems establish reasonable thresholds as triggers for their own regulatory interest. And while the United States, unlike Germany, also recognizes local conduct as a valid basis for jurisdiction, conduct with no local effects would present no regulatory interest to spur the application of U.S. law. Thus, the systems share an understanding of "territoriality" as used to justify a claim of jurisdictional authority.

II. THE "EXTRATERRITORIALITY" PROBLEMATIC: CLAIMS OF JURISDICTIONAL AUTHORITY IN SITUATIONS OF CONFLICT

Once effects-based jurisdiction is recognized, it is clear that situations may arise in which more than one nation has an interest in regulating the conduct or transaction in question. A country in which the relevant conduct takes place, particularly if the actors are its citi-

41. *Id.* at ¶ 15.
42. *Id.* at ¶ 16.
43. *Id.* at ¶ 18.
44. *See* Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 38 (1992) ("While the theoretical rationale of the implementation approach is distinct from the effects doctrine, there are striking similarities as to their practical consequences."). Like U.S. antitrust law, European competition law applies only when the effects in question reach a certain threshold, although the precise articulation of that threshold is slightly different in the two systems. *See id.* at 40-41.

zens, may feel that its regulatory interest should trump that of another country. This potential for regulatory conflict generates the next question: should the scope of a country's jurisdiction be limited when competing interests are present? If so, how should those limits be defined? It is on this point that the U.S. system diverges from other legal systems. That divergence has created a significant substantive conflict regarding jurisdictional approaches, and has fed the development of "extraterritoriality" as an expression of resistance to certain claims of regulatory authority. Claims of extraterritoriality work in part to recast the jurisdictional analysis: rather than focusing on the location of the relevant effects—which, as previously described, can be characterized as a legitimate basis for the exercise of jurisdiction—they focus on the (foreign) location of the relevant conduct, thereby implying an excess of jurisdictional reach.

This Part begins by describing the evolution of the U.S. approach to conflicts of competition law, highlighting two important aspects of that approach: first, its rejection of international law as a relevant framework; and second, its emphasis on private-law norms. It then compares that approach to the German approach, identifying some fundamental differences in the understanding of extraterritoriality.

A. *The U.S. Approach to Resolving Conflicts of Competition Law*

As previously outlined, the 1945 decision in *Alcoa* concluded that effects within the territory of the United States constituted a valid basis of legislative jurisdiction. In considering the possible limitations on jurisdictional reach, the court started here:

> we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in [the Sherman Act], without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."[45]

This passage contains two important interpretive steps. First, it frames the question of legislative scope as one of domestic rather than international law. It is noteworthy in this regard that Judge Hand did not cite the 1927 decision of the Permanent Court of Justice

45. *Alcoa*, 148 F.2d at 443.

in the *Lotus* case,[46] which held as a general matter that jurisdiction based on effects did not violate international law.[47] Thus, rather than positioning the issue against the backdrop of international law, the court positions it as a matter of statutory interpretation, with the outer boundary of prescriptive jurisdiction defined by the U.S. Constitution.[48] Second, turning to the task of statutory construction, the court looks to domestic private law for guidance in establishing where Congress intended that outer boundary to lie. The court does make an initial reference to international law—the phrase "limitations customarily observed by nations" suggests attention to customary international law principles—but then turns immediately to conflicts law, which is domestic law, not international, and private law, not public.[49] This orientation has significantly affected the subsequent development of U.S. law regarding the regulation of competition in situations of conflict with other nations.

The first step is consistent with the hierarchy of legal sources in the United States, under which Congress is not barred from enacting statutes inconsistent with international law.[50] Under such circumstances, U.S. courts are bound to effectuate the intent of Congress even when a violation of international law would result.[51] It does not follow, of course, that Congress *would* lightly violate international law; indeed, at the time *Alcoa* was decided, the so-called "Charming Betsy" presumption—that Congress should be assumed not to violate international law unless no other construction of its intent is possible[52]—had long been in place. *Alcoa* did not cite this presumption, however.

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46. Lotus, Judgment No. 9, 1927, P.C.J. Series A, No. 10, p. 19.

47. See discussion in Harold G. Maier, *Jurisdictional Rules in Customary International Law, in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 64, 67 (Karl M. Meessen ed., 1996). The *Lotus* court did imply that that such jurisdiction required an accommodation of other countries' competing interests, as I will discuss in more detail *infra*.

48. And the Constitution has in fact been the subject of "inattention" as a potential limitation on the extraterritorial application of federal law. *See* Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 L. & CONTEMP. PROBS. 11, 24-25 (1987).

49. At the time of the *Alcoa* decision, the influence on U.S. conflicts jurisprudence of its international law roots was stronger than in later years; nevertheless, writing a few years before the *Alcoa* decision, Arthur Nussbaum noted that "[i]n . . . American private international law, the law-of-nations doctrine has never won a real foothold." Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189, 197 (1942).

50. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987) (recognizing that the enactment of federal statutes may bring the United States into violation of international law); Zenith Radio Corp. v. Matsushita Electric Ind. Co., 494 F.Supp. 1161 (E.D. Pa. 1980) ("[I]nternational law must give way when it conflicts with or is superseded by a federal statute . . .).

51. *See* Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 495 (D.C. Cir. 1984); *see also* Brilmayer, *supra* note 48, at 20.

52. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). *See also* EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) (affirming the "long-

The second step brings the court to conflict-of-laws rules as the means of identifying relevant limitations. The *Alcoa* court itself did not discuss these principles in any detail: it simply cited the Restatement of Conflict of Laws, and a handful of opinions, for the proposition that acts done in one state might fall under the law of another.[53] It neither recognized the primarily interstate focus of much U.S. conflicts law (two of the three cases it cited were domestic cases)[54] nor did it move on to the next question, which would be recognizing the choice-of-law problem that would result from an assertion of jurisdiction on the basis of effects.[55] Thus, in *Alcoa* itself, conflicts law appears less to provide a limitation on the reach of U.S. laws than to articulate an enabling principle: conflicts law recognizes jurisdiction based on acts that occur elsewhere. Thus, if acts would have been unlawful had they occurred within the United States, then they would be held unlawful, "though made abroad, if they were intended to affect imports and did affect them."[56]

Cases subsequent to *Alcoa* applied U.S. antitrust law to foreign conduct with increasing regularity. Not surprisingly, this practice generated conflict with other nations, as the countries in which that conduct took place often asserted competing claims of jurisdictional authority. That conflict generated various forms of protest, including, most pointedly, blocking statutes.[57] In response, some courts in the United States began to develop a new approach to the question of legislative jurisdiction—an approach that sought to balance the interests of the United States and of other nations. It is in these cases that the importance of the choices made in the *Alcoa* framework be-

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standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)). This question of statutory construction was more recently addressed in a Supreme Court opinion regarding the application of the Americans with Disabilities Act to the operations of a foreign cruise line. Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005).

53. *Alcoa*, 148 F.2d at 443. The original Restatement of Conflict of Laws, then in effect, states that "If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 65 (1934).

54. The third, while it dealt with a conspiracy conviction of a person then out of the United States, was based on criminal activity carried on within the jurisdiction of the country. Ford v. U.S., 273 U.S. 593 (1927), cited in *Alcoa*.

55. *Cf.* RESTATEMENT (FIRST) OF CONFLICT OF LAWS, *supra* note 53, at § 65 comment b: "Under the rule stated in this Section, it may and frequently does happen that more than one state has legislative jurisdiction . . . the court at the forum must select the law of one of the several states thus having legislative jurisdiction, to govern the case.".

56. *Alcoa*, 148 F.2d at 444. *See also* Dodge, *supra* note 21, at 126-27 (describing this approach as based on unilateral conflict-of-laws methods and noting consistency with an earlier private-law case in which Judge Hand had espoused the local-law conflicts approach).

57. *See* Alford, *supra* note 44, at 9-10 (describing the critical reception of effects-based jurisdiction abroad and the enactment of blocking statutes in response).

came apparent, as they imparted a particular orientation to the extraterritoriality jurisprudence.

The "interest balancing" approach, which emerged in the 1970s, added a second step to the jurisdictional analysis. Under this approach, courts must not only ascertain that the United States' interest in regulating particular conduct is sufficient to trigger regulation, but must also assess whether it is sufficient *as compared with* the competing interests of other states. The pre-eminent interest-balancing case, *Timberlane*, began its discussion of extraterritoriality by noting:

> That American law covers some conduct beyond this nation's borders does not mean that it embraces all, however . . . . it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.[58]

Following the *Alcoa* approach, however, the court then goes on to say that "what that point is or how it is determined is not defined by international law."[59] Rather, it cites "international comity and fairness" as the guidelines for this analysis. The court also cites, as reflecting the same idea, Section 40 of the Restatement (Second) of Foreign Relations Law. That section asserts that states are required by international law to consider, in good faith, moderating the exercise of their jurisdiction; the *Timberlane* court describes that section as "indicat[ing] that 'jurisdictional' forbearance in the international setting is more a question of comity and fairness than one of national power."[60] A subsequent case, *Mannington Mills*, made this point even more explicitly: it stated that legislative jurisdiction clearly existed over conduct having substantial effects in the United States, and then discussed the question of how to account for competing sovereign interests in a passage entitled "comity, abstention and international repercussions."[61]

Under the heading not of international law but of "comity," then, the *Timberlane* court introduced its innovation: an investigation of "whether the interests of, and links to, the United States including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-à-vis those of other nations, to justify an assertion

58. Timberlane Lumber Co. v. Bank of America, N.T., 549 F.2d 597, 609 (C.A. Cal. 1976).

59. *Id. But see id.* at 610-13, suggesting that international law is relevant. *Cf.* Laker Airways v. Sabena, 731 F.2d 909 (D.C. Cir. 1984) (international law not relevant).

60. Timberlane, 549 F.2d at 609 n.27.

61. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (C.A.N.J. 1979).

of extraterritorial authority."[62] Following *Alcoa*'s focus on conflict of laws, the court proposed specific elements to guide the jurisdictional analysis that borrowed heavily from private choice-of-law methodology:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effects, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[63]

In constructing this list, the court drew on influential scholarship that had proposed similar solutions.[64] In a 1961 article, Donald Trautman noted the insufficiency of purely territorial analysis.[65] In attempting to articulate standards that courts might apply in grappling with cases presenting actual conflicts with the regulatory interests of foreign nations, he looked to choice of law.[66] He used it as an analogy; in regulatory interpretation, as he recognized, the question is not which law to choose but simply whether domestic law applies or not.[67] But the specific factors that he thought would be useful to the analysis led him to suggest a "relative interests"—that is, interest-balancing—test. Andreas Lowenfeld, in his 1979 Hague Lectures, undertook a similar task.[68] In setting out a list of factors relevant to the exercise of legislative jurisdiction, he "borrowed liberally" from the general guidelines articulated in the Restatement (Second) of Conflict of Laws.[69] The resulting list reflects these pri-

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62. Timberlane, 549 F.2d, at 613.

63. *Id.* at 614.

64. The *Timberlane* court in particular drew on a proposed test articulated in KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958) (presenting it as a "jurisdictional rule of reason").

65. Donald T. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586, 592 (1961) (". . . it has been found unworkable and irrational to decide jurisdictional competence solely on the basis either of the location of the activity or the status of the persons involved.").

66. "Once it is recognized that the problem may be to decide which of the statutes of two or more countries should be applied to a particular case it is apparent that the court faces a problem much like that dealt with in the conflict of laws. Choice-of-law rules are designed to resolve precisely such problems." *Id.* at 616.

67. *Id.* at 617.

68. Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311 (1979-II).

69. *Id.* at 329.

vate-law roots, including, in addition to classic connecting factors such as "the territory in which the activity is principally carried on," such items as "the protection of justified expectations" and "the conflicts, if any, between the regulation in question and the potential exercise of legislative jurisdiction pursuant to the authority of another State."[70]

This approach is also embodied in the Restatement (Third) on Foreign Relations Law, adopted in 1987, for which Professor Lowenfeld served as reporter. Section 403(2) of that Restatement provides that after having established the existence of an appropriate jurisdictional basis (including local conduct or local effects), a state must then consider whether the exercise of jurisdiction on that basis would be reasonable. The reasonableness analysis turns on a list of factors that, as the Reporters' Notes explain, "adopt the factors listed in . . . the Restatement, Second, of Conflict of Laws."[71] Among them are "the extent to which another state may have an interest in regulating the activity" and "the likelihood of conflict with regulation by another state."[72] To address situations in which it would be reasonable for each of two states to regulate, Section 403(3) provides that a state should defer to the other if the latter's interest is "clearly greater."[73] Importantly, while relying upon private conflict-of-laws methodology for its content, the drafters of the Restatement indicated that the principle of reasonableness was to be understood "as a rule of international law."[74]

The *Timberlane* era reflects the high point of U.S. thinking about how extraterritorial regulation might be limited in response to jurisdictional conflict. It is worth pausing, then, to consider what this style of analysis means in terms of territoriality and sovereignty. First, the interest-balancing method articulated in the *Timberlane* line of cases recognizes no hard limits on the reach of domestic antitrust law to cross-border cases. International law, with its foundation in sovereign equality, plays virtually no role in analysis of legislative jurisdiction: when U.S. courts do look for principles to limit the legislative reach of domestic antitrust law, they begin with the notion of comity, a softer starting point.[75] (Although some commentators have

70. *Id.*

71. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 50, at § 403 reporters' note 10.

72. *Id.*, § 403(2)(g), (h).

73. *Id.* § 403(3).

74. *Id.*, comment a; *see also* reporters' note 10 ("reasonableness is understood here not as a basis for requiring states to consider moderating their enforcement of laws that they are authorized to prescribe, but as an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe").

75. *See* Gerber, *German Antitrust*, *supra* note 30, at 781 (describing this as "essentially a discretionary political issue."); Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 925-31 (describing the consequences of a

suggested that comity is in fact a principle of customary international law,[76] the U.S. position remains that articulated in an 1895 decision, which is that it lies between law and mere courtesy.[77] This view is shared by the public agencies charged with application of U.S. antitrust law.[78]) As a result, courts do not view a consideration of foreign interests as *mandated* by international law. Consistent with this position, commentators have criticized the Restatement (Third) of Foreign Relations Law's reasonableness standard as simply aspirational, noting that it does not reflect U.S. understanding or practice regarding the limits of legislative jurisdiction.[79]

Second, the turn to the domestically-oriented system of conflicts law as a guide to fleshing out what comity might entail in cases of jurisdictional conflict has particular consequences related to the construction of territoriality. One consequence of that turn is simply that, looking inward, it elevates domestic interests over international considerations. As one commentator has noted, "[t]he perspective of conflict of laws lies within a state. It is directed to domestic interests, both public and private. Foreign interests are relevant only insofar as they form part of the state's foreign policy, for instance, if they reflect considerations of reciprocity."[80] The focus on domestic interests therefore diverts attention from the fact that applying forum law to foreign conduct operates within the international arena as a claim of regulatory authority vis-à-vis other sovereigns. Another consequence

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comity analysis disconnected from international law). *Cf.* Rep. of Austria v. Altmann, 541 U.S. 677 (2004) (describing sovereign immunity as "a matter of grace and comity," not as a principle of international law).

76. *See* Frederick A. Mann, *The Doctrine of International Law Revisited After Twenty Years,* 186 RECUEIL DES COURS 19, 87 (1984).

77. Hilton v. Guyot, 159 U.S. 113 (1895). *See also* Maier, *supra* note 45, at 73 ("Evidence of an international legal rule requiring this result is sparse"); Dodge, *supra* note 21, at 139 ("international law does not require comparative interest balancing"). While the Restatement (Third) of Foreign Relations styles it as a principle of customary international law, comity has to date not been viewed in that light by the majority of U.S. commentators or by U.S. courts.

78. *See* Antitrust Enforcement Guidelines for International Operations, *supra* note 27, at ¶ 3.2 (describing comity as "reflect[ing] the broad concept of respect among co-equal sovereign nations").

79. *See, e.g.,* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction,* 43 VAND. L. REV. 1003, 1149 (1990) ("The modern reasonableness test . . . has been hailed as progress of a sort, but not necessarily as an accurate statement of international jurisdictional obligations. To the contrary, the Restatement (Third) has been criticized precisely because it seems to exceed precedent and practice both in the United States and abroad."). This characterization is consonant with the Supreme Court's decision to reject reasonableness analysis in the Hartford Fire Insurance case, discussed *infra.*

80. Gerber, *German Antitrust, supra* note 30, at 783, 790. *See also* Ralf Michaels, *The Re*-State-*Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism,* 51 WAYNE L. REV. 1209, 1249 ("Since it has overcome its grounding in international law, the perspective of conflict of laws is the perspective of an individual state, not that of the entire global legal system or even the entire world society.").

flows from the particular orientation of U.S. choice-of-law methodology. Traditional conflicts theory is anchored in considerations of territorial sovereignty, predicated on the assumption that the laws of foreign states stand on equal footing with forum law, and that a legal relationship should therefore be governed by the law of the jurisdiction to which it most closely relates.[81] At the time that interest balancing came into vogue, however, U.S. conflicts law was under the influence of Brainerd Currie's "governmental interest analysis."[82] That approach, unlike traditional Savignyian analysis, seeks not so much to locate the proper seat of any given transaction, but rather to identify and promote legislative policy interests.[83] By focusing on the strength and applicability of the governmental interest underlying the private law in question, it reduces the importance of territorial linkages.[84] As integrated into analysis of legislative scope, then, this approach shifts attention away from the significance of territoriality as a way of identifying and accommodating foreign interests.

For these reasons, even at the height of the interest-balancing era, territoriality—both in the strict sense and in the sense of territorial sovereignty—did not play a major role in U.S. jurisprudence. More importantly, the turn inward to choice-of-law methods encouraged U.S. courts to focus on the U.S. interests at stake and not on the fact that application of law to foreign conduct is an act which might undermine a foreign state's regulation of events within its own territory.[85] It thus downplayed the importance of territorial sovereignty.

The heyday of interest balancing, in any event, was short. In 1993, the Supreme Court revisited the legislative reach of antitrust law in *Hartford Fire Insurance v. California*.[86] There, it held 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,"[87] and that the only further jurisdictional question would be whether "the principle of international comity" should lead courts in particular circumstances to decline the exercise of jurisdiction.[88] It then conflated comity with the doctrine of foreign sovereign compulsion, stating that unless the conduct in question was *required* by

81. *See* Schwartz & Basedow, *infra* note 152.

82. *See generally* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (1959); BRAINERD CURRIE, SELECTED ESSAYS (1963).

83. *See* Brilmayer, *supra* note 48, at 17-18.

84. *See* MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 112-14 (1995) (contrasting this U.S. focus on public policies with the more traditional European approach to conflicts).

85. *See* Douglas E. Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L L. 487, 502-03 (1985).

86. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

87. *Id.* at 796.

88. *Id.* at 797.

another state, no "true conflict" of regulation was present.[89] The result was to foreclose the consideration of competing foreign interests—a consideration that, even if not required by international law, would at least have been counseled by a comity-based approach.[90]

What is most interesting for the purposes of this discussion is the Court's rejection of an alternative analysis forwarded by Justice Scalia in his dissenting opinion. Justice Scalia agreed that Congress intended the Sherman Act to apply to foreign conduct at least in some circumstances.[91] However, he then sought to introduce a second layer of analysis, addressed particularly to the jurisdictional conflict that effects-based regulation presents. His opinion frames the analysis as a matter of statutory construction, and in that sense follows *Alcoa*: "'The law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe."[92] Unlike *Alcoa*, however, which briefly mentioned public international law but then turned for guidance to conflict-of-laws norms, Justice Scalia's opinion pointed explicitly to the roots of the presumption against extraterritoriality, and of comity analysis generally, in public international law.[93] Thus, while he defers to the private conflict-of-laws based analysis that has come to characterize U.S. law on this point,[94] his opinion looks to international law itself as the central point of reference: "the practice of using international law to limit the extraterritorial reach of statutes is firmly established in [U.S.] jurisprudence."[95] The majority's rejection of this approach was therefore a rejection of a more strongly international orientation.

The most recent Supreme Court decision in international antitrust jurisdiction, *F. Hoffmann-LaRoche v. Empagran*, again reflects this debate about analytical approaches. In that case, the Court considered claims brought under the Sherman Act by plaintiffs who had

89. *Id.* This step in the analysis has drawn much criticism. *See, e.g.*, Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 46 (1995).

90. *See* Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563 (2000).

91. Hartford Fire Insurance, 509 U.S. at 814 (Scalia, J., dissenting).

92. *Id.* at 815 (internal citations omitted), citing *Charming Betsy*, *supra* note 52.

93. *Id.*, referring to "the respect sovereign nations afford each other by limiting the reach of their laws," and, citing Story, to "the true foundation and extent of the obligation of the laws of one nation within the territories of another.".

94. This orientation is signaled in part by the fact that Justice Scalia does not cite the *Lotus* case, which would have indicated a more direct reference to international rather than domestic law.

95. *Id.* at 818.

purchased price-fixed goods in transactions in foreign markets.[96] In addressing the question of the Act's legislative scope, contrary to its posture in *Hartford Fire*, the Court seems attuned to the public international law framework. It begins by citing the Charming Betsy principle: "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[97] Then, following the approach outlined by Justice Scalia in his dissenting opinion in the earlier case, the majority links this principle of construction directly to customary international law and "the legitimate sovereign interests of other nations."[98] Thus, the Court appears ready to import the salient international law concerns into its analysis of the statute.[99]

It is questionable how much to read into this decision, however, as the Court in *Empagran* ultimately ducks the issue of how to resolve conflicts of jurisdiction. Separating the transactions occurring within the United States from transactions occurring elsewhere, the Court simply concludes that the case presented no domestic effects and therefore no basis for asserting domestic legislative jurisdiction.[100] As a result, while it presents the intriguing possibility of a shift toward a more international-law based approach, it does not ultimately undermine the holding in *Hartford Fire* regarding consideration of foreign interests in cases of conflict. Indeed, one passage of the Court's opinion appears to endorse the earlier decision's conclusion that where the requisite domestic effects are present, triggering a domestic legislative interest, no consideration of foreign interests is required—whether by international law or otherwise.[101]

B. *The German Approach to Resolving Conflicts of Competition Law*

As previously described, the German system, like the U.S. system, views the exercise of regulatory authority on the basis of local

96. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

97. *Id.* at 164. It should be noted that this is a sort of variation on the traditional *Charming Betsy* presumption, as it seeks to avoid not conflicts with international law, but rather interference with foreign sovereign authority.

98. *Id.* at 164-65.

99. At one point the Court notes the need to help "the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65.

100. *Id.* at 169.

101. *Id.* at 165 ("Application of [U.S.] antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused."). Following a subsequent citation to cases in which courts have taken "account of comity considerations case by case, abstaining where comity considerations so dictate," the Court suggests that such an approach "is too complex to prove workable," suggesting that it remains committed to the *Hartford Fire Insurance* approach in cases presenting domestic as well as foreign effects. *Id.* at 168.

effects as consistent with international law. However, it takes an entirely different approach to the question of whether legislative jurisdiction should be limited in cases of actual or potential conflict with the interests of another nation. As the research below suggests, German courts and commentators view this problem through two lenses—public international law and international enforcement law—that magnify the importance of territoriality within the jurisdictional framework. As a result, the relationship between territory and regulatory power is constructed differently in German jurisdictional law than in the U.S. system.

1. The International Law Lens

Article 25 of the German Constitution (*Grundgesetz*) places customary international law above domestic law in the hierarchy of norms.[102] This means that the German legislature must not enact a statute that violates customary law.[103] In the German system, then, the entire process of interpreting the jurisdictional reach of statutory law is seen from within the framework of international law.[104] Where in the United States the inquiry is framed as one purely of statutory construction, "concerned only with whether Congress chose to attach liability,"[105] in Germany, one commentator notes, it would simply be inappropriate to discuss the statute's intended sphere of application independent of international law limits.[106] For that reason, international law considerations have dominated the discussion of international competition regulation in Germany.[107] International law is seen within the German system as creating a strict, hard limit on the legislative reach of a state, and much of the analysis in this area therefore attempts to derive from public international law definitive methods for resolving conflicts of regulatory jurisdiction.[108] Importantly, the stronger link to public international law has kept

102. Article 25 provides that "The general rules of international law shall be an integral part of federal law. They shall override laws and directly establish rights and obligations for the inhabitants of the federal territory." DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 511 (2d ed. 1997) (translation of selected provisions of the Basic Law, Appendix A). International treaties are addressed separately, in Article 59, which provides that "[t]reaties which regulate the political relations of the Federation or relate to matters of federal legislation" require implementation by means of federal law. GG Art. 59(2) (translation in KOMMERS at 511).

103. *See generally* Christian Koenig, *in* MANGOLDT/KLEIN/STARCK, KOMMENTAR ZUM GRUNDGESETZ, GG 25 Rdnr. 6-7 (2005) (discussing the status of "universal" but also, possibly, regional customary international law as superior to statutory law).

104. *See* IMMENGA/MESTMÄCKER, *supra* note 28, at § 130 Abs. 2, 2704 (n.17).

105. See discussion *supra* at note 45 and accompanying text.

106. REHBINDER, *supra* note 32, at 30, 47.

107. *See* JÜRGEN BASEDOW, WELTKARTELLRECHT 29 (1998).

108. Gerber, *German Antitrust*, *supra* note 30, at 760. *See also* BERNHARD BECK, DIE EXTRATERRITORIALE ANWENDUNG NATIONALEN WETTBEWERBSRECHTS UNTER BESONDERER BERÜCKSICHTIGUNG LÄNDERÜBERGREIFENDER FUSIONEN 77-79 (1986).

notions of territory and Westphalian sovereignty at the forefront of thinking about jurisdiction.[109]

Even in assessing first principles under § 130(2) GWB—the viability of its second clause, stating that the GWB would be applied not only to domestic but also to foreign conduct that caused domestic effects—German commentators on international antitrust turned to public international law. Where in the United States the *Alcoa* court approached the issue as a matter of statutory construction, in Germany the inquiry was whether, in general, international law permitted nations to extend their legislative reach to conduct done outside their territorial borders. Commentators turned first to the Permanent Court of Justice's 1927 decision in the *Lotus* case. The Court there held that "far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . . ."[110] The *Lotus* case, however, addressed conduct that had occurred on the high seas. In the antitrust context, effects-based jurisdiction would lead to the regulation of conduct that had taken place within the territory of another nation. This distinction generated additional debate about whether in such a situation domestic effects could create a basis for legislative jurisdiction consistent with international law, or if regulating foreign conduct would violate the territorial sovereignty of the other nation involved.[111] Some commentators suggested that a "prohibitive rule," in the form of customary international law, barred nations from legislating foreign conduct on the basis of its local effects.[112] Others argued that domestic effects would be sufficient as a basis for regulation only if some other connecting factor created a link to the regulating state.[113] The majority view, however, was that jurisdiction

109. *See* Heinz-Peter Mansel, *Staatlichkeit des Internationalen Privatrechts und Völkerrecht, in* VÖLKERRECHT UND IPR 89, 94 (Stefan Leible & Matthias Ruffert eds., 2006) (arguing that even in a system in which states are no longer viewed as the sole subjects of international law, the basic function of international law in limiting the claims to sovereignty made by individual states remains viable).

110. Lotus, Judgment No. 9, 1927, P.C.J. Series A, No. 10, p. 19.

111. *See* Rudolf Dolzer, *Extraterritoriale Anwendung von nationalem Recht aus der Sicht des Völkerrechts*, BITBURGER GESPRÄCHE JAHRBUCH 2003, 71, 79 (2003) (hereinafter Dolzer, *Extraterritoriale Anwendung*) (noting that because the Lotus decision involved conduct on the high seas, it left open the question whether, in the case of conduct occurring in another state, the territorial sovereignty of that state might not be a "prohibitive rule" preventing extraterritorial application).

112. *See* JÜRGEN SCHWARZE, DIE JURISDIKTIONSABGRENZUNG IM VÖLKERRECHT 17-18 (1994) (providing a brief summary of the German commentary for and against this proposition).

113. *See, e.g.*, Heinrich Kronstein, *Conflicts Resulting From the Extra-Territorial Effects of the Antitrust Legislation of Different Countries, in* XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 432, 437

based on effects within Germany satisfied international law.[114] In 1979, the Bundesgerichtshof explicitly accepted the validity of effects jurisdiction under international law, rejecting, essentially without discussion, the argument that the scope of German law did not encompass foreign conduct.[115]

Analysis then turned to the question of whether the application of German competition law to foreign conduct was limited in situations involving conflict with foreign regulatory interests. This issue too was framed as one of international law: commentators asked whether the existence of sufficient effects was the *only* requirement international law imposed, or whether, in cases of actual or potential conflict with other jurisdictions, international law required more. Early scholarship suggested that it did not. Schwartz, for instance, stated that international law had nothing to say on this point, arguing instead that courts and agencies should simply be considerate of the interests of competing states.[116] He suggested a range of soft-law norms that might be useful, including reciprocity and comity (and the long-term self interest in cooperation),[117] but derived no binding norms from international law.

Rehbinder reached a similar conclusion. Unlike Schwartz, he did identify as relevant a particular international law principle: the prohibition against abuse of rights. He suggested that this general principle of international law could lead to the conclusion that statutes should, in cases of doubt, be interpreted in a way that would interfere as little as possible with the international order.[118] He did not, however, find the principle a sufficiently concrete basis for an actual requirement that the regulating state consider the interests of another state.[119] Rather, Rehbinder concluded that the rule required (a) that the transaction in question have some connection to the Ger-

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(Kurt H. Nadelmann et al. eds., 1961) (arguing that, in addition to domestic effects, some other link would be required, such as the participation of a domestic company or the implementation of some conduct within the territory of the regulating state).

114. REHBINDER, *supra* note 32, at 64 (concluding that the effects principle as such did not violate international law). *See also* Walter Rudolf, *in* TERRITORIALE GRENZEN DER STAATLICHEN RECHTSETZUNG 18 (Walter Rudolf & Walter S. Habscheid eds., 1973) (concluding that states have the authority to apply their norms to persons or transactions beyond their borders); KARL M. MEESSEN, VÖLKERRECHTLICHE GRUNDSÄTZE DES INTERNATIONALEN KARTELLRECHTS 227 (1975) (noting that the effects basis is superior to the conduct basis in that it identifies situations in which the regulating state has a real regulatory interest); MENG, *supra* note 39, at 87.

115. *Organic Pigments*, *supra* note 38 (rejecting the argument that domestic public law cannot apply to conduct occurring in a foreign country). See discussion in Gerber, *German Antitrust*, *supra* note 30, at 772-73.

116. SCHWARTZ, *supra* note 31, at 274.

117. *Id.* at 281.

118. REHBINDER, *supra* note 32, at 102.

119. *Id.* at 104. *See generally* Alexandre Kiss, *Abuse of Rights*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4, 5 (Rudolf Bernhardt ed., 1992) (discussing the lack of agreement on the significance and application of the principle).

man market and (b) that the law's application not lead to unfair results.[120] In articulating the connection between these components, however, he suggested that the existence of direct and substantial effects within Germany would suffice to satisfy the fairness requirement[121]—in other words, given the presence of such effects, the fact that other states' interests were involved would be irrelevant. He therefore characterized the consideration of foreign interests more as an international relations exercise than as a mandate of international law.[122] Other commentators followed Rehbinder in concluding that the doctrine required nothing more than sufficient domestic effects,[123] and it ultimately played only a minor role in German jurisdictional analysis.

Later commentators, perhaps in light of the increasing activity in international antitrust regulation,[124] suggested that other international law norms might be relevant in cases involving foreign conduct. These included not only the basic principle of sovereign equality,[125] but also the principle of proportionality[126] and the rule of non-intervention in foreign states.[127] In the late 1970s, the latter gained prominence in jurisdictional analysis. Before that time, most commentators had concluded that the non-intervention principle did not mandate a particular hierarchy of jurisdictional authority (for in-

120. REHBINDER, *supra* note 32, at 65.

121. *Id.* at 91 (stating that a "serious interference" with local competition conditions was required).

122. *Id.* at 105. He maintains this position in his commentary in IMMENGA/MESTMÄCKER, *supra* note 28; *see* § 130 Abs. 2, 2707 (n 23) (stating that the principle prohibits only serious disproportion between domestic regulatory interest and the harm caused to another state; thus, it leaves states quite a bit of room in choosing criteria triggering application of their law, and in applying and enforcing it). *See also* Ernst Steindorff, *Verwaltungsrecht, Internationales, in* 3 WÖRTERBUCH DES VÖLKERRECHTS 581 (Karl Strupp & Hans-Jürgen Schlochauer eds., 1962) (describing such consideration as a principle of international relations, not to be confused with a principle of international law); Dolzer, *Extraterritoriale Anwendung, supra* note 111 (concluding that the consideration of foreign interests appears not to have reached the status of customary international law).

123. *See, e.g.,* Steinberger, *supra* note 29, at 93; Rudolf, *supra* note 114, at 19 (rejecting the principle as insufficiently accepted and of insufficient precision to be useful). *Cf.* Jennings, *supra* note 24, at 153 ("The position can be expressed in terms of the doctrine of abuse of rights. A State has a right to extraterritorial jurisdiction where its legitimate interests are concerned but the right may be abused, and it is abused when it becomes essentially an interference with the exercise of the local territorial jurisdiction.").

124. Gerber suggests that the increased activities of German regulators in the area of merger control led to this shift. Gerber, *German Antitrust, supra* note 30, at 765.

125. *See* HANS-JÖRG ZIEGENHAIN, EXTRATERRITORIALE RECHTSANWENDUNG UND DIE BEDEUTUNG DES GENUINE-LINK-ERFORDERNISSES: EINE DARSTELLUNG DER DEUTSCHEN UND AMERIKANISCHEN STAATENPRAXIS 22 (1992) (stating that the limits of a state's legislative jurisdiction must be determined primarily in accordance with the principle of sovereign equality).

126. *See* IMMENGA/MESTMÄCKER, *supra* note 28, at ¶ 22.

127. *See* ZIEGENHAIN, *supra* note 125, at 30 (describing this as the most important limitation on extraterritorial jurisdiction).

stance, by requiring a rule of territoriality as the paramount basis of jurisdiction). They concluded that it was simply impossible to derive a specific test from such a general principle of international law, as it failed to provide specific substantive content to a conflicts norm.[128] In a 1975 book on the international law aspects of competition regulation,[129] however, Karl Meessen asserted on the basis of the non-intervention principle that international law affirmatively required some form of interest balancing: that "the governmental interests of the regulating state will suffice to justify the exercise of jurisdiction, *unless* the governmental interests of the foreign state significantly outweigh them."[130] At least in the area of competition regulation, he argued, this principle had consistent content sufficient to warrant its application as customary international law.[131]

German case law essentially adopted Meessen's views on the application of the principle of non-intervention in determining legislative jurisdiction. Two cases in particular demonstrate the role of international law in defining the outer reach of German competition law. In the *Synthetic Rubber* case,[132] decided in 1980, a German court for the first time addressed the role of international law in a situation of direct conflict between German and foreign regulatory interests. The case arose out of a proposed acquisition involving the French subsidiaries of two multinational corporations. The proposed merger was lawful in France and approved by the French government; the German Federal Cartel Office (FCO) nevertheless barred it on the basis of adverse domestic effects. The FCO had admitted that the merger's "center of gravity" lay outside Germany, however, and the court turned to the question whether the GWB should apply when the principal impact of the acquisition would be felt abroad. It began with the proposition that general rules of international law, by virtue of Article 25 GG, took precedence over domestic legislation. Referring to the rule of non-intervention, it then held that international law required "reasonable" forum contacts in order to support the exercise of jurisdiction. Noting that the FCO's bar would prevent the merger from occurring, and would therefore make itself felt in an-

128. *See* Steindorff, *supra* note 122. Steinberger too suggests that "the principle of non-intervention as such is considered to be too abstract to determine limits of jurisdiction without further specifications." Steinberger, *supra* note 29, at 92.

129. MEESSEN, *supra* note 114.

130. *Id.* at 182 (emphasis added).

131. Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 804 (1984) (hereinafter Meessen, *Antitrust Jurisdiction*) (describing it as a "relatively precise rule of law" in the antitrust context); *see also* Karl M. Meessen, *Conflicts of Jurisdiction Under the New Restatement,* 50 LAW & CONTEMP. PROBS. 47, 62 (1987) (arguing that an *obligation* to defer "to foreign States whose interests in the matter have more weight" was established as a rule of customary international law in the antitrust field); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665 (1986).

132. KG 26 Nov. 1980, WuW/E OLG 2411 (*Synthetic Rubber*).

other country, it held that international law prohibited legislative jurisdiction in the case despite the planned transaction's effects in Germany.[133] In defining the reasonableness of the link between the transaction and German interests, then, it took into account the comparative strength of the transaction's connections with another nation.

In the *Cigarettes* case,[134] a later court discussed in more detail the application of the international law rule against intervention. That case involved a U.S. company's purchase of a fifty percent stake in a British company whose own German subsidiary was a competitor of the buyer. The FCO barred the acquisition on the basis that it would lead to the strengthening of a market-dominant position in Germany. In doing so, it recognized the non-intervention principle, but argued that because the foreign interests at stake were merely private property interests, no "true" governmental interests had been invoked that would be infringed by its blocking of the merger.[135] In reviewing the FCO's action, the German court returned to the doctrine of non-intervention. It held that the FCO had improperly blocked the entire transaction; in its view, prohibiting the German subsidiary from being brought within the control of its U.S. competitor was sufficient.[136] Thus, although the transaction as a whole clearly presented reasonable links to the German forum, applying German law to bar the entire foreign acquisition would nevertheless violate international law if a narrower application of that law, limited to the domestic effects, was possible.[137] More recent cases too demonstrate the currency of international law principles in analyzing the scope of German competition law. In one 2003 case, for example, the FCO reviewed a planned acquisition by a Japanese company of a French company.[138] The FCO noted that the economic effects of the acquisition would be felt predominantly in Germany, and asserted that the application of German competition law was therefore proper. It was on the basis of international law that the applicants contested this assertion of jurisdiction, maintaining that the FCO's failure to consider France's asserted interest in the acquisition violated customary international law.[139]

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133. See discussion of the case in Steinberger, *supra* note 29, at 85; Gerber, *German Antitrust, supra* note 30, at 774-75.

134. FC, 24 Feb. 1982, WuW/E BkartA 1943 (1983).

135. See discussion in Steinberger, *supra* note 29, at 88; Gerber, *German Antitrust, supra* note 30, at 776-79. The FCO further argued that the principle of abuse of right did not apply, since there was no "blatant disproportion" between the domestic regulatory interest and the harm suffered by the regulated entities.

136. KG 1 July 1983, WuW/E OLG 3051. *See also* discussion in Meessen, *Antitrust Jurisdiction, supra* note 131, at 800; Steinberger, *supra* note 29, at 89.

137. *See* ZIEGENHAIN, *supra* note 125, at 128.

138. FCO 2 May 2003, B 3 – 24410 – U – 8/03.

139. The applicants did not prevail with this argument.

Whether this international law framework has led to the establishment of clear and predictable rules on the GWB's applicability in cases of conflict can be debated.[140] What is evident, though, is that because of it, territorial sovereignty has remained at the center of German jurisdictional analysis. This does not necessarily mean that the German system remains focused on territory as the source of legislative power, in the historical sense.[141] Indeed, the rule of non-intervention itself can be described as aimed "at the protection of sovereignty, less in the territorial sense, and more in the sense of recognizing 'the equal right of each nation to preserve its authority.'"[142] But a system that looks to international law in analyzing legislative jurisdiction adopts not an inward perspective, focusing on the furtherance of domestic legislative interests, but an outward one, focusing on the organization of the international regulatory community.[143] This approach necessarily preserves a strong connection between territory and regulatory authority,[144] retaining the sense and purpose of the old territoriality principle, if not its strict parameters. As Rudolf Dolzer characterizes it, the value of the territoriality principle is not that it leads to specific rules for the resolution of jurisdictional conflict, but that it reflects the duty of each state to respect its neighbors' right to autonomous regulation.[145]

It is important in connection with this outward orientation of German jurisdictional law that the German system also explicitly turned away from a private conflict-of-laws paradigm in addressing conflicts of regulatory jurisdiction. In the 1930s, Karl Neumeyer developed a structural approach to conflicts of regulatory law that drew on the private international law model, in the form of a comprehensive theory of international administrative law (*internationales Verwaltungsrecht*).[146] In the sense used here, this is a body of law meant to determine the sphere of applicability of various forms of ad-

140. *See* Gerber, *German Antitrust, supra* note 30, at 782-83 (suggesting that the German system would yield clearer results than that of the United States).

141. *See generally* KLAUS VOGEL, DER RÄUMLICHE ANWENDUNGSBEREICH DER VERWALTUNGSRECHTSNORM 91-97 (1965) (discussing the historical development of the territoriality principle and the break, with Savigny and the Nationstaat movement, from strict territoriality), 142 (concluding that the territoriality principle is most often used to express either a general concept of the legal regulatory order or a postulate of international relations).

142. BECK, *supra* note 108, at 128, quoting MEESSEN, *supra* note 114, at 202.

143. *See, e.g.*, Dolzer, *Extraterritoriale Anwendung, supra* note 111, at 76 (describing the function of international law in this respect as securing a functional coexistence and minimizing disputes about the allocation of power and resources).

144. In a 1959 case, the Bundesgerichtshof stated that "the idea of territoriality resides within the rules determining regulatory competence." BGH 17.12.1959, BGHZ 31, 367, 371.

145. *See* Dolzer, *Extraterritoriale Anwendung, supra* note 111, at 81.

146. KARL NEUMEYER, 4 INTERNATIONALES VERWALTUNGSRECHT (1936). *See also* VOGEL, *supra* note 141, at 176-86 (discussing Neumeyer's theory).

ministrative law in the international arena.[147] Neumeyer's intent was to delineate a body of domestic law that would resolve conflicts of public administrative law much as domestic conflict-of-laws rules resolved conflicts of private law. Analysis would begin in each case with an examination of the particular regulatory purpose of a given administrative norm. Only if examination of the norm's regulatory purpose did not sufficiently clarify its extraterritorial reach would international administrative law look to general principles in order to determine the norm's proper scope.[148] This approach shares certain characteristics with interest analysis in the United States, as it would look inward, to the domestic policy embodied in regulatory law, rather than outward to the international community.

However, the theory never gained much traction,[149] and international administrative law never matured into a systematic approach capable of defining the reach of all German regulatory law.[150] Some critics, including Frederick A. Mann, rejected the entire project outright, along with its conceptual basis in private-law systems.[151] Consistent with that position, German commentators have also declined to integrate private international law methodology more generally into thinking about regulatory law. Ivo Schwartz and Jürgen Basedow state the difference as follows:

> Private international law method . . . is based on the principle that a foreign legal system is of equal value with the law of the forum, and an effort is made to refer every situation to the legal system with which it is most closely connected . . . . In contrast, modern laws prohibiting restrictive business practices have been enacted essentially in the public interest of a specific state exercising a market regulatory function . . . . [Thus,] the international competition law of a given

147. In other words, the phrase was not meant to describe the substantive law developed and applied by international bodies. *See* Klaus Vogel, *Administrative Law, International Aspects*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 119, 22, at 24 (describing it in this sense as "a law of administrative conflicts of law, in other words an administrative law parallel to private international law."). Similarly, Werner Meng describes it as a domestic public-law conflicts regime. MENG, *supra* note 39, at 222.

148. *See* VOGEL, *supra* note 141, at 382.

149. Vogel, *supra* note 147, at 24 ("[Neumeyer's theory] has failed to find adherents outside Germany or even in the German literature on administrative law.").

150. *See* VOGEL, *supra* note 141 (concluding that no free-standing substantive international administrative law can be identified; rather, conflicts principles have to be built into each substantive administrative norm separately). *Accord* MENG, *supra* note 39, at 223.

151. Frederick A. Mann, *Conflict of Laws and Public Law*, 132 RECUEIL DES COURS 107, 118 (1971-I) ("Under the perhaps unfortunate influence of Karl Neumeyer's [work] it has become widespread practice in Germany (though probably nowhere else) to assert the existence of a branch of law which, in regard to public law, is intended to develop rules and to perform functions that, in the sphere of private law, correspond to private international law. In truth no such rules exist.").

> state does not act as a neutral arbitrator between the substantive competition law of a foreign state and the law of the forum; . . . [and] the general principles of private international law thus do not extend to competition law.[152]

Thus, while the U.S. system has come to rely on private choice-of-law analysis as a conceptual framework for analyzing legislative jurisdiction, the German system has not taken the same inward turn. Rather, it remains focused on the external architecture of the international system.

2. The International Enforcement Lens

Most modern competition laws, including the laws of Germany and the United States, have a hybrid character. They combine criminal law aspects (e.g., providing for penal sanctions in certain situations), private-law aspects (e.g., creating certain rights for parties to private agreements, or for parties injured by anticompetitive conduct), and administrative law aspects (e.g., vesting regulatory oversight in public agencies).[153] Fundamentally, though, their nature is that of public regulatory law, enacted by governments seeking to maintain certain conditions of competition within their markets.[154]

In the United States, unlike in most countries, competition enforcement has from the beginning been a true blend of public and private activity. On the public side, the Antitrust Division of the Department of Justice implements U.S. antitrust law through civil and criminal proceedings; the Federal Trade Commission's Bureau of Competition conducts administrative review and investigations, particularly in the area of mergers, and also has authority to initiate certain civil proceedings.[155] Substantial enforcement, however, is achieved on the private side, in the form of civil actions brought by private attorneys general—individuals or businesses that have incurred harm as the result of anti-competitive behavior.[156] In the United States, therefore, the question of legislative scope arises not only in the context of direct state action against violators, but also in

152. Ivo E. Schwartz & Jürgen Basedow, *Restrictions on Competition*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, vol. III, ch. 35, at 8-9 (1995); *see also* MENG, *supra* note 39, at 87 (distinguishing "ordinary" conflicts of laws from conflicts of states' regulatory interests); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982) (criticizing the U.S. Restatement approach for conflating the two sets of principles).

153. *See generally* Schwartz & Basedow, *supra* note 152, at 4.

154. *Id.* at 8 (noting that such laws "have been enacted essentially in the public interest of a specific state exercising a market regulatory function.").

155. *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, 2 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (2d. ed. 2001) (outlining the U.S. enforcement structure).

156. The Clayton Act provides for such litigation. 15 U.S.C. § 15.

the context of ordinary civil litigation between private parties. Indeed, much of U.S. jurisdictional law in the antitrust arena has been developed in decisions addressing claims brought by private plaintiffs.[157] This orientation has colored the U.S. view on the reach of domestic competition law, as it decouples the inquiry regarding that law's scope from the issue of the state's enforcement power. While the courts are of course aware of the public regulatory goals underpinning private antitrust litigation, they do not in such cases directly confront acts by state agencies themselves, and tend to focus instead on the ordinary remedial interests at stake.[158] The fact that private civil litigation often provides the procedural context for considering prescriptive jurisdiction reinforces the turn toward domestic, private-law models to analyze regulatory limits.

The extent to which the private-enforcement paradigm has affected the U.S. approach to legislative scope is illustrated in the decision in *U.S. v. Nippon Paper.*[159] That case arose out of a conspiracy by a Japanese corporation to fix the prices of thermal fax paper sold in the United States. It was not a civil action for damages but rather a criminal action, and the court addressed whether U.S. antitrust law applied in the criminal context to conduct that had taken place entirely abroad. The First Circuit answered this question in the affirmative, taking only two interpretive steps. First, it concluded that *Hartford Fire Insurance* had "conclusively establishe[d] that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within [the Sherman Act's] jurisdictional reach."[160] Second, noting that civil and criminal claims are "based on the same language in the same section of the same statute,"[161] it applied ordinary canons of statutory construction to conclude that the Act's legislative scope was the same in both contexts. Although the court included a brief discussion of comity, it simply accepted the decision in *Hartford Fire Insurance* that such considerations were irrelevant.[162] Thus, even in a case involving prosecutorial action by the U.S. government itself, for a crime no constituent element of which took place in the United States, the matter was framed as a question of domestic statutory intent.[163]

157. This is not always the case: both the *Alcoa* and *Hartford Fire Insurance* cases, for example, involved state proceedings.

158. *See generally* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation,* 26 YALE J. INT'L L. 219 (2001) (discussing the balance of compensatory and deterrent goals in private antitrust litigation).

159. U.S. v. Nippon Paper Industries Co., Ltd., 109 F.3d 1 (1st Cir. 1997).

160. *Id.* at 4.

161. *Id.*

162. *Id.* at 8.

163. The case is also interesting in that it completes the circle begun in *Alcoa.* There, to support his conclusion that effects-based jurisdiction was proper, Judge Hand cited a number of criminal conspiracy cases holding that U.S. legislation could

Only in a concurring opinion did one judge suggest that principles of international law were relevant, and "requir[e] examination beyond the language of . . . the Sherman Act." Expressing a view not shared by the majority, he stated that "where international law suggests that criminal enforcement and civil enforcement be viewed differently, it is at least conceivable that different content could be ascribed to the same language depending on whether the context is civil or criminal. It is then worth asking about the effect of the international law which Congress presumably also meant to respect."[164]

In Germany, by contrast, enforcement of competition law is viewed as a matter of public regulation. The Federal Cartel Office is charged with the primary implementation and enforcement of the GWB.[165] The GWB historically provided only in very limited circumstances for private civil actions in connection with antitrust violations,[166] and such actions played essentially no role in German competition regulation.[167] German cases and commentary therefore viewed the enforcement of domestic competition law almost exclusively as an exercise of regulatory authority by state agencies.[168] Only recently has the role of private enforcement begun to expand, as a result of the 2005 enactment of the Seventh Amendment to the Law

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reach conduct that took place largely abroad, as long as a constituent element of the relevant offense occurred in the United States. *See supra* notes 19-23 and accompanying text. Here, in holding that U.S. legislation reached criminal conduct taking place *entirely* abroad, the First Circuit cited the civil cases that had flowed from *Alcoa*.

164. *Id.* at 10 (Lynch, J., concurring). While that opinion recognized that international law might require different treatment in criminal cases, however, it concluded that the particular facts nevertheless justified regulation.

165. GWB § 48 (reserving competence for the agencies of the individual Bundesländer in situations presenting no national dimension). The Monopoly Commission, consisting of five members appointed by the federal government, provides opinions on issues of competitive conditions. GWB § 44, 45.

166. Prior to the 2005 revisions, GWB § 33 provided that a party harmed by unlawful conduct could recover damages in private litigation only if the conduct had violated a provision intended to protect a specific individual interest, rather than the general public. Thus, anticompetitive conduct that affected an entire market could not give rise to private lawsuits. The requirement that the violation relate to a provision "serving to protect another" was traditionally read extremely restrictively. *See* RAINER BECHTOLD, KARTELLGESETZ, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN 348-49 (2002). As a result, private damages actions were rare. *See* Karl Wach et al., Executive Summary and Overview, National Report for Germany, in Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules (Ashurst Report) (2004), *available at* http://ec.europa.eu/competition/antitrust/actions damages.study.html, at 1 (concluding at the time of writing that damages "have only been awarded in very few cases").

167. *See* Hannah L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23 BERKELEY J. INT'L L. 474, 493 (2005) (discussing reasons for lack of private litigation).

168. *See* REHBINDER, *supra* note 32, at 241 (noting that the public administrative aspects of the GWB take precedence over the aspects relating to private rights).

Against Restraints on Competition.[169] That statute introduced significant changes, both substantive and procedural, in order to strengthen private enforcement of competition law.[170] In some respects, however, the amended statute continues to recognize the subsidiarity of private enforcement to public regulation,[171] and it remains to be seen to what extent the changes will overcome the various procedural hurdles to private litigation.

These differences in enforcement patterns have important consequences. In the German system the question of extraterritorial legislative reach is considered against the backdrop of independent limitations on cross-border enforcement activity by states—in other words, the issue of how far national competition laws reach is always intertwined with the issue of the enforcement of those laws outside the territory of the enacting state. While the legitimacy and parameters of extraterritorial legislative jurisdiction remain contested, the law is clearer on extraterritorial enforcement jurisdiction: no state may engage in an act of coercion in the territory of another state without the latter's consent.[172] In many cross-border cases involving the potential violation of national competition law, the necessary administrative investigations and proceedings will involve public acts touching foreign jurisdictions. These may include the service of process abroad, the issuance of orders to produce documentary evidence located abroad, and the taking of oral testimony from witnesses located abroad.[173] As acts of public authorities, these can take place on foreign soil only with the consent of the other state involved.[174] In the German view, this is true even when such procedures are taken in the context of private litigation rather than public administrative ac-

169. *Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, English version *available at* http://www.bundeskartellamt.de/wEnglisch/Competition Act/CompAct.shtml. For an overview of the amendment, see Andreas M. Klees, *Breaking the Habits: The German Competition Law after the 7th Amendment to the Act against Restraints of Competition (GWB)*, 7 GERMAN L.J. 399 (2006).

170. *See* Klees, *supra* note 169, at 416. This move to strengthen private enforcement was taken parallel to similar developments at the Community level.

171. One section, for instance, provides that when multiple purchasers are harmed by an infringement, an industry association can bring a claim for disgorgement of the benefit received. That amount will be remitted to the government, however; in addition, if the FCO chooses to address the matter by imposing a fine, such an action is foreclosed. GWB § 34a(1).

172. This is recognized in U.S. doctrine as well—while public international law limits embodying this kind of territorialism have faded in other areas, they do remain in U.S. doctrine primarily with this sort of direct action.

173. *See* Brenda Sufrin, *Competition Law in a Globalised Marketplace: Beyond Jurisdiction*, *in* ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES 105 (Patrick Capps et al. eds., 2003) ("[M]erely taking legislative (prescriptive) jurisdiction . . . is not enough. The crucial point is whether a State also has enforcement jurisdiction whereby its authorities can take evidence, conduct investigations, serve proceedings and recover penalties abroad.").

174. BROWNLIE, *supra* note 9, at 309.

tion.[175] Enforcement in cross-border actions is thus seen against the backdrop of classic territorial sovereignty, with the concern being that the implementation of the GWB will involve illegitimate interference in the territory of another nation.[176]

It is recognized in the German system that the application of domestic law on the basis of domestic effects does not necessarily involve extraterritorial enforcement in this sense. That is, if the FCO applies the GWB in a German proceeding to prohibit the acquisition of a German company in a transaction that, while consummated abroad, would create an unlawful monopoly in Germany, that does not involve a public act taken in the territory of another state: it involves merely the application of local public law to a private transaction.[177] Thus, the German system does not view the question of extraterritorial legislation as entirely coterminous with the question of extraterritorial enforcement.[178] However, because enforcement of the GWB is a public process, German commentators are much more attuned to the limits of local power in implementing any prohibitions on foreign conduct through extraterritorial application.[179] This awareness of limits on enforcement puts another frame around their expansion of effects-based jurisdiction, as it highlights the fact that the application of the GWB is a public regulatory act that touches other nations.[180]

C. *Contextualizing the U.S. and German Approaches*

The different models developed in Germany and the United States to address the issue of legislative jurisdiction have their roots in, and reflect, larger differences between the two systems. Consider, for instance, the relationship between the United States and Ger-

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175. BASEDOW, *supra* note 107, at 32-33. This is important also because it will remain true even given the strengthening of the private action in EU law, which will continue to rely on national civil procedure systems.

176. *See* ZIEGENHAIN, *supra* note 125, at 128-29 (arguing that jurisdiction to prescribe cannot be analyzed independent of jurisdiction to enforce; thus, the reach of German competition law is dependent in part on the extent of the intervention in foreign systems); JOACHIM BERTELE, SOUVERÄNITÄT UND VERFAHRENSRECHT 101-02 (1998).

177. *See* HANS-JÜRGEN SCHLOCHAUER, DIE EXTRATERRITORIALE WIRKUNG VON HOHEITSAKTEN 41-42 (1962) (distinguishing between state action that interferes directly with the territorial sovereignty of another nation and state action, like that permitted by GWB § 130(2), that affects private transactions concluded pursuant to foreign law).

178. *See* SCHWARTZ, *supra* note 31, at 247.

179. *See, e.g.*, Steinberger, *supra* note 29, at 94 (noting that § 130(2) "does not claim extra-territorial enforcement jurisdiction in the sense that it empowers German cartel authorities or courts to render acts on foreign territory.").

180. *See* Jürgen Basedow, *Wirtschaftskollisionsrecht: Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates*, 52 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 8, 25 (1988) (describing the linkage in the German system between the substantive norms and their procedural enforceability).

many in the antitrust context itself. The post-war years created fundamentally different social understandings of the linkage between territory and economic control. For the United States, the post-war period brought the exportation of domestic law outside the borders of the country—not through extraterritorial application of U.S. law, but more directly, through the imposition of Allied law during the period of German occupation.[181] This experience may have given the United States a view of its activities in this regard as a sort of benevolent imposition of norms onto other territories, a pattern that was followed through into the period of European integration.[182] Thus, the later rejection under jurisdictional law of hard international law limits, and the adoption of a method of analysis focused on national interests, may have drawn on and reinforced the tradition of outward extension of domestic regulatory law. From the German perspective, of course, the development of national competition law during the post-war years was experienced entirely differently,[183] and laid the groundwork for later insistence on the prerogatives of the country's regained sovereignty.[184]

The role of international law itself, as related to the question of law's scope, may also be constructed and experienced differently within the two systems. As one public international law scholar put it, "The word 'territorium,' around which the concepts of territoriality and extraterritoriality are oriented, was used by Grotius not only to refer to territory in the geographical sense, but also to the sphere within which state jurisdiction exists."[185] The more unlinked the sphere of regulatory authority is to geographical territory, however, the greater the possibility of discord among neighbors. Germany has had the experience both of imposing norms beyond its territory and suffering the imposition of foreign norms. After the war, as previously noted, the occupation laws, with their foreign content, were imposed on the country through direct intervention. Earlier, though, in the years leading up to the war, the Großraum theory had sought to justify a form of international law resting not on the territorial integrity of sovereign states but rather on their spheres of influence[186]—a theory that conflicted categorically with the notion of

181. *See* Buxbaum, *supra* note 167, at 476-80.

182. *See id.* at 481-82.

183. *See* Walter S. Habscheid, *in* TERRITORIALE GRENZEN, *supra* note 114, at 57 (discussing the perception that the "quasi-missionary impulse" underlying U.S. cartel politics was insufficient rationalization for the extraterritorial extension of U.S. law).

184. *See generally* TONY A. FREYER, ANTITRUST AND GLOBAL CAPITALISM, 1930-2004 246-62 (2006) (describing antitrust policy during the Allied occupation of Germany); *cf.* Janet McLean, *From Empire to Globalization: The New Zealand Experience*, 11 IND. J. GLOBAL LEGAL STUD. 161 (2004) (examining questions of sovereignty and power from the perspective of a country emerging from colonial rule).

185. Rudolf, *supra* note 114, at 33.

186. *See generally* CARL SCHMITT, VÖLKERRECHTLICHE GROßRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE: EIN BEITRAG ZUM REICHSBEGRIFF FÜR

formal equality among nation-states.[187] It is not surprising, then, that the German system later adopted a more territory-focused system of jurisdictional authority as a reaction to such developments.

Indeed, Article 25 of the Grundgesetz, whose elevation of international law above municipal law largely created the international law focus analyzed above, was adopted in 1949 as an expression of Germany's expectations regarding its membership in the international community.[188] One constitutional historian describes the process as follows:

> [O]n the international plane, [National Socialism] meant a claim for absolute sovereignty, not restricted by treaties . . . , not even restricted by respect for the sovereignty of the other members of the international community, thus destroying the very principle of self-determination of peoples which had been so persistently demanded for Germany herself. . . . After the very short interval of this nationalism gone mad (1933-1945), after the relatively short interval of the predominance of the idea of absolute sovereignty not derived from the true German tradition (1871-1945), Germany has to try to build up a system of restrictions of national sovereignty . . . [After 1945,] a new Constitution was drafted to amend the errors of the past and to embody the lessons taught by the collapse of a system which had embodied the most reckless abuse of power ever known in German constitutional history.[189]

VÖLKERRECHT (1939); *see also* CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM 1950 (G.L. Ulmen trans. 2006).

187. *See* Detlev F. Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661 (1990) (describing the theory that hegemony, based on the strength of a powerful political idea, gives a state the right to interfere in internal matters of subordinate states in order to effectuate that idea); Christian Joerges, *Europe a* Großraum? *Shifting Legal Conceptualisations of the Integration Project*, *in* DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 171 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003) ("The *Großraum* debate Carl Schmitt sparked off in 1939 was, first of all, about the destruction of classical international law."), 171-73 (describing the theory).

188. Its neighboring articles likewise express this aspiration. Article 24 provides in part that "the Federation may become a party to a system of collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world." GG Art. 24(b) (translation in KOMMERS, *supra* note 102, at 511); Article 26, that "Any activities apt or intended to disturb peaceful international relations, especially preparation for military aggression, shall be unconstitutional." GG Art. 26(1) (translation in KOMMERS at 511). *See* Koenig, *supra* note 103, at Art. 25 Rdnr. 12 (describing these articles as "the expression and central element of the constitutional decision in favor of international cooperation and a tendency in the Basic Law friendly to international law").

189. F.J. Berber, *German Law*, *in* SOVEREIGNTY WITHIN THE LAW 79, 86-87 (Arthur Larson & C. Wilfred Jenks, eds. 1965).

In the German system, then, restoring territorial limits to the conception of sovereignty was a deliberate choice.[190] It has both a limiting dimension (acting as a control on the nation's own exercise of power) and a protective dimension (acting as a defense against imposition by others). In both directions, the focus on territoriality serves to establish a concrete method of delimiting power—and it is a focus of direct relevance to jurisdictional rules. Writing in 1965, Klaus Vogel pointed to the "world open" system established in post-war Germany, noting that it deliberately emphasized international cooperation and integration in the world community. He viewed this as the source of a general principle favoring restrictive rather than aggressive interpretation of the scope of German regulatory law.[191]

The net result is that the claims of jurisdictional authority, or of resistance to the exercise of authority, made within these respective systems draw their content and meaning not only from the competition law context, but from broader aspects of the legal regimes. Thus, while German commentators, like their U.S. counterparts, recognize the historical contingency of sovereignty in the Westphalian sense, as well as the challenges posed by globalization, they do not generally draw from this recognition the conclusion that jurisdictional law should be detached from territorial sovereignty. As illustrated above, at least in the context of prescriptive jurisdiction, current German law is more entrenched in the public international law framework than U.S. law, and so territoriality remains a much more relevant and immediate concept there.

III. Conclusions

To a significant degree, it is the forces we discuss under the heading of globalization that suggest the need to reshape jurisdictional law. The "borderless" nature of some activities, the near-global nature of others—all of this seems to demand regulatory solutions freed from territorial underpinnings. Similarly, the multidisciplinary retheorization of territory and power in the global age supports and promotes the development of "global" theories of jurisdiction. What the analysis above seeks to demonstrate is that attention to the individual legal contexts in which claims of regulatory authority are made, and contested, remains critical to the success of this transition. This Part argues that uncovering those contexts is necessary, first, to avoid misunderstandings by the various actors engaged in jurisdic-

190. *See* Koenig, *supra* note 103, at Art. 25 Rdnr. 10 (describing the drafters' intent to establish a "restrictive" approach in this sense. *See also* Klaus Vogel, Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit (1964).

191. Vogel, *supra* note 141, at 409, 416-18.

tional determinations, and second, to reveal the full range of values relevant to emerging theories of jurisdiction.

A. *Recognizing Disjuncture*

The rhetoric of territoriality and extraterritoriality dominates the discourse about conflicts of legislative jurisdiction. As the foregoing analysis demonstrates, however, the legal frameworks within which that rhetoric is used differ from country to country. As a result, the ways in which jurisdictional claims have been deployed and understood, and the ways in which they have been addressed by the courts and other actors considering international antitrust cases, reveal real and consequential disjunctures in understanding.

These disjunctures have permeated U.S.-based litigation of international antitrust cases. The U.S. Supreme Court's most recent international antitrust case, *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*,[192] illustrates them particularly clearly. That case arose out of the activities of a price-fixing cartel in the vitamins market that had caused significant adverse effects in the United States and in many other countries. The plaintiffs were non-U.S. vitamins distributors who had purchased the price-fixed goods in Australia, Ecuador, Panama and Ukraine; the defendants were international pharmaceuticals companies incorporated in a number of different countries.[193] Many foreign governments[194] filed briefs as *amici curiae* in that case, supporting the argument of the defendant corporations that U.S. antitrust law did not reach the foreign transactions in question. The governments claimed, in the words of one representative brief, that "basic principles of international law regarding the allocation of jurisdiction between states"[195] barred the exercise of legislative jurisdiction by the United States over the foreign conduct in question. That brief, submitted on behalf of the governments of the United Kingdom, Ireland, and the Netherlands, went on to state that

> the primary ground of jurisdiction which is universally recognized in international law is "territoriality." In accordance with this principle, a state may exercise its authority to prescribe and enforce its law over all persons and things within its territory. By contrast a state's authority to exercise jurisdiction extraterritorially is much more limited . . . [T]he

192. 542 U.S. 155 (2004).
193. *Id.* at 159-60. The original class action included U.S. purchasers as well, but this decision addressed jurisdiction over the claims of only the foreign purchasers.
194. Belgium, Canada, Germany, Ireland, Japan, the Netherlands, and the United Kingdom.
195. F. Hoffmann-LaRoche Ltd v. Empagran, S.A., Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, 2004 WL 226597 at 18 (2004).

more controversial "effects doctrine" suggests that in certain circumstances a state may exercise jurisdiction over events that have a clear effect in its territory, even if the planning and execution takes place elsewhere.[196]

Such claims make little sense if viewed as an assertion by *amici* that other countries, on the basis of territorial contacts, had a greater regulatory interest in the conduct than did the United States. In the case itself, the transactions in question had not occurred within the territory of the United Kingdom, Ireland or the Netherlands, but rather in other countries—none of whose governments made similar filings indicating hostility to the possibility of U.S.-based litigation. Thus, *amici* could hardly assert the "primacy of territoriality" as a basis for promoting a specific regulatory interest in the case.[197] The claims do, however, make sense as statements relating more generally to the way in which individual nations—in particular, the United States—exercise their regulatory power in the global arena. What *amici* were arguing about, in other words, was not the right of particular countries to regulate the specific transactions in question, but rather the shape of the international regulatory system.[198]

Disjunctures in the debate about jurisdictional reach are echoed, and reinforced, by a related debate: the so-called *Justizkonflikt* between Europe and the United States over various aspects of civil procedure.[199] In that context too, the extent to which territory remains the currency of analysis—and the source of misunderstanding and disagreement—is evident. In many civil justice systems, functions such as evidence gathering reside within the exclusive purview of the courts; therefore, unauthorized parties (including private litigants as well as foreign courts) are precluded from engaging in them within the territory of the relevant state.[200] When U.S. litigants or courts attempt to request or order the production of evidence from

196. *Id.* at 19.

197. This fact led some to conclude that *amici* were claiming "extraterritoriality" simply as a cover for defending their own corporations, an inference not infrequently drawn in international antitrust cases. *See* Clifford A. Jones, *Foreign Plaintiffs, Vitamins, and the Sherman Antitrust Act After Empagran,* EUR. L. REP. JULY/AUGUST 270, 274 (2004).

198. Vaughan Lowe made a similar point about blocking statutes, describing them "not [as] measures of retorsion or retaliation, but simply formal expressions of a legal truth . . . : that the world is made up of independent sovereign States with sovereign and inalienable rights to choose their own economic systems." A.V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34 INT'L COMP. L.Q. 724, 746 (1985). As I have argued, what is "true" in one system may not be so in others, making it critical to understand the meaning underlying such claims.

199. *See generally* DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA (Walther J. Habscheid ed., 1986); ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 137-39 (1996).

200. *See generally* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 557-59 (2004).

abroad, they often meet objections framed in terms of "judicial sovereignty" that seek to limit the "extraterritorial" reach of U.S. procedural mechanisms. Thus, for instance, in *Société Nationale Industrielle Aérospatiale v. Dist. Ct.*,[201] the case in which the U.S. Supreme Court considered whether U.S. courts could continue to order the discovery of evidence located abroad pursuant to domestic rules of procedure or were confined to the procedures set forth in a multilateral treaty,[202] the German government grounded its argument in favor of the latter position entirely in public international law:

> [T]he US Government seriously underestimates the German Federal Government's resolve concerning German judicial sovereignty which is embedded in the German constitution, and therefore, cannot be waived by the government . . . . The respect of another country's judicial sovereignty is the very principle of international law upon which all international treaties on judicial assistance are based and which the Federal Republic of Germany hoped to see observed by the United States when becoming a party to the Hague Evidence Convention . . . . The Federal Republic of Germany continues [to urge] a decision taking into account the respect of other countries' sovereignty which is the fundamental principle on which international law is based.[203]

The U.S. Supreme Court, however, barely responded to this point. It began by holding that the evidence-gathering procedures set forth in the treaty itself were not mandatory.[204] Consistent with the U.S. approach to legislative jurisdiction, it did not then consider whether customary international law might provide any hard limits on the application of domestic procedural rules. Rather, it turned to a consideration of whether "international comity" might at least counsel initial use of the treaty's procedures. It concluded, in language reminiscent of the *Timberlane* interest-balancing approach, that comity required a "particularized analysis" in each case of "the respective interests of the foreign nation and the requesting nation."[205] The Court then framed those interests not in terms of the international system, but largely in terms of the private interests involved—on the

201. 482 U.S. 522 (1987).

202. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

203. Diplomatic Note presented by the Embassy of the Federal Republic of Germany to the U.S. Department of State, April 8, 1986, included as Appendix A to Brief for the Federal Republic of Germany as Amicus Curiae, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., available at 1986 WL 727492.

204. 482 U.S. at 539-40.

205. *Id.* at 543-44.

U.S. side, the interest of litigants in avoiding "unduly time-consuming and expensive" procedures that would be "less certain to produce needed evidence" than use of U.S. procedural rules.[206] From within the U.S. conceptual framework, this decision may be seen as at least an attempt to establish a standard designed to permit the consideration, within the context of ordinary civil litigation, of various competing interests.[207] From within the German conceptual framework, however, it appears as a wholesale repudiation of the international regime.[208]

Uncovering the assumptions behind claims of territoriality or extraterritoriality is a critical step in ensuring that the institutions responsible for weighing such claims—including national courts, administrative agencies, and legislatures—can properly assess the meaning and force of those claims in instances of conflict. This step is relevant not only in the context of litigation but also in the legislative setting. The ongoing dispute between the United States and European countries regarding the desirability of a multilateral antitrust regime, for instance, reflects different assumptions about the virtue of territorial sovereignty as the foundation of a global framework.[209] The current preference of Germany (and the European Union generally) for bringing antitrust regulation under the WTO umbrella is consistent with its vision of sovereign equality.[210] Conversely, the United States, accustomed to addressing the issue of regulatory conflict primarily as a matter of domestic interest and policy, may continue to prefer bilateral and ad-hoc cooperation and coordination efforts.[211] Understanding the context for such preferences will im-

206. *Id.* at 543.

207. Whether the precise standard articulated by the Court in fact provided sufficient guidance to lower courts in performing this balancing is another story. *See* Hannah L. Buxbaum, *Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from Aerospatiale*, 38 TEX. INT'L L.J. 87 (2003) (arguing that it did not).

208. *See* BERTELE, supra note 176, at 429 (describing the German government's contention that the decision was inconsistent with international law).

209. *See* KEVIN C. KENNEDY, COMPETITION LAW AND THE WORLD TRADE ORGANISATION: THE LIMITS OF MULTILATERALISM 14-17 (2001) (outlining some of the reasons for this disagreement).

210. *See* Dolzer, *Extraterritoriale Anwendung*, *supra* note 111, at 89-90 (advocating the WTO solution). *See also* Meessen, *Antitrust Jurisdiction*, *supra* note 131, at 809 (suggesting the development of an "International Centre for Settlement of Antitrust Disputes," a specialized tribunal addressing controversies arising out of conflicts of antitrust jurisdiction); discussion *infra* at note 218 and accompanying text (noting that less dominant states generally benefit from multilateral frameworks).

211. In its Final Report, issued in 2000, the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (ICPAC) advocated only a limited role for the WTO in connection with competition policy. See ICPAC Final Report, Chapter 5, *available at* http://www.usdoj.gov/atr/icpac. *See also* Sufrin, *supra* note 173, at 124-26 (describing with more optimism the possibility of U.S. involvement in a multilateral structure for international competition regulation).

prove the process as alternative regulatory mechanisms are debated and negotiated.

B. *Territoriality as Artifact? Integration into Jurisdictional Theory*

As discussed in the introduction to this Article, current work on jurisdictional theory investigates the connections between territory, sovereignty and jurisdiction. Incorporating insights from other disciplines, it intentionally complicates the relationship among those elements in part to challenge the continued salience of territory in the construction of jurisdictional rules. That challenge intersects with the related proposition, flowing from the pluralist insight that legal norms can be generated not only by states but also by non-state actors in a variety of settings,[212] that territory-bounded nation-states are not the only relevant actors in jurisdictional debates.[213] On this view, the growing involvement of other actors in jurisdictional determinations—actors, including NGOs, that do not define their own mandate or the scope of the problems they address by reference to geographic territory—is another factor that diminishes the role of territory in jurisdictional law.

In one narrow respect, emerging jurisdictional models do recognize the continued salience of territorialism: in the context of enforcement. If an assertion of jurisdictional authority is to be enforced, coercive power must be enlisted—and that remains within the exclusive purview of state actors and is therefore more closely tied to territoriality. Due to this "reality of territorial enforcement," territorialism in this sense retains relevance in pluralist models.[214] Yet jurisdictional assertions are linked to state action even outside the narrow context of enforcement, simply because it is often state actors who mediate conflicting jurisdictional claims. While some jurisdictional assertions made by non-state actors might achieve direct force within various communities through "jurispersuasional" means,[215]

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212. *See generally* Michaels, *supra* note 80, at 1221-24 (surveying studies of legal pluralism).

213. *See* Berman, *Globalization of Jurisdiction, supra* note 5, at 319-20 ("Too often, . . . contemporary frameworks for thinking about jurisdictional authority unreflectively accept the assumption that nation-states defined by fixed territorial borders are the only relevant jurisdictional entities, without examining how people actually experience allegiance to community or understand their relationship to geographical distance and territorial borders.").

214. Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 940 (2006). As Berman goes on to note, the "territorial nexus . . . does not in any way eliminate or delegitimize the transnational or international normative assertion" that may be made by non-state actors.). *Id. See also* Berman, *Globalization of Jurisdiction, supra* note 5, at 323.

215. Berman, *supra* note 214, at 952 ("The assertion of jurisdiction is the way a community—any community—seizes the language of law, attempts to construct itself as a coherent community, offers a norm to regulate that community, and asserts its 'soft' power.").

many such assertions must pass through the filter of consideration by state actors, such as national courts, who may in the process reframe or reconstruct them. Because local understandings of what territorial sovereignty means form part of that filter, territoriality retains relevance in this sense as well, whether or not enforcement mechanisms are in play.

More generally, jurisdictional theories must reject the tendency to present territorial sovereignty as a sort of jurisdictional artifact—as the touchstone of an older and no longer terribly useful approach to resolving regulatory conflict. Viewed from within the United States system, such a characterization is not particularly jarring; as the analysis above suggests, the U.S. approach already minimizes the importance of territory in determining legislative scope. This is not the case in all systems, however, and attempts to map the connections between territory and jurisdiction on the transnational plane must account for the conceptual and institutional differences across legal regimes. The use of territoriality as a mechanical standard used to link particular conduct with a particular country's law—rightly rejected—must be distinguished from the use of territoriality as an expression of a specific understanding about fairness and legitimacy in cross-border regulation. A cosmopolitan jurisdictional model would reject the construction of community as "a geographically determined territory circumscribed by fixed boundaries," instead bringing into view the multiple interests and affiliations that define our sense of community.[216] Part of the point of that move is to encourage the actors making jurisdictional decisions to replace a focus on internal domestic policy with a broader focus: to expand the "idea of a government's self-interest . . . to include an interest in being a cooperating member of the global community."[217] Yet, paradoxically, territorial sovereignty may be the vehicle used to express precisely such interests in global community. As in the German system, an argument to retain territorial divisions as the basis for allocating regulatory jurisdiction can be a statement about cooperation and harmony in the global arena—about the values on which the international community rests, and the terms on which various actors will participate in the systems of coordination and cooperation that are developing in the cross-border regulatory arena.[218]

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216. Berman, *Globalization of Law, supra* note 5, at 322.

217. Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1880 (2005).

218. Thus, within the German system, territorial sovereignty is viewed by various actors not as undermined by the current pressures on jurisdictional law, but as an appropriate means of *countering* those pressures. This position is not peculiar to Germany: reliance on territorial sovereignty in a strict sense helps protect the interests of less dominant members of the international community against the interests of the more dominant. As Professor Jennings noted,

This, then, is the challenge facing jurisdictional law. Dividing the world into compartments, as Mann put it, is no longer a satisfactory or even a viable way to conceive of regulating the global economy. It ignores the diffusion of both the conduct that must be regulated and also the means by which regulatory authority is asserted in the global economy. Yet methodological frameworks seeking a basis in transgovernmental communities, or in community values, must integrate the relevant values that are sometimes expressed through invocations of territorialism.[219] The task will be to generate a conversation about what lies behind claims of "territoriality" and "extraterritoriality," thereby creating more specific awareness of what is being contested—not only the power of particular actors to regulate certain conduct, but the shape of the global regulatory community.

> [The posture that there is no hard legal obligation to refrain from extraterritorial regulation] is a characteristic posture of the "big chap" dealing with the "little chap." The little chap, on the other hand, looks for rules and expects and asserts that there must be some to be found in international law.

R.Y. Jennings, *The Proper Reach of Territorial Jurisdiction: A Case Study of Divergent Attitudes*, 2 GA. INT'L & COMP. L. 35, 37 (1972).

219. *See* Klaus Vogel, intervention in TERRITORIALE GRENZEN, *supra* note 114, at 83, noting that while international law prohibits only the exercise of sovereign acts on the territory of another state, states increasingly meet their regulatory ends not through "official" sovereign acts but through more indirect routes. He goes on to suggest that new categories and new analytical models must be created that bring the values in classic international law to bear. *Id.* at 85.