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Reasonableness as a Limit to Extraterritorial Jurisdiction

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NOTES

REASONABLENESS AS A LIMIT TO EXTRATERRITORIAL JURISDICTION

The *Revised Restatement of American Foreign Relations Law* (Tentative Draft No. 2) (*Revised Restatement*) made a nation's exercise of unreasonable jurisdiction unlawful[1] by elevating multivariable interest analysis[2] from a judicial abstention doctrine[3] to a criterion of jurisdiction *vel non*.[4] The drafters of the *Revised Restatement* acted in response both to the perceived failure of the territorial model of jurisdiction[5] to accommodate an increasingly integrated world in general,[6] and to the expanding extraterritorial application of American public law in particular.[7] The *Revised Restatement*'s standard of multivariable interest analysis supplanted the abstention doctrine of the *Restatement (Second)*

1. REVISED RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter REVISED RESTATEMENT] § 403 (1981). *See infra* notes 36-41 and accompanying text.

2. Multivariable interest analysis involves a consideration of a list of national contacts and a balancing of the importance of the forum's particular national public policy against the policies of a foreign country. *See infra* notes 34, 38, 78, 79 & 83.

3 Judicial abstention refers to a court's discretion to dismiss a case or refuse to entertain a complaint because of a finding that a foreign forum has a greater interest in the matter. This doctrine occasionally employs multivariable interest analysis, but only as a discretionary tool. Courts and commentators often refer to judicial abstention as comity. *See infra* notes 33 & 88.

4. Jurisdiction *vel non* literally means jurisdiction or not. Under this approach, jurisdiction can only vest once a court has performed a multivariable interest analysis calculus and concluded that its exercise of jurisdiction is reasonable. *See infra* notes 36-41 and accompanying text.

5. Geography rather than function underlies the distribution of formal power in the international community. *See* Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1110 (1956). The territorial model of jurisdiction is workable only so long as human activity remains predominately within the territorial boundaries of individual states. When human activity begins to traverse territorial boundaries, application of the territorial model may produce irreconcilable conflicts. *See infra* note 6.

6. *See* K. WALTZ, THEORY OF INTERNATIONAL POLITICS 211-22 (1979).

A territorial model of jurisdiction begins to break down as society becomes more mobile and economies more diverse. The decline of the territorially based jurisdiction model of American law parallels the decline of the territorial model in the international community. A strict territorial jurisdiction model, *see, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877), could not accomodate the increased mobility of society. An effective model must instead depend on some kind of minimum contacts or an effects principle. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Liberal interpretations of the effects or minimum contacts standard cause courts to look for a limit to assertions of jurisdiction to ensure the integrity of the federal system. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

7. *See* Grundamn, *The New Imperialism: The Extraterritorial Application of United States*

of American Foreign Relations Law (Restatement Second).[8] The drafters of the *Revised Restatement* concluded that the abstention model divorced a state's power from the wisdom of exercising that power and failed to limit adequately states' exercise of extraterritorial jurisdiction.[9]

This Note argues that the *Revised Restatement*'s elevation of multivariable interest analysis to a criterion of jurisdiction *vel non* represents not only an inaccurate statement of what the law is,[10] but also an unwise statement of what the law should be.[11] After outlining the differences between the *Restatement Second* and the *Revised Restatement*,[12] this Note discusses the extraterritorial application of American antitrust laws[13] to illustrate the problem of extended extraterritorial jurisdiction[14] and to trace the origin of reasonableness as a limit to extraterritorial jurisdiction.[15] Next, this Note examines judicially imposed constraints on the reach of America's securities laws to illustrate the limited use of reasonableness as a restriction on extraterritorial jurisdiction.[16] This Note then focuses on the scope of a sovereign's prescriptive jurisdiction as defined in international[17] and American[18] law by examining situations of concurrent jurisdiction. Finally, this Note concludes that the *Restatement Second*'s abstention standard better supplements political solutions[19] and is, therefore, preferable to the *Revised Restatement*'s standard of multivariable interest analysis.[20]

Law, 14 INT'L LAW. 257, 257 (1980) ("In the past twenty-five years the United States has had three major exports: rock music, blue jeans, and United States law.").

8. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT (SECOND)] § 40 (1965). *See infra* notes 31-35 and accompanying text.

9. *See* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law,* 76 AM. J. INT'L L. 280, 300 (1982).

10. *See infra* notes 145-29 and accompanying text.

11. *See infra* notes 146-63 and accompanying text.

12. *See infra* notes 21-46 and accompanying text.

13. *See infra* notes 47-90 and accompanying text.

14. *See infra* notes 47-67 and accompanying text.

15. *See infra* notes 68-90 and accompanying text.

16. *See infra* notes 91-110 and accompanying text.

17. *See infra* notes 111-19 and accompanying text.

18. *See infra* notes 120-28 and accompanying text.

19. *See infra* notes 164-68 and accompanying text.

20. *See infra* notes 129-63 and accompanying text.

I. THE CHANGED FOCUS OF THE RESTATEMENT

A. *The Restatement Second*

The *Restatement Second* adheres to traditional international law principles of jurisdiction to prescribe,[21] which is the capacity of a state to make a rule of law with respect to any particular activity.[22] Jurisdiction to prescribe may rest on universality,[23] nationality,[24] the protective principle,[25] or territoriality.[26] The *Restatement Second* further follows traditional views in distinguishing subjective[27] and objective[28] theories of the

21. RESTATEMENT (SECOND) § 6 comment a (1965).

22. *Id.* The *Restatement (Second)* also adopts the traditional international law distinction between jurisdiction to prescribe and jurisdiction to enforce. *Id.* Jurisdiction to enforce is the state's capacity to execute any rule that the state prescribes, thereby presuming a legitimate basis of prescriptive jurisdiction. *Id.* § 7(2). Jurisdiction to enforce does not extend beyond a state's territory regardless of the basis on which jurisdiction to prescribe rests. *Id.* § 20. Examples of enforcement jurisdiction include arrest, trial, entry of judgment, and confiscation. Because jurisdiction to prescribe is a prerequisite for jurisdiction to enforce, the discussion of reasonableness and jurisdiction in this Note will be primarily in terms of jurisdiction to prescribe.

23. The *Restatement (Second)* included piracy, conservation of marine life on the high seas, and collision and salvage on the high seas under universal jurisdiction. *Id.* §§ 34-36. The *Revised Restatement* expands the concept of universal jurisdiction to include slave trade, hijacking, genocide, war crimes, and perhaps terrorism. REVISED RESTATEMENT § 404 (1981).

24. The *Restatement (Second)* addresses the nationality concept as follows:

> (1) A state has jurisdiction to prescribe a rule of law
>
> (a) attaching legal consequences to conduct of a national wherever the conduct occurs or
>
> (b) as to the status of a national, wherever the thing or other subject matter of which the interest relates is located.
>
> (2) A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.

RESTATEMENT (SECOND) § 30 (1965).

25. The *Restatement (Second)* defines the protective principle as follows:

> (1) A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.
>
> (2) Conduct referred to in Subsection (1) includes in particular the counterfeiting of the state's seals and currency, and the falsification of its official documents.

Id. § 33.

26. *See infra* notes 27-30 and accompanying text.

27. The subjective theory of territoriality allows a state to prescribe a rule of law to conduct commenced within the state but consummated abroad. *See Harvard Research Draft Convention on Jurisdiction with Respect to Crime, Art. 3,* 29 AM. J. INT'L L. 439, 484 (Supp. 1935). Section 17 of the *Restatement (Second)* codified the subjective theory of territoriality. *See infra* note 29 and accompanying text.

28. United States courts may assert jurisdiction over an offense if consummation of any constituent element of the offense occurs within the state. *See, e.g.,* Strassheim v. Daily, 221 U.S. 280, 285 (1911); The Antelope, 23 U.S. (10 Wheat.) 337, 344 (1825). International law has also recognized

territorial basis of prescriptive jurisdiction. Section 17 of the *Restatement Second* adopts the subjective theory of territoriality by allowing a state to prescribe a rule of law attaching legal consequences to conduct within the territory of the state, regardless of where the effects of the conduct are felt.[29] Section 18 adopts the objective theory by allowing a state to prescribe a rule of law attaching legal consequences to conduct wholly outside its territory, if that conduct takes effect within the state's territory.[30]

More than one state may have prescriptive jurisdiction over the same act or transaction.[31] When two states have concurrent jurisdiction to prescribe rules that require inconsistent conduct on the part of a party, section 40 of the *Restatement Second* adopts the traditional international principle of comity.[32] Section 40 requires states to moderate their exer-

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that foreign conduct that causes an effect within a state's territory is within the principle of objective territoriality. *See* 2 J. MOORE, INTERNATIONAL LAW DIGEST 244 (1906); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws,* 33 BRIT. Y.B. INT'L L. 146, 175 (1957). Section 18 of the *Restatement (Second)* codified the objective theory of territoriality. *See infra* note 30 and accompanying text.

29. A state has jurisdiction to prescribe a rule of law
(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and
(b) relating to a thing located, or a status or other interest localized, in its territory.

RESTATEMENT (SECOND) § 17 (1965).

30. A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Id. § 18.

31. *See id.* § 37 (1965). "A state having jurisdiction to prescribe or to enforce a rule of law may exercise such jurisdiction notwithstanding the fact that another state also has jurisdiction. . . ."). Concurrent jurisdiction does not require one state to yield jurisdiction, even if the two states' laws lead to inconsistent conclusions. *See* Akehurst, *Jurisdiction in International Law,* 46 BRIT. Y.B. INT'L L. 145, 207-08 (1972).

32. RESTATEMENT (SECOND) § 40 (1965). Comity, while not a rule of international law, constitutes something more than mere courtesy. Hilton v. Guyot, 159 U.S. 113, 164 (1895). Courts will decline to exercise jurisdiction over a particular transaction and occurrence because of the interests of other states and/or their respect for the needs of the international system. *See* Akehurst, *supra* note 31, at 215-16; Katzenbach, *supra* note 5, at 1104; Maier, *supra* note 9, at 281-85.

Comity rests on the principle enunciated by the Dutch scholar, Ulrich Huber, that "the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they *do not prejudice the powers or rights of another state, or its subject.*" In Davis, *The*

cise of jurisdiction by weighing all respective interests.[33] Section 40 thus resembles modern choice of laws analysis.[34] Both section 40 and choice of laws analysis go to the wisdom or prudence of the judiciary's assertion of jurisdiction rather than to the question of jurisdiction *vel non*.[35]

B. The Revised Restatement

Although section 402 of the *Revised Restatement* also allows a state to prescribe a rule of law based on nationality, the protective principle, or territoriality,[36] section 403 precludes a state from exercising jurisdiction

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Influence of Huber's de Conflictu Legum on English Private Law, 18 BRIT. Y.B. INT'L L. 49, 59 (1937) (translation) (emphasis added). Justice Story saw comity as a means of facilitating the effective functioning of the international system. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 33 (M. Bigelow ed. 1883). Professor Beale stated that: "The doctrine of comity seems to mean only that in certain cases the sovereign is not prevented by any principle of international law, but only by his own choice, from establishing any rule he pleases for the conflict of laws." J.H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 19, at 43 (1935). For an excellent discussion on the historical origins of comity, see Yntema, *The Comity Doctrine,* 65 MICH. L. REV. 9 (1966).

33. The *Restatement (Second)* provides as follows:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
> (a) vital national interests of each of the states,
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
> (c) the extent to which the required conduct is to take place in the territory of the other state,
> (d) the nationality of the person, and
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

RESTATEMENT (SECOND) § 40 (1965).

34. *Compare id. with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971), which provides as follows:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Id.

35. RESTATEMENT (SECOND) § 40 Reporter's Note 2, at 120-21 (1965).

36. *Subject to § 403,* a state may, under international law, exercise jurisdiction to prescribe and apply its law with respect to

when that exercise would be unreasonable.[37] The determination of reasonableness requires the evaluation and balancing of certain factors that include national contacts, expectations, and the importance of the national interest.[38] These factors resemble those set forth in section 40 of the *Restatement Second*[39] and the multivariable interest analysis that courts have developed in the antitrust field.[40] Unlike the *Restatement Second*, however, under section 403, jurisdiction does not vest until a court finds that its exercise is reasonable.[41]

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(1)(a) conduct a substantial part of which takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory which has or is intended to have substantial effect within its territory;
(2) the conduct, status, interests or relations of its nationals outside its territory; or
(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or certain state interests.

REVISED RESTATEMENT § 402 (1981) (emphasis added).

The *Revised Restatement* adopts the same definitions of jurisdiction to prescribe and jurisdiction to enforce that appear in the *Restatement (Second)*, but adds a third category—jurisdiction to adjudicate. REVISED RESTATEMENT § 401(1)-(3) (1981). Jurisdiction to adjudicate "means authority of a state to subject persons or things to the process of its courts or administrative tribunals, whether for the purpose of enforcing the state's laws and regulations or otherwise." *Id.* § 401(3). For a discussion of the difference between jurisdiction to enforce and jurisdiction to adjudicate, see Lowenfeld, 58 A.L.I. PROC. 234 (May 20, 1981).

37. "Although one of the bases for jurisdiction under § 402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable." REVISED RESTATEMENT § 403(1) (1981).

38. (2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:
(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
(b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation in question;
(e) the importance of regulation to the international political, legal or economic system;
(f) the extent to which such regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity;
(h) the likelihood of conflict with regulation by other states.

Id. § 403(2).

39. *See supra* note 33 and accompanying text.

40. *See infra* notes 68-90 and accompanying text.

41. "In contrast to prior § 40, consideration of the relevant factors is conceived here not as an act of good faith in moderating enforcement of jurisdiction authorized by law, but as an element in

The *Revised Restatement* illustrates the principle of reasonable prescriptive jurisdiction in the areas of tax,[42] antitrust,[43] securities,[44] and foreign subsidiary regulation.[45] Exercise of jurisdiction under these illustrative provisions depends upon a finding of reasonableness under subsection 403(2).[46]

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determining whether the state has jurisdiction as a matter of law." REVISED RESTATEMENT § 403 Reporter's Note 10, at 113-14 (1981).

Subsection 403(3) finds it unreasonable for a state to exercise jurisdiction that is otherwise reasonable if it would require a person to violate a reasonable regulation in another state. *Id.* § 403(3). Courts, moreover, should resolve conflicting concurrent jurisdiction by referring to the principle of reasonableness outlined in subsection 403(2). *Id.* § 403(3).

Subsection 403(4)(a) requires American courts to interpret the jurisdictional scope of statutes as being consistent with the standard of reasonableness detailed in subsection 403(2). Subsection 403(4)(b), however, mandates that if Congress expressly determines that a particular statute should reach beyond the limits of reasonableness, an American court must enforce the law.

42. *See id.* §§ 411-13.

43. (1) Any agreement in restraint of United States trade made in the United States, and any conduct or agreement in restraint of such trade carried out predominantly in the United States, is subject to the jurisdiction of the United States regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct.

(2) Any agreement in restraint of United States trade made outside of the United States, and any conduct or agreement in restraint of such trade carried out predominantly outside of the United States, is subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(3) The United States has authority to exercise jurisdiction with respect to any other agreement or conduct in restraint of United States trade if such agreement or conduct has substantial effect on the commerce of the United States *and the exercise of jurisdiction is not unreasonable under § 403(2) and (3).*

Id. § 415 (emphasis added).

44. (1) Any transaction in securities carried out, or intended to be carried out, on a securities market in the United States is subject to United States jurisdiction to prescribe, regardless of the nationality or place of business of the participants in the transaction or of the issuer of the securities.

(2) As regards transactions in securities not on a securities market in the United States, but where

(a) securities of the same issuer are traded on a securities market in the United States; or

(b) representations are made or negotiations are conducted in the United States in regard to the transactions; or

(c) the party subject to the regulation is a United States national or resident, or the persons sought to be protected are residents of the United States. *The authority of the United States to exercise jurisdiction to prescribe depends on its reasonableness in the light of evaluation under § 403(2).*

Id. § 416 (emphasis added).

45. *Id.* § 418. Every provision of section 418 is dependent upon a finding of reasonableness under § 403(2). For a discussion of reasonableness and section 418, see Thompson, *United States Jurisdiction Over Foreign Subsidiaries: Corporate and International Law Aspects,* 14 LAW & POL. INT'L BUS. 319, 380-99 (1983).

46. *See, e.g.,* REVISED RESTATEMENT § 415(3) (1981).

II. THE ORIGIN AND LIMITATION OF REASONABLENESS

A. *The Expanding Territorial Concept of Antitrust Jurisdiction*

The Supreme Court first addressed the extraterritorial reach of the Sherman Act[47] in 1909 in *American Banana Co. v. United Fruit Co.*[48] Justice Holmes, writing for the Court, found that the application of American antitrust laws to wholly foreign conduct would be a breach of international comity.[49] After concluding that the law of the state in which the conduct occurred should apply,[50] Justice Holmes held: "All legislation is prima facie territorial."[51]

Holmes' restrictive interpretation of the Sherman Act's extraterritorial reach has since become an anomaly.[52] In the years immediately following *American Banana*, the Supreme Court expanded the reach of the antitrust laws to encompass restrictive trade practices that involved both the United States and foreign countries.[53] The Supreme Court also applied the antitrust laws to restraints on foreign commerce that affected

47. *See* 15 U.S.C. § 1 (1982) ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce among . . . or with foreign nations is declared to be illegal. . . ."). *Id.* § 2 ("Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce . . . with foreign nations, shall be guilty of a felony. . . .").

48. 213 U.S. 347 (1909). United Fruit, an American corporation, had monopolized the Latin American banana market, conspired to restrain the trade of bananas, and fixed the price of bananas. A second American corporation, American Banana, attempted to enter the Latin American banana market. United Fruit enlisted the aid of the Costa Rican government to seize American Banana's facilities. American Banana alleged the seizure was a violation of American antitrust laws. *Id.* at 354-55.

49. *Id.* at 355-57.

50. *Id.* at 357.

51. *Id.* Although Justice Holmes took a restrictive view of the extraterritorial application of the Sherman Act, he did not deny the possibility that the Act might apply to wholly foreign conduct that has an effect within the United States. Because American Banana did not allege that United Fruit's anticompetitive practices affected the United States, Holmes did not address the issue. In Strassheim v. Dailey, 221 U.S. 280 (1911), Justice Holmes affirmed Michigan's authority to assert jurisdiction over fraud that took place outside of Michigan, but that had an effect within Michigan. "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of harm as if he had been present at the effect, if the state should succeed in getting him within its power." *Id.* at 285.

52. *See* Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979). *See also* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS app. B, at 498 (2d ed. 1973) (as of May, 1973, the Department of Justice had filed 248 foreign trade antitrust cases and had not lost one because of a jurisdictional defect).

53. *See, e.g.*, United States v. Pacific & Arctic Co., 228 U.S. 87 (1913) (monopolization of a railroad line running through the United States, Canada and Alaska); United States v. American Tobacco Co., 221 U.S. 106 (1911) (agreement between British and American companies to divide up the world tobacco market).

the United States.[54]

An American court did not fully develop an "effects" test until 1945 when the Second Circuit decided *United States v. Aluminum Co. of America (Alcoa)*.[55] Because *Alcoa* extended the extraterritorial application of the antitrust laws to its outermost limit,[56] the decision remains a focus for debate over principles of extraterritoriality.[57] The court, per Judge Learned Hand, initially inquired into whether Congress had intended the antitrust laws to apply to conduct wholly outside the United States.[58] After cautioning that interpretation of the antitrust laws should be consistent with the law of nations and "Conflict of Laws" principles,[59] he concluded that Congress wished the antitrust laws to apply to wholly foreign conduct intended to affect and actually affecting the United States.[60]

The *Alcoa* "intended effects" test in either a strict or modified form[61]

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54. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (conspiracy to restrain the importation of sisal from Mexico into the United States); Thomsen v. Cayser, 243 U.S. 66 (1917) (conspiracy to restrain the shipping trade between New York and South Africa).

55. 148 F.2d 416 (2d Cir. 1945). Aluminum Limited, a Canadian corporation and former subsidiary of Alcoa, entered into an agreement with European aluminum producers to limit the export of aluminum to the United States. *Id.* at 439-42. The Second Circuit considered this appeal pursuant to a federal statute that allowed the Supreme Court to refer a case to the circuit court when the Court could not muster a quorum. *Id.* at 421. The Supreme Court later ratified the decision. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

56. *See* J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 6.05 (2d ed. 1981).

57. *See* Haight, *International Law and the Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954); Jennings, *supra* note 28; Raymond, *A New Look at the Jurisdiction in* Alcoa, 61 AM. J. INT'L L. 558 (1967).

58. 148 F.2d at 443.

> [W]e 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.

Id.

59. *Id. See also* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1802) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .").

60. Judge Hand reasoned that Congress did not intend to ascribe liability to unintended effects because of "the international complications likely to arise from an effort in this country to treat such agreements as unlawful. . . ." 148 F.2d at 443.

61. *See, e.g.*, United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949) ("a direct and influencing effect on trade"), *modified and aff'd*, 341 U.S. 593 (1951); ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, at 6-7 (Jan. 26, 1977) (effect must be "substantial and foreseeable"); RESTATEMENT (SECOND) § 18 (quoted *supra* note 30).

became widely accepted.[62] After *Alcoa*, courts concentrated on the effect on American foreign commerce in determining whether to apply United States' antitrust laws to conduct occurring in other countries.[63] The "effects" test failed, however, to take into consideration the legitimate interests of other nations.[64] This failure, as well as international outcry,[65] prompted commentators[66] and courts[67] to search for a limit to the "effects" test.

62. *See, e.g.,* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) (dumping mercury in Lake Erie which causes pollution in Ohio); Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (infringement of plaintiff's patent by defendant in Mexico causes unlawful effects within the United States).

63. *See, e.g.,* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (antitrust violations consisting of misuse of patents by parent research companies and Canadian, English and Australian patent pools); Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement, 451 F.2d 727 (2d Cir. 1971) (comity did not require a U.S. court to dismiss a Sherman Act claim by a Swiss corporation against a French corporation despite existence of a Franco-Swiss treaty requiring resolution of disputes between those nations' nationals in French or Swiss courts), *cert. denied,* 406 U.S. 906 (1972); Sabre Shipping Corp. v. American President Lines, Ltd., 407 F.2d 173 (2d Cir. 1968) (restraints of trade in shipping industry between Hong Kong, Japan and U.S.), *cert. denied,* 395 U.S. 922 (1969); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968) (conspiracy to interfere with American corporation financing shipping between Taiwan and South Vietnam), *cert. denied,* 393 U.S. 1093 (1969); Industria Siciliana Asfalti, Bitumi, Sp.A. v. Exxon Research & Engineering Co., 1977-1 TRADE CAS. (CCH) ¶ 61,256 (S.D.N.Y. Jan. 18, 1977) (Italian oil refiner alleges illegal tying arrangement for refinery being built in Italy); Occidental Petrol. Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971) (conspiracy to monopolize the exploration, development and exploitation of oil of the territorial waters of the Trucial States); United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949) (General Electric acquired patents throughout the world to restrict the supply of tungsten incandescent electric lamps into the United States).

64. *See* J. ATWOOD & K. BREWSTER, *supra* note 56, at 158. A stark example of American courts' failure to pay due respect to comity appears in United States v. Imperial Chem. Indus., 105 F. Supp. 215 (S.D.N.Y. 1952). In *Imperial Chemical,* an American court mandated the dissolution of exclusive patent licensing and exchange agreements between American and British corporations. The agreements violated American antitrust laws, but were perfectly legal under British law. The British government refused to give effect to the American court order. British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd., [1952] 1 Ch. 19, 24 (C.A.), *made permanent,* [1955] 1 Ch. 37.

65. *See* Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act,* 18 B.C. IND. & COMM. L. REV. 199, 199-200 (1977); Note, *A Comparative Analysis of the Efficacy of Bilateral Agreements in Resolving Disputes Between Sovereigns Arising from Extraterritorial Application of Antitrust Laws: The Australian Agreement,* 13 GA. J. INT'L & COMP. L. 49, 58 (1983).

66. *See* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); Beausang, *The Extraterritorial Jurisdiction of the Sherman Act,* 70 DICK. L. REV. 187 (1966); Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach,* 28 STAN. L. REV. 1005 (1976); Note, *Extraterritorial Application of the Antitrust Laws; A Conflict of Laws Approach,* 70 YALE L.J. 259 (1960).

67. *See infra* notes 68-90 and accompanying text.

B. Reasonableness as a Limit to Extraterritorial Antitrust Jurisdiction

In 1977, the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*,[68] made the first judicial attempt to limit the extraterritorial reach of the antitrust laws.[69] The *Timberlane* court formulated a tripartite test to determine the validity of extraterritorial applications of the antitrust laws.[70] First, a court must find some actual or intended effect upon American foreign commerce.[71] Second, the effect should be large enough to be cognizable under the Sherman Act.[72] Finally, the court should consider the magnitude of the effect on American commerce in light of any foreign interest "to determine whether American authority should be asserted in a given case as a matter of *international comity and fairness*."[73]

The *Timberlane* court relied upon choice of law jurisprudence[74] and section 40 of the *Restatement Second*[75] to support its cognizance of foreign interests. The court also considered the act of state doctrine[76] as

68. 549 F.2d 597 (1977). Timberlane alleged that Bank of America had conspired to prevent it from milling and exporting Honduran lumber to the United States. The district court dismissed Timberlane's complaint for lack of subject matter jurisdiction. The Court of Appeals vacated the dismissal and remanded for consideration in light of international comity and fairness. *Id.* at 616.

69. *Cf.* Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 815 (1968) (the "effect" test is too mechanical; the court should look to find a "nexus"), *cert. denied,* 393 U.S. 1093 (1969).

70. 549 F.2d at 613.

71. *Id.* The *Timberlane* test requires a lesser effect on American commerce than the standard set in *Alcoa*. *See supra* note 60 and accompanying text.

72. *Id.*

73. *Id.* (emphasis added).

74. *Id.* The court relied upon the approach suggested by Judge Hand in *Alcoa*. *See supra* note 58 and accompanying text. The *Timberlane* court also cited Lauritzen v. Larsen, 345 U.S. 571 (1953), which holds that the National Labor Relations Act does not apply to foreign seamen on foreign ships that call in American ports, as support for the conflict of laws approach in situations of international concurrent jurisdiction. 549 F.2d at 614. *See infra* notes 120-27 and accompanying text.

75. *See supra* note 33 and accompanying text.

76. 549 F.2d at 613. Underhill v. Hernandez, 168 U.S. 250, 252 (1897) provides the classical formulation of the act of state doctrine:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

For the modern restatement of the act of state doctrine, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (sugar illegally expropriated by Cuba now within the United States an act of state). *See also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (Cuba's retention of postconfiscation payments for cigars not an act of state); International Ass'n of Machin-

precedent for its concern with the foreign interests implicated by the exercise of extraterritorial jurisdiction.[77] The Ninth Circuit turned to Kingman Brewster's "jurisdictional rule of reason" to help formulate a comity test.[78] The court consequently developed a set of factors[79] to assess the conflict with foreign law and to determine whether the American interest was sufficient to justify the exercise of extraterritorial jurisdiction.

Two years after *Timberlane* the Third Circuit also incorporated concepts of comity and fairness into the decision whether to exercise extraterritorial jurisdiction. The Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*[80] noted the worldwide criticism of the United States'

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ists v. Organization of Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir. 1981) (labor union brought a Sherman Act price fixing suit against OPEC), *cert. denied,* 454 U.S. 1163 (1982); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1976) (Libya nationalized oil reserves and alienated Hunt; alleged conspiracy among seven principal oil companies), *cert. denied,* 434 U.S. 984 (1977).

One may view the *Timberlane* court's cognizance of foreign interests and contacts as developing a private side to the act of state doctrine. American courts should not sit in judgment of private foreign conduct that does not substantially affect the United States. Note that both *Timberlane* and *Mannington Mills* contained act of state claims. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292-94 (3d Cir. 1979); 549 F.2d at 605-08.

77. 549 F.2d at 613.

78. (a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunities; (c) the relative seriousness of effects on the United States compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate locations, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies; and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

Id. at 614 n.31 (quoting K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958)).

79. *Id.* at 614-15.

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of 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 effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present. Nationality is another; though foreign governments may have some concern for the treatment of American citizens and business residing there, they primarily care about their own nationals. Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Id. Cf. supra note 38 (REVISED RESTATEMENT's principle of reasonableness).

80. 595 F.2d 1287, 1296 (3d Cir. 1979). Mannington Mills alleged that Congoleum's fraudu-

extraterritorial application of its antitrust laws.[81] After citing *Timberlane*'s"balancing process,"[82] the court formulated its own multivariable comity balance.[83] The *Mannington Mills* court expressly applied its comity analysis to determine the wisdom or prudence of exercising jurisdiction.[84] The concurring opinion, however, contended that comity analysis should enter into the court's determination of subject matter jurisdiction *vel non*.[85]

Although the multivariable comity analysis developed in *Timberlane* and *Mannington Mills* met with approval from commentators,[86] disagreement arose over whether the multivariable comity analysis ought to go to the question of jurisdiction *vel non* or to judicial abstention.[87] Courts following *Timberlane* have applied the comity analysis solely as

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lent licensing of foreign patents was a violation of the Sherman Act. The district court dismissed on act of state grounds. *Id.* at 1290.

81. *Id.* at 1297.

82. *Id.*

83. The court set forth the following factors: (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties; (3) Relative importance of the alleged violation of conduct here compared to that abroad; (4) Availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; (10) Whether a treaty with the affected nations has addressed the issue. *Id.* at 1297-98. *Compare id. with supra* note 38 (REVISED RESTATEMENT's reasonableness standard).

84. 595 F.2d at 1296.

85. *Id.* at 1299 (Adams, J., concurring).

> I do not agree that a court may conclude that it is invested with subject matter jurisdiction under the Sherman Act but may nonetheless abstain from exercising such jurisdiction in deference to considerations of international comity; rather, it seems that those considerations are properly to be weighed at the outset when the court determines whether jurisdiction *vel non* exists.

Id.

86. *See* W. FUGATE, *supra* note 52, §§ 2.14-2.15; Ongman, *"Be No Longer A Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope,* 71 NW. U.L. REV. 733 (1977); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns,* 77 COLUM. L. REV. 1247 (1977). *But see* Kadish, *Comity and the International Application of the Sherman Act: Encouraging the Courts to Enter the Political Arena,* 4 NW. J. INT'L L. & BUS. 130 (1982) (multivariable interest analysis is a political rather than judicial function).

87. *Compare* J. ATWOOD & K. BREWSTER, *supra* note 56, § 6.13 ("balancing process should be an integral part of jurisdictional issue") *and* Ongman, *supra* note 86, at 742 n.34 (multivariable comity analysis must go to the question of jurisdiction *vel non* to prevent the situation of a remedy without a wrong) *with* Kadish, *supra* note 86, at 171 ("introducing comity considerations into a jurisdictional analysis is questionable at best").

an abstention doctrine.[88] The application of *Timberlane*'s comity analysis as an abstention doctrine has not, however, successfully curtailed antitrust extraterritorial jurisdiction.[89] Courts consequently have turned to the second prong of the *Timberlane* test and increased their scrutiny of the magnitude of the effect of foreign acts on American commerce.[90]

C. *Extraterritorial Securities Regulation and the Limits to Reasonableness*

Courts confronting the extraterritorial reach of the Securities Act of 1933[91] and the Securities Exchange Act of 1934[92] have chosen neither to employ reasonableness[93] nor to borrow multivariable comity analysis from the antitrust field to serve as a limit.[94] These courts have not found

88. *See* Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 n.7 (5th Cir. 1982) ("[l]ike the Third Circuit majority and the Seventh Circuit, however, we do not read the *Timberlane* balancing test as a test of subject matter jurisdiction"), *vacated on other grounds,* 460 U.S. 1244, *cert. denied,* 104 S. Ct. 393 (1983); Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981) (although not expressly adopting a jurisdictional or abstention position, the court does rely on section 40 of the *Restatement (Second), see supra* note 33, which is clearly discretionary); *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980). *But see* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1177-89 (E.D. Pa. 1980) (favorably discussing *Timberlane* and assuming that *Timberlane*'s balancing test went to jurisdiction).

89. Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981), is the only decision to dismiss an antitrust allegation for lack of subject matter jurisdiction. The court ordered a dismissal because the foreign interests outweighed minimal American interest. *Id.* at 870-71. The *Timberlane* and *Mannington Mills* courts expanded jurisdiction by reversing and remanding dismissals for lack of subject matter jurisdiction. *See supra* notes 68 & 80.

90. *See, e.g.,* National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1982); El Cid Ltd. v. New Jersey Zinco Co., 551 F. Supp. 626, 632 (S.D.N.Y. 1982).

Increased scrutiny of the magnitude of effects upon American conduct is the most effective judicial means for limiting extraterritorial jurisdiction. Courts are better equipped to measure the magnitude of an effect than to balance competing foreign and domestic interests and contacts. In addition, courts could scrutinize more carefully whether an effect was direct and foreseeable. *See infra* note 167 and accompanying text.

91. 15 U.S.C. §§ 77a-77aa (1982).

92. 15 U.S.C. §§ 78a-78hh-1 (1982). The courts have not been concerned with the registration provisions or the broker-dealer regulations. Instead, they have addressed the extraterritorial application of the antifraud provisions. *See, e.g.,* section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) (1982); § 10(b) of the Exchange Act, *id.* § 78j(b); and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1984).

93. *See infra* notes 100-10 and accompanying text. *But see* Note, *American Adjudication of Transnational Securities Fraud,* 89 HARV. L. REV. 553, 565 (1976) (underlying basis to the Second Circuit's decisions was international political considerations).

94. Even the Ninth Circuit, which decided *Timberlane,* has not applied the *Timberlane* comity analysis to extraterritorial securities regulation. *See* Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983); Des Brisay v. Goldfield Corp., 549 F.2d 133 (9th Cir. 1977). *See also* A.L.I. FEDERAL SECURITIES CODE § 1905 (1980). In fact, one court refused to apply choice of law analysis to securi-

the legislative history of the two Acts helpful in defining the extraterritorial scope of the securities laws.[95] They have, therefore, relied upon general principles of international law, canons of statutory construction, and the broad remedial purpose of the securities laws to define the extraterritorial scope of those laws.[96] As a result, courts have extended the jurisdictional reach of the securities laws[97] by employing both the subjective[98] and objective theories of territoriality.[99]

Under the objective theory of territoriality, courts have applied the securities laws to fraudulent foreign conduct that takes effect within the United States.[100] This approach resembles the "effects" test developed in

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ties questions automatically because of the lack of constitutional guarantees in the international system:

> Before leaving subject-matter jurisdiction, we should say a word in answer to the defendants' argument that since choice of law principles would select the law of England as the rule governing liability, application of § 10(b) of the Securities Exchange Act would violate international law [Cite omitted]. At first blush the contention that the courts of the forum transgress their jurisdiction if they apply the forum's own law when correct choice of law doctrines would require them to apply the law of another state as the normative principle would scarcely seem to warrant discussion, *particularly in a case like this where the full faith and credit clause of the Constitution can have no application.*

Leasco Data Processing Equip. Corp. v. Maxwell, 486 F.2d 1326, 1338 (2d Cir. 1972) (emphasis added).

95. *See* SEC v. Kasser, 548 F.2d 109, 114 n.21 (3d Cir. 1977) (while the securities laws speak specifically to foreign commerce, they are silent as to scope of jurisdiction; therefore, the court gives foreign commerce a broad interpretation).

96. *See* Continental Grain (Australia) Ltd. v. Pacific Oilseeds, Inc. 592 F.2d 409, 416 (8th Cir. 1978) (court reverses a lower court dismissal for lack of subject matter jurisdiction because defendants' conduct within the United States was sufficiently related to and furthered their fraudulent scheme).

97. The Second Circuit, in Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied,* 432 U.S. 1018 (1975), announced the clearest and most comprehensive standard regarding the extraterritorial force of the securities laws. According to the court, the securities laws:

> (1) Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and
>
> (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but
>
> (3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.

Id. at 993.

98. *See infra* notes 106-09 and accompanying text.

99. *See infra* notes 100-05 and accompanying text.

100 *See, e.g.,* Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.) (public offerings expressly disclaimed registration under American securities laws, were made by a Canadian corporation, underwritten by American investment organizations, and shares were almost completely distributed outside the U.S.), *cert. denied,* 423 U.S. 1018 (1975); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.) (Canadian corporation whose stock traded on American Stock Exchange withheld information

the antitrust field.[101] Courts applying the objective approach contend that Congress intended to protect the domestic securities markets from fraudulent foreign conduct as well as domestic fraud.[102] They maintain that a contrary holding would frustrate the securities laws' important public purpose.[103] According to these courts, to be cognizable under the securities laws the effect of the fraud in the United States should be specific, direct, and foreseeable.[104] Under the objective theory of territoriality, then, general, unspecified effects upon the economy of the United States are insufficient to confer jurisdiction upon a United States district court.[105]

In addition, courts have held that the American securities laws apply to fraudulent conduct within the United States that actually takes effect abroad using a subjective theory of territoriality.[106] These courts assert that Congress did not intend to allow the United States to become a haven for the export of fraudulent securities schemes.[107] This congressional intent determines whether any particular conduct is cognizable under the securities laws.[108] They have thus found that although "merely prepara-

to benefit French parent, thus impairing American investors' investment), *rev'd on other grounds,* 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 906 (1969).

101. *See supra* notes 55-67 and accompanying text.

102. "We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities markets from the effects of improper foreign transactions in American securities." Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir.), *rev'd on other grounds,* 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 906 (1969).

103. *Id.* at 207.

104. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 n.35 (2d Cir.) (court cites favorably Steele v. Bulova 344 U.S. 280 (1952)) for the specific, direct and foreseeable requirement), *cert. denied,* 423 U.S. 1018 (1975).

105. "But it does not support subject matter jurisdiction if there was no intention that the securities should be offered to anyone in the United States, simply because in the long run there was an adverse effect on this country's general economic interests or on American security prices." Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975).

106. *See, e.g.,* IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1338 (2d Cir. 1972).

107. The Third Circuit, for example, stated: "We are reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'" SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977). *See also* IIT, An Int'l Inv. Trust v. Cornfeld, 619 F.2d 909 (2d Cir. 1980); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5 (2d Cir. 1979); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979); Straub v. Vaisman & Co., 540 F.2d 591 (3d Cir. 1976); SEC v. United Fin. Group, Inc., 474 F.2d 354 (9th Cir. 1973); Travis v. Anthes Imperial, Ltd., 473 F.2d 515 (8th Cir. 1973).

108. The *Bersch* court framed the question as "whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them [fraudu-

tory" fraudulent conduct is insufficient to confer jurisdiction,[109] the perpetration of fraudulent conduct will suffice.[110]

III. CONCURRENT MARITIME JURISDICTION AND THE EXTENT OF A SOVEREIGN'S JURISDICTION TO PRESCRIBE

A. International Law

In *S.S. "Lotus"*,[111] the Permanent Court of International Justice, while addressing a problem of concurrent maritime jurisdiction,[112] held that a state may exercise prescriptive jurisdiction unless a rule of international law prohibits that exercise.[113] The court's holding rested on the principles that a state is sovereign and, therefore, supreme within its territory,[114] and that international law emanates from states freely consenting, either by treaty or custom, to limit their sovereignty.[115] "Restrictions" upon the independence of states, therefore, cannot be presumed.[116]

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lent conduct within the United States which was directed abroad] rather than leave the problem to foreign countries." Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

109. *See id.* at 992 ("while merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident."); *see also* Mormels v. Girofinance, S.A., 544 F. Supp. 815 (S.D.N.Y. 1982) (securities laws do not apply to a predominantly foreign transaction).

110. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 (2d Cir. 1972) (maintaining that drawing a fine line between preparation and perpetration was necessary for the United States to avoid exercising jurisdiction over everything on the one hand and becoming a base for the export of fraudulent schemes on the other).

111. (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10 (Judgment of Sept. 7).

112. *"Lotus"* is the leading international case addressing both concurrent maritime jurisdiction and a sovereign's jurisdiction generally. In *"Lotus,"* a French mail steamer collided with a Turkish collier on the high seas. When the French ship entered a Turkish port, the Turkish authorities arrested the French watch officer and charged him with manslaughter. *Id.* at 10. France protested Turkey's exercise of jurisdiction to the Permanent Court of International Justice. The Permanent Court sustained Turkey's assertion of jurisdiction. *Id.* at 33. For the bases of both nations' jurisdiction, see *infra* note 119.

113. *Id.* at 18.

114. *See* Island of Palmas (or Miangas) Arbitration (U.S. v. Neth.) (Perm. Ct. Arb.), *cited in* 22 AM. J. INT'L L. 867 (1928).

115. International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

1927 P.C.I.J., ser. A, No. 10, at 18.

116. *Id.*

The primary restriction upon a state's exercise of jurisdiction announced by the Permanent Court in *S.S. "Lotus"* was that a state "may not exercise its power in any form in the territory of another state."[117] This prohibition, however, does not restrict a state's right to exercise jurisdiction over objective effects emanating from conduct occurring outside a state's territory.[118] The Permanent Court thus believed that states should be afforded wide discretion when determining the extraterritorial reach of their laws.[119]

B. American Law

When the Supreme Court determines whether the Jones Act[120] and the National Labor Relations Act[121] apply to foreign ships while in American waters, it employs a choice of law balancing test that evaluates various national interests and contacts.[122] The Court has recognized that the

117. *Id.*

118. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. 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, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

Id. at 19.

119. *Id.* The Permanent Court's narrow holding was that the negligent conduct on the French ship which caused effects on the Turkish ship was sufficient to vest jurisdiction in Turkey. The negligent conduct and the illegal effects were sufficient to give *both* states jurisdiction.

120. 46 U.S.C. § 688 (1982) (tort recovery act for seamen who suffer injuries while at sea). *See, e.g.,* Hellenic Lines Ltd. v. Rhodities, 398 U.S. 306 (1970) (Greek seaman employed under Greek contract recovered under Jones Act for injury on Greek ship while in American waters because owner had substantial business contacts with the United States); Romero v. International Terminal Operating Co., 358 U.S. 354 (1958) (foreign sailor on foreign ship injured while in American waters not allowed to recover); Lauritzen v. Larsen, 345 U.S. 571 (1953) (Danish sailor on Danish ship on the high seas not allowed to recover).

121. 29 U.S.C. §§ 141-97 (1982). *See, e.g.,* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1962) (American-owned ship that had regular and continuous contacts with the United States, but flew a foreign flag and hired foreign seamen, did not come within the NLRA); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) (foreign ship owner, foreign crew, foreign flag in American waters; NLRA did not apply).

122. *See, e.g.,* Lauritzen v. Larsen, 345 U.S. 571, 583 (1953) ("Place of the Wrongful Act"); *id.* at 584 ("*Law of the Flag*"); *id.* at 586 ("*Allegiance or Domicile of the Injured*"); *id.* at 587 ("*Alle-*

parochial exercise of jurisdiction by the United States would disrupt both international trade and relations.[123] Therefore, before extending the reach of American law to foreign ships in American waters, it has deferred to the needs of the international system[124] by carefully considering comity and international maritime law.[125]

The Court, however, has been careful not to limit Congress' power to condition the entry of foreign ships into American waters.[126] The Court's decisions do not undermine the authority of Congress to prescribe a rule of law for foreign ships in American waters.[127] Rather the

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giance of the Defendant Shipowner"); *id.* at 588 ("*Place of the Contract*"); *id.* at 589 ("*Inaccessibility of Foreign Forum*"); *id.* at 590 ("*The Law of the Forum*"). *Lauritzen*'s choice of law analysis can be compared with *Timberlane*'s multivariable comity analysis, *supra* note 78 and accompanying text, and the *Revised Restatement*'s multivariable interest analysis, *supra* note 38.

123. The Supreme Court has demonstrated a special regard for the needs of the international system. The Court is conscious of the problems likely to result from frequent parochial exercise of jurisdiction in the field of private international law. In Breman v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972), the Court reasoned as follows:

> [t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

In Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the Court reiterated its distaste for parochial exercises of jurisdiction: "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemingly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.* at 516-17.

124. *See* Lauritzen v. Larsen, 345 U.S. 571, 582 (1953).

125. *See* Wildenhus's Case, 120 U.S. 1 (1887). The Peace of Port doctrine holds that as a matter of comity local governments will abstain from interfering in the internal matters of ships within their territorial waters. This doctrine does not, however, negate the power of the territorial government to exercise sovereignty over a ship within its territorial waters. *Id.* at 12. Courts and commentators have disagreed over whether international law compels this doctrine, or considers it discretionary. *Compare* Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957) (discretionary, not mandatory) *with* Lauritzen v. Larsen, 345 U.S. 571, 581-82 (1953) (doctrine "has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules to foster amicable and workable commercial relations") *and* Akehurst, *supra* note 31, at 205 ("[I]t is disputed whether this rule is based on international law or on comity. Even states which say that this is based on international law admit that there is an exception when the effects of the crime extend to the coastal state.").

126 *See, e.g.,* Romero v. International Terminal Operating Co., 358 U.S. 354, 381 (1958) ("We are not here dealing with the sovereign power of the United States to apply its law to situations involving one or more foreign contacts"); Wildenhus's Case, 120 U.S. 1, 12 (1887) ("It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. . . .").

127. Courts have used the principle of conditioning to expand the extraterritorial reach of Amer-

Court has emphasized that its choice of law analysis functions solely as a method of statutory interpretation.[128] Thus, the Court determines only whether Congress intended a particular law to apply to foreign ships in American waters when the legislative history is silent.

IV. ANALYSIS

The *Restatement Second* and the *Revised Restatement* purport to articulate rules of international law. A restatement in the field of international law takes on enhanced signficance because American judges are not familiar with international law and will tend to rely more heavily on a restatement.[129] The American Law Institute's elevation of reasonableness from a comity consideration to a criterion of jurisdiction *vel non* is not an accurate restatement of the law.[130] Section 403 instead reflects the American Law Institute's opinion regarding the proper limit to a sovereign's jurisdiction.

No American court has expressly applied reasonableness to the question of subject matter jurisdiction *vel non*. While courts applying antitrust law have developed a standard of reasonableness similar to subsection 403(2),[131] they have treated it as a judicial abstention doctrine.[132] Courts interpreting the extraterritorial scope of the securities laws have ignored the standard of reasonableness[133] and have looked instead to the nature and magnitude of illegal conduct or effects within the United States to determine the extraterritorial reach of the securities

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ican environmental laws. *E.g.*, National Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1356-57 (D.C. Cir. 1981) (environmental impact statements required before export of nuclear technology); Sierra Club v. Adams, 578 F.2d 389, 391 (D.C. Cir. 1978) (environmental impact statement required before the United States can participate in the construction of a highway in Panama and Columbia). *See generally* Note, *The Extraterritorial Application of NEPA Under Executive Order 12, 114*, 13 VAND. J. TRANS. L. 173 (1980) (Carter's Executive Order requiring federal agencies to consider environmental impact of their actions abroad).

128. *See* Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957). *See also* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 117-18 (1804).

129. *See* Maier, *supra* note 9, at 280. Courts have already begun to cite to the *Revised Restatement*. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 921 (D.C. Cir. 1984) (court does not employ section 403 reasonableness as a criteria of jurisdiction *vel non*).

130. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 952 (D.C. Cir. 1984). According to the *Laker* court: "There is, therefore, no rule of international law holding that a 'more reasonable' assertion of jurisdiction mandatorily displaces a 'less reasonable' assertion of jurisdiction as long as both are, in fact, consistent with limitations on jurisdiction imposed by international law." *Id.*

131. *Compare supra* note 79 *and* 83 *with* note 38.

132. *See supra* note 89 and accompanying text.

133. *See supra* notes 100-10 and accompanying text.

laws.[134]

International law does not support subsection 403(2). The Permanent Court of International Justice held in *"Lotus"* that the law does not presume restrictions upon the independence of sovereigns.[135] The Permanent Court allowed a state to exercise jurisdiction unless a rule of international law prohibited the state from that exercise.[136] The *Revised Restatement*, in contrast, requires that before exercising jurisdiction a state must find some permissive rule of international law.[137] The custom and practice of other nations exercising extraterritorial jurisdiction also do not support subsection 403(2) as an emerging rule of international law.[138]

The choice of law analysis that the Supreme Court formulated in concurrent maritime jurisdiction cases appears to employ reasonableness as a limit to the application of American laws.[139] The Supreme Court, however, did not limit the jurisdiction of the United States over its territorial waters.[140] The Court merely entertained a presumption that Congress did not intend the laws in question to affect foreign ships in American waters.[141] If the Court had found that Congress had expressly intended the statute to apply to foreign ships in American waters, the Court would not have hesitated to apply the statute.[142] An approach applying reasonableness as a criterion of jurisdiction *vel non* conflicts with the Supreme

134. *See supra* notes 97-110 and accompanying text.

135. *See supra* text accompanying note 116.

136. *See supra* text accompanying note 113.

137. "It has long been established that international law forbids a state to exercise jurisdiction to prescribe other than on an accepted basis of jurisdiction." REVISED RESTATEMENT § 403 comment a (1981). This comment is an incorrect restatement of the Permanent Court's holding in *"Lotus."* *See supra* text accompanying note 112.

138. *See* Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws,* 18 STAN. J. INT'L L. 279 (1982). *See also* Akehurst, *supra* note 31, at 197-99. The European Economic Community has developed the one-company doctrine to apply its restrictive business legislation. The one-company doctrine is as expansive as the *Alcoa* "effects" test. *See* Europemballage Corp. v. E.C. Comm'n, 12 COMMON MKT. L. REP. 199, 221-22 (1973); Imperial Chem. Indus. Ltd. v. E.C. Comm'n, 11 COMMON MKT. L. REP. 557, 629 (1972).

139. *Compare supra* note 121 *with supra* note 38.

140. *See supra* note 126 and accompanying text.

141. *See supra* notes 127 & 128 and accompanying text.

142. The courts that have addressed the extraterritorial reach of the securities, antitrust or labor laws have entertained the statutory presumption that Congress did not intend to contravene the laws of nations, or conflict of laws principles. *See supra* notes 51, 58-60, 94 & 123 and accompanying text. The REVISED RESTATEMENT also adopted this statutory presumption. *See supra* note 41 and accompanying text.

Court's consistent statement in the maritime cases that it was not limiting Congress' power to prescribe a rule of law.

Section 403 places certain conduct or effects within a sovereign's territory outside of a sovereign's competence.[143] Section 403 would find the regulation of the labor relations of a foreign vessel within American waters beyond Congress' authority.[144] Similarly, a Moslem state would lack authority to prescribe its religious canons to foreign vessels in its waters or airspace. Section 403 thus prevents a state from regulating conduct or effects within its territory that it deems inimical to its economic, political, or moral integrity.[145]

Although reasonableness as a discretionary abstention doctrine is a desirable limitation on any political system, the integration of reasonableness into the jurisdictional equation is of questionable value.[146] While adoption of section 403 would cause courts to address with greater frequency and care the foreign implications of their exercise of jurisdiction and thus conceivably would conceivably curtail the extraterritorial application of American law,[147] it would also raise several procedural and substantive problems.[148]

First, reasonableness as a criterion of subject matter jurisdiction *vel non* affords foreign defendants several important procedural weapons to impede the American judicial process. Any party may challenge a

143. *See supra* notes 37-41 and accompanying text.

144. Professor Lowenfeld illustrated the operation of section 403 at the 58th Meeting of the American Law Institute with the following hypothetical:

> Say a ship is going from England to the United States and back. . . . Don't just say we have jurisdiction over that ship. Let us see what kind of jurisdiction. We have jurisdiction to say you have to take on a pilot in the harbor. We have jurisdiction to say a certain number of lifeboats must be there. We have jurisdiction to say you have to give us a customs form. But how about ratemaking? How about organizing the union or saying how many hours of watch does a seaman take on and off?

Lowenfeld, 58 A.L.I. PROC. 251 (May 20, 1980).

145. The primary problem with section 403 is that nations often do not agree on what constitutes unreasonable regulation. While Professor Lowenfeld might agree that imposition by the United States of its labor laws on foreign ships in American waters is unreasonable, the American seaman's union might find it perfectly reasonable. Saudi Arabia may consider compliance with the prohibition against drinking alcohol by foreign ships within its waters reasonable, while American tourists may consider it unreasonable.

146. *See* Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions,* 18 STAN. J. INT'L L. 247, 268 (1982).

147. *See* Kestenbaum, *Antitrust's "Extraterritorial Jurisdiction:" A Progress Report on the Balancing of Interests Test,* 18 STAN. J. INT'L L. 311, 332 (1982).

148. *See infra* notes 149-60 and accompanying text.

court's subject matter jurisdiction at any stage of a proceeding.[149] More importantly, a defaulting party may collaterally attack a court's judgment for lack of subject matter jurisdiction.[150] Foreign defendants could decide to stay away from American proceedings for certain strategic reasons and later enter to challenge subject matter jurisdiction.[151] After allowing an American court to enter a judgment against them, foreign defendants could then collaterally attack the judgment in an American or foreign court. Section 403 thus has the potential to delay already backlogged courts, increase the procedural gamesmanship of multinational antitrust and securities litigation, and undermine the finality of American judgments. Finally, requiring courts constantly to engage in a multivariable interest balancing test would involve difficult and drawn-out discovery.[152]

Second, because no other nation has adopted the principle of reasonableness as a limit to jurisdiction *vel non*,[153] unilateral incorporation of reasonableness into the jurisdictional formula would be inequitable to the United States. International law should rest upon reciprocal rights and duties to which states freely consent either by custom or by treaty.[154] The unilateral adoption of section 403 by the United States in conjunction with application of the act of state doctrine would create an inequitable situation. The act of state doctrine prevents an American court from sitting in judgment of the public acts of another country.[155] Section 403 would prevent the United States from prescribing a law to transnational transactions if a foreign sovereign had a stronger interest in pre-

149. *See* FED. R. CIV. P. 12(h)(3).

150. *See, e.g.*, The Case of the Marshalsea, 77 Eng. Rep. 1027 (K.B. 1613); Elliott v. Peirsol, 26 U.S. (1 Pet.) 328 (1828). *See also* Kalb v. Feuerstein, 308 U.S. 433 (1940); Chicot County Drainage Dist. v. Baxter State Bank., 308 U.S. 371 (1940); Boskey & Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940).

151. The exercise of unreasonable jurisdiction under section 403 would mean that a court did not have subject matter jurisdiction. It would not mean that a state did not have personal jurisdiction. When American courts determine whether an international action is within its jurisdiction, they refer to subject matter jurisdiction. *See* IIT, An Int'l Inv. Trust v. Cornfeld, 619 F.2d 909, 916-21 (2d Cir. 1980); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 413-22 (8th Cir. 1979); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1333-39 (2d Cir. 1972); *supra* notes 85 & 94.

152. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 950 (D.C. Cir. 1984) (discovery of national interests and discovery requests from foreign governmental branches which would be difficult to get).

153. *See supra* note 142 and accompanying text.

154. *See supra* text accompanying notes 113-14.

155. *See supra* note 76.

scribing a conflicting legislative scheme.[156] Thus, American courts will defer to the legitimacy of foreign legislation and then balance that foreign legislation against conflicting American legislation.[157]

A third, theoretical, problem is that the *Revised Restatement* precludes the possibility of concurrent jurisdiction.[158] Subsection 403(2) assumes that only one state's laws apply to a multinational transaction and only that state should exercise jurisdiction. Choice of law, however, is neither an exact nor precise area of law.[159] In the United States, even though the Constitution places limitations on choice of law,[160] several states may

156. *See supra* notes 37-41 and accompanying text.

157. The conflict between American antitrust laws and the British Protection of Trading Interest Act (PTIA), 407, PARL. DEB. H.L. (5th Ser.) 432 (1980), provides an example of how the deference American courts afford foreign legislation will undermine American statutory goals. Britain enacted the PTIA to undermine the extraterritorial reach of the American antitrust laws. The PTIA has "clawback" provisions that afford two-thirds restitution to persons who are liable for a treble damage judgment. For general discussion of the PTIA, see Samie, *Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction,* 7 INT'L TRADE L.J. 58 (1982); Note, *The Protection of Trading Interests Act of 1980—Britain's Latest Weapon in the Fight Against the United States Antitrust Laws,* 4 FORD INT'L L.J. 341 (1981); Note, *The Protection of Trading Interest Act of 1980: Britain's Response to United States Extraterritorial Antitrust Enforcement,* 2 NW. J. INT'L L. & BUS. 476 (1980). American courts will defer to the legitimacy of the PTIA and recognize the conflict as a factor mitigating against American antitrust jurisdiction. The irony of this situation is that the PTIA rests on the proposition that the American antitrust laws are illegitimate. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 948 (D.C. Cir. 1984). The *Laker* court characterized judicial interest balancing as follows:

> However this approach is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objective of the domestic law.

Id.

158. Concurrent jurisdiction is clearly a component of international law. *See* M. WHITEMAN, 5 DIG. OF INT'L L. 218-19 (1965).

159. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 952 (D.C. Cir. 1984):

> [I]t does not necessarily follow, as the use of interest balancing as a method of choosing between competing jurisdictions assumes, that there is a line of reasonableness which separates jurisdiction to prescribe into neatly adjoining compartments of national jurisdiction. There is no principle of international law which abolishes concurrent jurisdiction.

Id.

160. The due process clause of the fourteenth amendment and the full faith and credit clause of article IV of the Constitution are the primary limits on the state's choice of law. The due process clause addresses the fairness to individuals of a state's exercise of jurisdiction, *see, e.g.,* Allstate Ins. Co. v. Hague, 449 U.S. 302, 326-31 (1980) (Stevens, J., concurring), while the full faith and credit clause attempts to reconcile overlapping state jurisdiction in a federal system. Justice Jackson stated that the founding fathers' design behind the full faith and credit clause was:

> [T]o federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records and judicial proceedings. It was placed foremost among those measures which would guard the new political and economic union

still possess sufficient interests and contacts in an interstate transaction to exercise jurisdiction and apply their law.[161] An international agreement on a common conception of reasonableness that would result in one nation exercising jurisdiction over a multistate transaction seems unlikely. Section 403 does not address the crucial issue: how to resolve conflicting national views of reasonableness.[162] Absent an internationally agreed upon full faith and credit clause, section 403 offers little hope of reconciling conflicting concurrent jurisdiction in the international system.

Finally, Section 403 does not present a practical solution to the problem of conflicting extraterritorial jurisdiction. In a world where states and courts jealously guard sovereignty, persuading foreign nations and courts that reasonableness is an element of subject matter jurisdiction will be more difficult than convincing them that reasonableness is an abstention doctrine.[163] Comity better accommodates the principle of sovereignty and the needs of the international system. Comity recognizes the absolute power of sovereigns within their territory and affords a method to accommodate the needs of the international system in reconciling conflicting jurisdiction. Section 403, in contrast, eliminates the malleability of the international system that a sovereign employs to address legislatively or diplomatically the needs of the international system.

CONCLUSION

The *Revised Restatement*'s requirement that a state's prescriptive jurisdiction be reasonable is a simple legal solution to a complex political problem. As the world grows more politically and economically integrated,[164] the international community must identify and agree to limit

against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states.

Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COLUM. L. REV. 1, 17 (1945). Similarly, the drafters of the *Revised Restatement* are attempting to rid the international system of "provincialism" by elevating choice of law (section 403 reasonableness) to a criterion of jurisdiction *vel non*. This attempt, however, is a fruitless endeavor in the absence of an international full faith and credit clause. *See supra* note 94.

161. *See, e.g.,* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1980) (Minnesota applied its insurance stacking law to an auto crash in Wisconsin between Wisconsin residents because decedent worked in Minnesota and decedent's plaintiff moved to Minnesota after crash); Martin, *Constitutional Limitations on Choice of Law,* 61 CORNELL L. REV. 185, 230 (1976) ("the 1930's witnessed a retreat from rigid limitations on a state's opportunity to apply its own law to cases with which it had a contact").

162. *See supra* note 145.

163. *See* Cira, *supra* note 146, at 269.

164. *See supra* note 6 and accompanying text.

sovereignty if it hopes to solve the problem of regulating transnational transactions and occurrences.[165] The best way to arrive at an acceptable limit is through a political process.[166] First, states should legislatively curtail their prescriptive jurisdiction to accommodate the needs of the international system.[167] Second, states should enter into treaties that define their jurisdictional boundaries.[168] Reasonableness as a discretionary judicial abstention doctrine is a better supplement to this political process because it is more flexible.

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165. *See* Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interest Act, 1980,* 75 AM. J. INT'L L. 257, 281 (1981).

166. In Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir. 1984), Judge Wilkey, writing for the majority, highlighted the political nature of conflicting concurrent jurisdiction in the international community. In *Laker,* Great Britain and the United States had issued antisuit injunctions against various parties involved in Laker's American antitrust suit against various international air carriers. These antisuit injunctions promoted the respective country's reasonable, but conflicting national policies. In upholding an antisuit injunction against all the defendants in the Laker antitrust suit, Judge Wilkey stated:

> Although, in the interest of amicable relations, we might be tempted to defuse unilaterally the confrontation by jettisoning our jurisdiction, we could not, for this is not our proper judicial role. *The problem in this case is essentially a political one,* arising from vast differences in the political-economic theories of the two governments which has existed for many years. . . . However, this conflict alone does not place the court in a position to initiate a political compromise based on its decision that the United States laws should not be enforced when a foreign jurisdiction, contrary to the domestic court's statutory duty, attempts to eradicate the domestic jurisdiction.

Id. at 953 (emphasis added).

167. *See, e.g.,* 15 U.S.C. §§ 6a and 45(a)(3) (1982) (direct, substantial, and reasonably foreseeable effect).

168. *See, e.g.,* Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia,— U.S.T. — T.I.A.S. No. 10365, *reprinted in* 21 INT'L LEGAL MAT. 702 (1982); Agreement Relating to Multilateral Cooperation on Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291.