

5 International Comity A Doctrine of Self-Restraint

Different nations entertain different doctrines and different usages in regard to them. The jurists of different countries hold opinions opposite to each other, as to some of the fundamental principles, which ought to have a universal operation; and the jurists of the same nation are sometimes as ill agreed among themselves. Still, however, with all these deductions, it is manifest, that many approximations have been already made towards the establishment of a general system of international jurisprudence, which shall elevate the policy, subserve the interests, and promote the common convenience of all nations. We may thus indulge the hope, that, at no distant period, the comity of nations will be but another name for the justice of nations.

Joseph Story, Commentaries on the Conflict of Laws, § 645 (1834)

Introduction

As demonstrated in chapter 3, the most fundamental question in trademark and unfair competition conflicts law pertains to the exact demarcation of spatial boundaries for individual rights protection and marketplace regulation. The solutions that have been suggested are manifold. Apart from substantivist theories jettisoning the nation-state paradigm *in toto*, all models are founded on a common denominator; the protection of rights and the enforcement of policies are inseparably tied to the concept of nation-state sovereignty. Although not always clearly expressed, the existence of a universally accepted principle is implied: in the international sphere, the scope of individual rights and nation-state policies must be limited. In other words, some form of conflict resolution is needed to provide for an avoidance—or at least a reconciliation—of conflicting sovereign interests.

Seen in this light, international trademark and unfair competition conflicts fall squarely into the sector of international economic and regulatory law. After all, the debate on the territoriality of regulation and its demarcations has been taking place much longer there. And it is well accepted that many gray areas exist where once genuinely “private” law has become “loaded” by concerns of regulatory public policy. Trademark

and unfair competition law can be found in this gray area. The multiplication of trade and commerce and its increasing internationalization in the twentieth century have not only publicized and politicized the field but also infused its conflicts law with the potential of causing inter-nation discord when conflicting regulatory interests are disregarded. Yet this is rarely explained with clarity, nor are the correct conclusions drawn. Most illustrative of this lack of clarity, as we have seen, is the traditional neglect of public policy concerns in European unfair competition choice of law, which is still characterized by obsolete paradigms of international tort doctrine and a focus on market participants' territorial conduct as the object of regulation. In US doctrine, by contrast, the pendulum has swung in the other direction. Here, the aspect of public policy is over-emphasized in a genuinely unqualified commercial effects test. This is combined with an almost naïve trust that the extraterritorial extension of trademark rights and unfair competition policies guarantees effective cross-border market regulation.

In order to provide the basis for a reconceptualization, I will begin by explaining how public and private law have come closer to one another and how this has been extrapolated to the international sphere through an increasing interconnectedness between public international law and private international law. This can be described as the fragment of a larger evolution of conflicts law and choice of law. Indeed, it highlights the subtle transformation of the Savignian conception of a genuinely "private" conflicts law into a public law instrument of cross-border regulation in a world of globalized societies and economies (*see infra* p. 383 *et seq.*). This development is closely tied to the history of the doctrine of international comity. Starting with the doctrine's incipencies in seventeenth-century Netherlands, I will illustrate its degradation in twentieth-century doctrine and its more recent (though widely unrecognized) resurrection. Two sectors are particularly apt for the illustration: the field of international antitrust law as a core area of international regulatory law and the field of international human rights litigation as part of a private rights enforcement regime (*see infra* p. 432 *et seq.*). Drawing on the results of these analyses, I will highlight the intricacies of international trademark and unfair competition conflicts. Here, too, we can see the doctrine of international comity at work. European jurists, of course, may be far more hesitant than their American counterparts to acknowledge the doctrine as an instrument of legal analysis, not to speak of its practical implementation.¹ But

¹ For this traditional civil law/common law divergence (and the potential of an increasing convergence in the future), *see* Tim W. Dornis, *Comity*, in *Encyclopedia of Private International Law* (Jürgen Basedow et al. eds., forthcoming 2017).

terminology and tradition must not impede the analysis at its core: what is uncontested is the fact that matters of internationally conflicting regulatory interests require moderation and reconciliation in systematic structures. The doctrine of international comity is the traditional vehicle for this function, as we will see in both US conflicts doctrine and early nineteenth-century European choice of law. It may thus also serve as a modern instrument of “civilization.” As closer analysis will show, the doctrine is multifaceted. In addition to its historic role of avoiding discord among countries, it maintains convenience in international transacting and commerce (*see infra* p. 480 *et seq.*).

Section 1 From *Comitas Gentium* to Transnational Law

Legitimacy of jurisdiction is a recurring theme in international economic law. The international scope of domestic regulation is usually determined by looking closely at the principles of public international law and comity.² While comity is, strictly speaking, not understood as a principle of public international law,³ it is usually credited with fulfilling the same function.⁴ Until today, the exact character and meaning of the doctrine have remained unclear.⁵ A detailed analysis would go beyond the scope of this chapter, and, in any case, a wealth of excellent scholarship already exists. What I will focus on is a specific facet of the doctrine of international comity that, albeit often overlooked, is of special importance for this inquiry: the issue of jurisdictional self-restraint and abstention.

² Also termed, for example, *comitas*, *courtoisie internationale*, and *Völkercourtoisie*.

³ See Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145, 215–216 (1972/73); Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1, 44 (1991); Peter Macalister-Smith, *Comity*, 671, 671–672, in *Encyclopedia of Public International Law*, vol. 1 (Rudolf Bernhardt ed., 1992).

⁴ Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982). Comity thus appears to be a crucible for conflicts resolution norms and their legitimacy under international law. As Sir Ian Brownlie explained, beyond “[n]eighbourliness, mutual respect, and the friendly waiver of technicalities,” the concept of comity is used in at least four ways: “(1) as a synonym for international law; (2) as equivalent to private international law (conflict of laws); (3) as a policy basis for, and source of, particular rules of conflict of laws; and (4) as the reason for and source of a rule of international law.” See Ian Brownlie, *Principles of Public International Law* 28–29 (7th edn., 2008); see also Peter Macalister-Smith, *Comity*, 671, 672, in *Encyclopedia of Public International Law*, vol. 1 (Rudolf Bernhardt ed., 1992); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1856 (1998).

⁵ For a summary of definitions and explanations regarding international comity doctrine, see Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1, 3 *et seq.* with fn. 4 to 18 (1991). For an overview of civil law (and other) jurisdictions’ rudimentary treatment of comity doctrine, see Tim W. Dornis, *Comity*, in *Encyclopedia of Private International Law* (Jürgen Basedow et al. eds., forthcoming 2017).

This element of comity has become somewhat defunct throughout the last century. Today, it is widely assumed that the more there exists an international or transnational consensus on substantive norms and policies, the less need there is for the single nation-state's jurisdictional abstention. One could say that theory and practice of transnationalization have established an apotheosis of substantive-norm and substantive-policy universality. Without a divergence on the level of substantive norms and policies, no more conflict exists. Hence, choice of law and conflicts law—it would seem—are obsolete and outdated. International human rights litigation is a prime example of such normativity “beyond the state.” In fact, an increasing number of legal sectors are infiltrated by a transnational law subtext. In all these areas, the domain of choice of law and conflicts law seems to have vanished. The main problem with such transnationalization, however, is its disregard for pitfalls in the functioning of the international community, especially with respect to socioeconomic communication and transacting. So far, this has not been explored with clarity. It is overlooked particularly with respect to international trademark and unfair competition law.

Interestingly, early theorists in the field were more cautious in this regard. Ulrich Huber and his contemporaries' seventeenth-century understanding of the *comitas gentium* expressly provided for a basic guarantee of international harmony as a core element of the doctrine. This was extended by Joseph Story and Friedrich Carl von Savigny. During the nineteenth century, the purpose of conflicts law and choice of law was to secure the utility and convenience of international transacting and commerce. It is this traditional function that still must be fulfilled. The world's legal orders may find themselves in full swing toward approximation, convergence, and even unification. Yet a mere blending of substantive norms and policies will not overcome the real-world obstacles that stand in the way of a truly globalized jurisdictional system. Without a concordant universality of international enforcement structures, transnationalization remains incomplete. Accordingly, the need for traditional instruments of conflicts law and choice of law still exists—notably for a doctrine of jurisdictional self-restraint and abstention.

I The Status Quo: A Publicization of Private International Law

The fields of private international law (also known as conflicts law or choice of law) and public international law (formerly often called the law of nations) have traditionally been treated as two distinct systems. Harold G. Maier's description of public international law as seeking to “regulate[] activity among human beings operating in groups called nation-states”

fittingly expresses this traditional view. Private international law, by contrast, “regulates the activities of smaller subgroups or individuals as they interact with each other.”⁶ Upon a closer look, however, the dichotomy is no longer so black and white—if it ever was.

A The (Non)Historical Dichotomy: Private and Public International Law

In nineteenth-century Europe, public and private international law were seen as complementary parts of a universal discipline. The modern nation-state was yet to be formed. Conflicts law, which was not codified, consisted of court decisions and scholarly commentary. Eminent scholars such as von Savigny, Johann Caspar Bluntschli, and Pasquale Stanislao Mancini were internationalist authorities. Their conceptions of conflicts law and choice of law, similar in nature, incorporated elements of public international law doctrine.⁷ The idea that private international law had its roots in the law of nations remained dominant in European doctrine until the early twentieth century.⁸ This understanding began to change with the advent of private law codifications throughout the continent. In the course of codifying their nation-states’ substantive private laws, law-makers also came across the field of private international law.⁹ In addition, public international law and national laws began to be separated along the lines of the individual’s status—while she was a potent actor in the domestic sphere, she was virtually nonexistent in the international arena. Hence, the regulation of private relationships—even if they were of an international nature—was beyond the scope of public international law.¹⁰ Absent international agreements obliging nation-states to provide

⁶ Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 *Am. J. Int’l L.* 280, 280 (1982).

⁷ For an overview of contemporary public international law and its protagonists, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, 11 *et seq.* (2001). For nineteenth-century internationalists, see Otto Kahn-Freund, *The Growth of Internationalism in English Private International Law (Lionel Cohen Lectures)* 6–7 (1960); more recently, see Heinz-Peter Mansel, *Staatlichkeit des Internationalen Privatrechts und Völkerrecht*, 89, 95–96, in *Völkerrecht und IPR* (Stefan Leible & Matthias Ruffert eds., 2006). For an enlightening (and biting) contemporary critique, see Franz Kahn, *Über Inhalt, Natur und Methode des internationalen Privatrechts*, 255, 280–281, in *Abhandlungen zum internationalen Privatrecht, vol. I* (Otto Lenel & Hans Lewald eds., 1928).

⁸ Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 *Colum. L. Rev.* 189, 194 (1942).

⁹ Karl-Heinz Ziegler, *Völkerrechtliche Verpflichtung zur Anwendung oder nur „freundliche Beachtung“ fremden Rechts? Die comitas-Lehre heute (Betrachtungen eines Rechtshistorikers)*, 43, 50 in *Völkerrecht und IPR* (Stefan Leible & Matthias Ruffert eds., 2006).

¹⁰ For the contemporary approach among public international law scholars in Germany, see, e.g., Heinrich Triepel, *Völkerrecht und Landesrecht*, 20 (1899) (“[Die Stellung des

for a certain regulation of private relations, the authority to determine the application of forum and foreign laws in conflicts cases was understood as falling within the exclusive domain of the domestic regime.¹¹

Of course, time and again, scholarly theory attempted to reestablish the unity of public and private international laws. In German doctrine, Ernst Zitelmann became famous for his turn-of-the-century approach, the “law-of-nations doctrine.”¹² But his effort was futile. Franz Kahn’s disdainful rejection has become well known:

For what is the public-international-law choice of law of this school? A law of nations that has never been practiced or acknowledged anywhere, that has always and anywhere been disobeyed and trespassed, and that—all this notwithstanding—still has to exist since it seems to be the Right and the naturally Necessary to theorists according to their general principles.¹³

Individuums] kann nicht die eines Rechtssubjekts sein. Der Einzelne ist vom Standpunkte einer die Staaten als solche verbindenden Rechtsgemeinschaft unfähig, Träger eigener, von der Rechtsordnung dieser Gemeinschaft ausgehenden Rechte und Pflichten zu sein. Es ist gleichgültig, dass es in grossem Umfange seine Interessen sind, deren Wahrung völkerrechtliche Sätze im Auge haben.”)

¹¹ See, e.g., Kurt Lipstein, *The General Principles of Private International Law*, 135 *Recueil des Cours* 97, 167 *et seq.* (1972-I); Karl-Heinz Ziegler, *Völkerrechtliche Verpflichtung zur Anwendung oder nur „freundliche Beachtung“ fremden Rechts? Die comitas-Lehre heute (Betrachtungen eines Rechtshistorikers)*, 43, 50–51, in *Völkerrecht und IPR* (Stefan Leible & Matthias Ruffert eds., 2006).

¹² See, e.g., Ernst Zitelmann, *Internationales Privatrecht*, vol. I 71 *et seq.*, 122 *et seq.* (1897) (e.g., *id.* at 71–72: “Aus der allgemeinen völkerrechtlichen Herrschaftsabgrenzung zwischen den Staaten können wir nun auf dem Wege besonderer Schlußfolgerung die Abgrenzung der Gesetzgebungsgewalt der verschiedenen Staaten in privatrechtlichen Dingen ermitteln; wir können danach feststellen, wie weit jeder einzelne Staat subjektive Privatrechte verleihen und entziehen kann.”); Ernst Zitelmann, *Geltungsbereich und Anwendungsbereich der Gesetze*, 207 *et seq.*, in *Festgabe der Bonner Juristischen Fakultät für Karl Bergbohm zum 70. Geburtstag* (1919). For a system akin to Zitelmann’s conception, though not directly founded on public international law, see Ernst Frankenstein, *Internationales Privatrecht (Grenzrecht)*, vol. I 1 *et seq.* (1926). For continental scholarship at the turn of the century and other attempts to reestablish (or maintain) the unity, see Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 *Colum. L. Rev.* 189, 194–195 (1942). For Zitelmann’s theory, see Max Gutzwiller, *Zitelmanns völkerrechtliche Theorie des Internationalprivatrechts*, 16 *Archiv für Rechts- und Wirtschaftsphilosophie* 468 (1922); more recently, see Erik Jayme, *Völkerrecht und Internationales Privatrecht—eine entwicklungsgeschichtliche Betrachtung*, 23, 34–35, in *Völkerrecht und IPR* (Stefan Leible & Matthias Ruffert eds., 2006).

¹³ Franz Kahn, *Über Inhalt, Natur und Methode des internationalen Privatrechts*, 255, 274, in *Abhandlungen zum internationalen Privatrecht*, vol. I (Otto Lenel & Hans Lewald eds., 1928) (“Denn was ist das völkerrechtliche internationale Privatrecht jener Schule? Ein Völkerrecht, das nie und nirgends geübt oder anerkannt, das immer und überall mißachtet und übertreten worden ist, und das allem zum Trotz doch bestehen muß, weil es den Theoretikern nach allgemeinen Grundsätzen als das Richtige, als das Naturnotwendige erscheint.” (author’s translation)). For the Reichsgericht’s rejection, see *RGZ* vol. 95, 164, 165 (11 March 1919) (“Am wenigsten vermag die Berufung auf Zitelmann eine selbständige Begründung der gegenteiligen Meinung zu ersetzen. Der Verfasser erhebt gar nicht den Anspruch, das internationale Privatrecht so darzustellen,

While there have been modern attempts to revive Zitelmann's approach,¹⁴ overall, the idea that choice of law can be controlled by principles of public international law has not gained ground.

Thus, it is conventional wisdom today that public international law seldom has a direct impact on private law conflicts resolution. Only a few tenets of public international law may actually be considered binding. For instance, a nation-state must not reject the application of foreign law *per se*. In addition, each state should provide for, at the very least, a rudimentary conflicts regime.¹⁵ By and large, however, the content of choice of law is undetermined and unaffected by international law.¹⁶

The picture in the United States is similar. Story, commonly referred to as the founding father of American conflicts theory, considered private and public international law as homogeneously overlapping systems.¹⁷ But this conceptual unity of regimes was never implemented in legal practice, and the law-of-nations doctrine, as Arthur Nussbaum

wie es tatsächlich in Geltung ist. Er will zu wissenschaftlich unanfechtbaren Rechtssätzen dadurch gelangen, daß er, von unmittelbar einleuchtenden Postulaten ausgehend, auf deduktivem Wege das System aufbaut. Dabei geht er von Voraussetzungen aus, die, wie er selbst nicht verkennt, mit dem tatsächlich herrschenden Zustande nicht gegeben sind. Er unterstellt eine völkerrechtlich sichere Abgrenzung des Machtbereichs der Staaten in der vielfachen Verschlungenheit von Personal- und Gebietshoheit gegeneinander, von der das heutige Völkerrecht noch weit entfernt ist.”)

¹⁴ For example, those of Georges Scelle, Hans Wiebringhaus, Frederick A. Mann, and Albert Bleckmann. See Georges Scelle, *Manuel élémentaire de droit international public* (1943); Georges Scelle, *Préface à l'ouvrage de Charles Carabiber, Les juridictions internationales de droit privé 7 et seq.* (1947); Hans Wiebringhaus, *Beitrag zur Frage des Verhältnisses von Internationalprivat- und Völkerrecht*, 1952 JR 383; Hans Wiebringhaus, *Das Gesetz der funktionellen Verdoppelung—Beitrag zu einer universalistischen Theorie des Internationalprivat- und Völkerrechts* (2nd edn., 1955); F. A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *Recueil des Cours* 1 (1964-I); Albert Bleckmann, *Die völkerrechtlichen Grundlagen des internationalen Kollisionsrechts* 59 *et seq.*, 166, *et passim* (1992).

¹⁵ For the axiom of recognizing foreign states' legal regimes and the general openness to the application of foreign laws under a concept of comity, see Franz Kahn, *Über Inhalt, Natur und Methode des internationalen Privatrechts*, 255, 286–287, in *Abhandlungen zum internationalen Privatrecht*, vol. 1 (Otto Lenel & Hans Lewald eds., 1928); see also Klaus Schurig, *Völkerrecht und IPR: Methodische Verschleifung oder strukturierte Interaktion?*, 55, 60–61, in *Völkerrecht und IPR* (Stefan Leible & Matthias Ruffert eds., 2006).

¹⁶ See, e.g., Ernst Rabel, *Rechtsvergleichung und internationale Rechtsprechung*, 1 *RabelsZ* 5, 5–6 (1927); Ernst Rabel, *The Conflict of Laws—A Comparative Study*, vol. 1 6 *et seq.* (2nd edn., 1958); Kurt Lipstein, *The General Principles of Private International Law*, 135 *Recueil des Cours* 97, 167 *et seq.* (1972-I); Egon Lorenz, *Zur Struktur des Internationalen Privatrechts* 56 *et seq.*, 87–88 (1977); Paul Heinrich Neuhaus, *Der Beitrag des Völkerrechts zum Internationalen Privatrecht*, 21 *German Y.B. Int'l L.* 60, 64 *et seq.* (1978); Christian von Bar & Peter Mankowski, *Internationales Privatrecht—vol. I: Allgemeine Lehren* § 3 para. 1 *et seq.* (2nd edn., 2003).

¹⁷ See *infra* p. 400 *et seq.*

summarized in 1942, “never won a real foothold.”¹⁸ And even though the vested rights approach so powerfully brought forward by Joseph Beale and ultimately also integrated into the Restatement (First) of Conflict of Laws may have been interpreted as having implemented a theory quite analogous to the uniformity of private and public international law,¹⁹ this fragile structure was soon destroyed by the realists’ attack. Around mid-century, American legal thought, particularly regarding choice of law, began to reject an overly cosmopolitan perspective. Instead, it began to narrow its focus to domestic law and the interstate arena. Legal realism virtually turned conflicts theory inward.²⁰ For conflicts law, this meant that public international law would not be a binding authority. Nor would it limit national lawmaking.²¹

B The Duality of Methods

This systematic isolation of national regimes from the law of nations, or international law, is reflected in the structure and technique of European choice of law. In the Savignian tradition, the field covers collisions between private law norms only. The interchangeability of national norms is founded on the assumption that private law is apolitical and an issue of interparty concerns. Accordingly, choice of law, at its core, should not inquire about a foreign law’s content but instead simply ensure “conflicts justice” by choosing the spatially most adequate legal order.²²

¹⁸ Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 Colum. L. Rev. 189, 197 (1942). See also John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 Colum. L. Rev. 561, 565 (1952).

¹⁹ Beale himself did not consider his conflicts law approach to be founded on public international law or comity. See, e.g., Joseph H. Beale, *A Treatise on the Conflict of Laws*, vol. I: *Jurisdiction* § 1.10 (1935); see also John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 Colum. L. Rev. 561, 566 (1952). But see Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 Colum. L. Rev. 189, 198 (1942).

²⁰ Matthias Reimann, *A New Restatement—For the International Age*, 75 Ind. L.J. 575, 577 and n. 17 (2000); for a similar point, see Kurt Lipstein, *The General Principles of Private International Law*, 135 *Recueil des Cours* 97, 140–141 (1972-I); more recently, Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 182 (1996); for the mid-nineteenth-century isolationism of US conflicts scholarship, see Gerhard Kegel, *Wandel auf dünnem Eis*, 35, 41, in *Zum Wandel des internationalen Privatrechts* (Friedrich K. Juenger ed., 1974).

²¹ For an illustrative summary, see Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* 13–14 (1949).

²² See, e.g., Paul Heinrich Neuhaus, *Die Grundbegriffe des internationalen Privatrechts* 2, 33 et seq. (1962); Klaus Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm* 215 et seq. (1965); Christian Joerges, *Zum Funktionswandel des Kollisionsrechts—Die “Governmental Interest Analysis” und die “Krise des Internationalen Privatrechts”* 151 et seq. (1971); Eckard Rehinder, *Zur Politisierung des Internationalen Privatrechts*, 1973 JZ 151, 151.

There are just a few categories of norms that are not deemed interchangeable. For example, the area of regulatory norms—often referred to as mandatory laws, *lois d'application immédiate*, or simply public law²³—will generally not be subjected to the classic jurisdiction-selecting technique. Savigny himself categorized these norms as “laws[] whose peculiar nature does not admit of so free an application of the community of law obtaining between different states.”²⁴ The two kinds of norms he distinguished within this class were “laws of a strictly positive, imperative nature” and “legal institutions of a foreign state, of which the existence is not at all recognized in ours, and which, therefore, have no claim to the protection of our courts.” The latter category makes up the modern public policy exception. The former, important for this inquiry, is the sector of what, today, is commonly termed “international economic or international commercial law.”²⁵ Unlike choice of law for genuine private law norms, a conflict between different nations’ regulatory norms cannot be an issue for multilateralism. The assumption of interchangeable norms—and, accordingly, the paradigm of the seat of the parties’ relationship—is inapplicable.²⁶ In essence, this approach remains founded on the statisticians’ conception, which was essentially a method of introspection: the scope of application of a certain law must be determined on the basis of the specific norm at issue. Inevitably, without the assumption of content neutrality and interchangeability, issues of public international law legitimacy (re)arise.²⁷

²³ For an extensive discussion of international terminology, see Kurt Siehr, *Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht*, 52 *RabelsZ* 41, 42–43 (1988).

²⁴ See Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 349, at 76 (William Guthrie transl., 2nd edn., 1880); see also the German original text in Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 349, at 32 (1849).

²⁵ In civil law terminology, this is the area of international economic (conflicts) law (“Wirtschaftskollisionsrecht”). One example is antitrust conflicts. See Jürgen Basedow, *Entwicklungslinien des internationalen Kartellrechts—Ausbau und Differenzierung des Auswirkungsprinzips*, 1989 *NJW* 627, 628; Klaus Schurig, *Zwingendes Recht, “Eingriffsnormen“ und neues IPR*, 54 *RabelsZ* 217, 227 (1990); see also Anton K. Schnyder, *Wirtschaftskollisionsrecht—Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter besonderer Berücksichtigung von Marktrecht* (1990).

²⁶ See, e.g., Rudolf Wiethölter, *Zur Frage des internationalen ordre public*, 133, 157 *et seq.*, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 7 (1967); Kurt Lipstein, *The General Principles of Private International Law*, 135 *Recueil des Cours* 97, 165 (1972-I); Jürgen Basedow, *Wirtschaftskollisionsrecht—Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates*, 52 *RabelsZ* 8, 8–9 and 20 (1988); Anton K. Schnyder, *Wirtschaftskollisionsrecht—Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter besonderer Berücksichtigung von Marktrecht* § 2 para. 29 *et seq.* (1990).

²⁷ Jürgen Basedow, *Wirtschaftskollisionsrecht—Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates*, 52 *RabelsZ* 8, 12–13 (1988); for a general overview

In US law, while choice of law and international economic, or regulatory, law are also distinguished, the technical dichotomy is less incisive. Formally, of course, choice of law and international economic law are even subject to two different restatements. Simply put, the Restatement (Second) of Conflict of Laws addresses conflicts resolution on private law issues, while the Restatement (Third) of Foreign Relations Law concerns collisions between federal regulatory and foreign states' policies and interests.²⁸ Upon a closer look, however, the techniques of conflicts resolution are less divergent. For one, the Restatement (Third) of Foreign Relations Law is founded on the Restatement (Second) of Conflict of Laws.²⁹ Further, scholars of international economic law not only have found the field infused with principles of public international law and comity but have also recommended the application of choice-of-law principles.³⁰ And legal practice is replete with cases where the issues have been intermingled. An oft-cited example is Judge Learned Hand's reasoning in the *Alcoa* decision, where he explained that limitations to the extraterritorial application of US antitrust law "generally correspond to those fixed by the 'Conflict of Laws'."³¹ Similarly, and more recently, Justice Scalia's dissenting opinion in *Hartford Fire* implemented choice-of-law principles in the analysis of jurisdictional sovereignty.³² As he explained, courts should look at the law of nations or customary international law to determine the reach of domestic norms. A statute should never be construed to "regulate foreign persons or conduct if that regulation would conflict with principles of international law." As he went on,

and critique, see Eckard Reh binder, *Zur Politisierung des Internationalen Privatrechts*, 1973 JZ 151, 156 *et seq.*

²⁸ For the (often implicit) distinction, see, e.g., Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 Am. J. Int'l L. 280, 289 (1982) (distinguishing "transnational regulatory cases" from "nonregulatory choice-of-law cases"); for the distinction between "traditional choice-of-law scholarship" and "international regulatory issues," see Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883, 889 (2002).

²⁹ See one of the rapporteurs' explanations in 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, 329 (1979-II).

³⁰ See *id.* at 328; Jean-Gabriel Castel, *The Extraterritorial Effects of Antitrust Laws*, 179 Recueil des Cours 9, 53, 110, 114 *et seq.* (1983-I); Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 Law & Contemp. Probs. 11, 11 *et seq.* (1987); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1, 84 *et seq.* (1992); but see Friedrich Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 L. & Contemp. Probs. 39, 41 (1987) (denying relations).

³¹ *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 443 (2nd Cir. 1945).

³² For Scalia's "distinctly 'private' view of antitrust enforcement" and a critique, see Herbert Hovenkamp, *Federal Antitrust Policy—The Law of Competition and Its Practice* § 21.2b (3rd edn., 2005).

“‘The controlling considerations’ in this choice-of-law analysis were ‘the interacting interests of the United States and of foreign countries’.”³³

C A Blurring of Boundaries

Indeed, principles of public international law and international comity are increasingly regaining access to national conflicts law. This is due to the field’s growing politicization and publicization—that is, an increasingly policy-oriented resolution of once genuinely private law conflicts. Several phenomena are illustrative.

First, at the doctrinal level, European choice of law—as US conflicts doctrine—is no longer (if it ever was) as disinterested in norm content and substantive law policies as has often been explained. In principle, of course, the divergence between Europe and the United States may still be emblemized by the theories once put forth by two key scholars: Gerhard Kegel and David Cavers. In defense of the European tradition, Kegel advocated a distinct disregard for the content of the relevant laws when determining the applicable regime. Choice of law, he explained, aims to find not the “objectively best law” but the “spatially best law”; accordingly, “conflicts justice takes functional precedence over substantive justice.”³⁴ US doctrine, on the other hand, is still characterized by Cavers’s conclusion that, in conflicts law, “[t]he court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?”³⁵ This preference for policy analysis implies a rejection of mechanical conflicts rules.³⁶ And although the scholarly field is diverse, the majority of American choice-of-law theories are content-selecting, not jurisdiction-selecting, models.³⁷ Early on, key voices called for a similar politicization of German and European doctrine.³⁸ And even

³³ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–816 (1993) (Scalia, J., dissenting).

³⁴ Author’s translation of Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* § 2, at 131 (9th edn., 2004) (“Deswegen ist die internationalprivatrechtliche Gerechtigkeit der materiell-privatrechtlichen funktionell vorgeordnet.”); see also Gerhard Kegel, *Begriffs- und Interessenjurisprudenz im internationalen Privatrecht*, 259, 270, in *Festschrift Hans Lewald* (Max Gerwig et al. eds., 1978).

³⁵ David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 189 (1933).

³⁶ See, e.g., Brainerd Currie, *The Disinterested Third State*, 28 Law & Contemp. Probs. 754, 778 (1963); Brainerd Currie, *Selected Essays on the Conflict of Laws*, ch. 13: *Justice Traynor and the Conflict of Laws*, 629, 637–638 (1963).

³⁷ For an overview, see, e.g., Anton K. Schnyder, *Interessenabwägung im Kollisionsrecht—Zu Brainerd Curries „governmental-interest analysis“*, 105 ZfSchwR 101, 108–109 (1986); Christian von Bar & Peter Mankowski, *Internationales Privatrecht—vol. I: Allgemeine Lehren* § 6 para. 81 *et seq.* (2nd edn., 2003); on the general lack of consensus see Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 279 (1990).

³⁸ See, e.g., Christian Joerges, *Zum Funktionswandel des Kollisionsrechts—Die “Governmental Interest Analysis” und die “Krise des Internationalen Privatrechts”* (1971); Eckard Reh binder, *Zur Politisierung des Internationalen Privatrechts*, 1973 JZ 151.

though in the 1970s these ideas were still strongly rejected, over time, the hiatus has grown smaller. Indeed, modern communitarian choice of law in Europe has, at least in part, forsworn the once strictly followed concept of content-neutral jurisdiction selection.³⁹ Tort conflicts are emblematic: a number of provisions of the Rome II Regulation actually give express regard to substance, as can be seen in the instrument's consumer protection impetus in product-liability conflicts, the multiple policies accommodated under the rules for international unfair competition conflicts, the express aim of international environmental protection, and the rigid regulation of choice-of-law clauses.⁴⁰

This last aspect reflects a second facet of publicization that can be found in the changes in many countries' domestic private law regimes. Since the twentieth century, the immemorial dichotomy between private and public law has been widely dissolved. Private and public law have never been as strictly separated under US legal thought as under the civil law tradition. In any event, the realist attack has further blurred distinctions that may have once existed in American law.⁴¹ And even though the private/public law distinction has traditionally been very concise in Germany, there, too, the legal system has witnessed a growing publicization of private law. Indeed, as far as the substantive private/public law dichotomy is concerned, it has become increasingly questionable whether the formal means of norm enforcement and a qualification of norms as pertaining either to "public law" or to "private law" should still matter. Of course, public law will directly "regulate" issues with which it is concerned; and this regulation is for state agencies to enforce. Private law, by contrast, establishes a system of order among individuals. The state will not directly intervene; it will merely provide for institutions to adjudicate and enforce.⁴² But the picture is no longer so simple. The nineteenth-century model of the liberal state as being distinct from a self-contained private law community has lost its formative function for legal structure and order.⁴³ Today, many areas of private law

³⁹ For an extensive account, see Tim W. Dornis, "Local Data" in *European Choice of Law: A Trojan Horse from Across the Atlantic?*, 44 Ga. J. Int'l & Comp. L. 2015 (forthcoming) (with numerous references).

⁴⁰ See art. 5, 6, 7 & 14 Rome II, as well as recitals 20, 21, 25 & 31.

⁴¹ See, e.g., Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 *Theoretical Inq. L.* 323, 324 (2001); see also John Henry Merryman, *The Public Law—Private Law Distinction in European and American Law*, 17 *J. Publ. L.* 3, 8–9 (1968); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1423, 1425–1426 (1982).

⁴² John Henry Merryman, *The Public Law—Private Law Distinction in European and American Law*, 17 *J. Publ. L.* 3, 11–12 (1968).

⁴³ John Henry Merryman, *The Public Law—Private Law Distinction in European and American Law*, 17 *J. Publ. L.* 3, 15 (1968); see also *id.* at 15 n. 44 (referring to Jennings's allegory that the "public lawyer is ousting the private lawyer"); in addition

have been enriched by public policy concerns. Private individuals may still act as citizens. But their conduct and activities implement public and regulatory policies. Private law of this kind no longer provides a neutral framework for transactions among private individuals. It has mutated by becoming “socialized” and “publicized.”⁴⁴ Contract law’s and tort law’s increasing concern for consumer protection are primary examples. The field of trademark protection and unfair competition prevention is another. As we have seen, the public policy of unfair competition prevention has evolved from an instrument of competitor protection into the integrated model of concurrent protection for competitors, consumers, and the public.⁴⁵ And since disputes are no longer purely private or interindividual, conflicts resolution has also become an issue of colliding regulatory policies. By this means, the socialization of private law has effectuated a progressive decrease in interchangeability. If private law norms are public policy loaded, it will be harder to fit them into a system of multilateral conflicts resolution.⁴⁶

Finally, a third reason accounts for the increasing enrichment of choice-of-law doctrine by governmental interests. This aspect is seldom pointed out with clarity. Even if a private law norm is not intended to “regulate,” it may still be found to exert significant impact under a perspective of international trade and commerce. In these cases, the state can no longer limit its role to acting as an umpire between individual parties alone. Such a perspective would neglect correlations between private-party conflicts and the international regulatory effects that may be exerted, for instance, by a discriminatory application of market-relevant norms of private law. Heinrich Kronstein alluded to this phenomenon in a 1949 article entitled “Crisis of ‘Conflict of Laws’ ”:

Before the rapid development of standardization and concentration in economic life ... reached its present phase, courts dealt with very many independent

see, e.g., Klaus Schurig, *Kollisionsnorm und Sachrecht* 18–19 (1981); Jürgen Basedow, *Wirtschaftskollisionsrecht—Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates*, 52 *RabelsZ* 8, 16 et seq. (1988).

⁴⁴ John Henry Merryman, *The Public Law—Private Law Distinction in European and American Law*, 17 *J. Publ. L.* 3, 15–16 (1968); Eckard Rehbinder, *Zur Politisierung des Internationalen Privatrechts*, 1973 *JZ* 151, 154; for German private law, see Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* 514 et seq. (1967). For a law and economics perspective, see, e.g., Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 *Vand. J. Transnat’l L.* 975, 1009–1010 (1994).

⁴⁵ See *supra* p. 275 et seq.

⁴⁶ See Larry Kramer, *Vestigis of Beale: Extraterritorial Application of American Law*, 1991 *Sup. Ct. Rev.* 179, 188; Christian Joerges, *Vorüberlegungen zu einer Theorie des internationalen Wirtschaftsrechts*, 43 *RabelsZ* 6, 36 (1979); Gunther Kühne, *Die Entsavignisierung des Internationalen Privatrechts insbesondere durch sog. Eingriffsnormen*, 815, 817, in *Festschrift für Andreas Heldrich zum 70. Geburtstag* (Stephan Lorenz et al. eds., 2005).

transactions between many independent persons of different countries. Each of these cases was unique, to be evaluated on its own merits and on nothing else. . . . There, in fact, the private interests in each of these hundreds of transactions prevailed over the possible public interest and no one had to worry about a systematic shift of the law in an entire field of life. . . . When the present principles on conflict of laws were prepared, investment in foreign fields was the principal aim. Today the principal function of participation or technological and marketing agreements (patents, trademarks) is regulation of power and markets. Can we use, there, the same rules in conflict as before? . . . [U]nder present conditions the “legal concept” is a characterization test which does not deal with individual unrelated contracts or participations, but with an entire type of transaction. If a certain law applies to one of those transactions, it applies to all of the same type. It applies rather to an institution than to a transaction. The public interest in cases of these types is obvious.⁴⁷

Private law norms no longer represent individual interests alone. A clear separation between private and governmental interests no longer exists, and it is doubtful whether the state may still be seen as not caring about private individual concerns.⁴⁸ The actual or potential multitude of individual interests as a whole constitutes the combined public interest. Private rights have become institutionalized. In sum, the multiplication of international transacting has made the extension and limitation of individual entitlements an issue of international competition, trade wars, and economic hegemony. Accordingly, the state no longer has an altruistic interest in private law.⁴⁹

In sum, many areas formerly deemed private law and private international law have had their character altered in a way that no longer allows them to be neatly categorized. The merger of private and public law at the level of national regimes has dissolved clear structures. And this dissolution has resulted in a publicization and politicization of conflicts law and choice-of-law methods. The field has thus become subsumed by a debate

⁴⁷ Heinrich Kronstein, *Crisis of “Conflict of Laws,”* 37 *Geo. L.J.* 483, 486–487 (1949). See also Rudolf Wiethölter, *Zur Frage des internationalen ordres public*, 133, 135–136, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 7 (1967); Eckard Rehlinger, *Zur Politisierung des Internationalen Privatrechts*, 1973 *JZ* 151, 154.

⁴⁸ For more illustration, see Tim W. Dornis, *Die Erbensuche im Kollisionsrecht—von grenzüberschreitender “Menschenhilfe” zu internationaler Marktregulierung*, 2015 *ZfPW* 376–384.

⁴⁹ But see Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 *Recueil des Cours* 91, 183 (1964-II) (“The state has an altruistic rather than egoistic interest in private law, concerning itself primarily with a just ordering of private life. In this respect even its domestic private law is not ‘its own’ private law; it rather strives to seek the best and fairest solution for all men.”). For Currie’s general critique of the traditional approach, see, e.g., Brainerd Currie, *Selected Essays on the Conflict of Laws*, ch. 5: *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 188, 191 (1963) (“The rational pursuit of self-interest is preferable to such irrational altruism.”).

on underlying public international law structures and on limitations to jurisdiction under the doctrine of international comity. As a result, this has created a number of gray areas of public international, private international, and international economic law.

II *In the Shadows: The Creeping Deformation of Comity*

The coalescence of private and public international law spheres is an important feature of the so-called transnationalization of the law. In essence, this phenomenon involves a constant mutation of public international law into something that is both more “private” and more “national.” At the same time, domestic laws are increasingly becoming enriched by norms and policies of public international law; hence, they are less “private” and less “national.” A prominent cause for this evolution was the change in the private individual’s status in the international arena. While private actors were virtually nonexistent under the classical system, modern international law accords them extensive rights and duties. Private relations are no longer isolated from public international law—as seen most evidently in the case of human rights protection.⁵⁰ The individual’s emancipation opened the door to the implementation of public international law in domestic private law regimes and, vice versa, a growing privatization of public international law.⁵¹ This mind-set has been further bolstered by the idea that concepts of nation-state sovereignty and territoriality are increasingly outdated. Since the world is becoming more and more “borderless,” traditional structures of lawmaking and policy making no longer seem to provide for a functioning order and regulation.

This development ultimately came along with the claim that a new paradigm of conflicts law and choice of law is needed. Like public international law, which was famously characterized as a “gentle civilizer of nations” by Martti Koskenniemi,⁵² the doctrine of international comity

⁵⁰ See, e.g., Hermann Mosler, *Völkerrecht als Rechtsordnung*, 36 *ZaöRV* 6, 30–31 (1976); Alfred Verdross & Bruno Simma, *Universelles Völkerrecht*, § 47 *et seq.* (3rd edn., 1984); Heinz-Peter Mansel, *Staatlichkeit des Internationalen Privatrechts und Völkerrecht*, 89, 94, in *Völkerrecht und IPR* (Stefan Leible & Matthias Ruffert eds., 2006). For a famous historical characterization of international law as non-individualist law *inter nationes*, see, however, Franz Kahn, *Über Inhalt, Natur und Methode des internationalen Privatrechts*, 255, 275 and 277, in *Abhandlungen zum internationalen Privatrecht*, vol. I (Otto Lenel & Hans Lewald eds., 1928).

⁵¹ See, e.g., Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 *Harv. Int’l L.J.* 327, 350 (2006); Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, 4 *J. Priv. Int’l L.* 121, 122–123 (2008); Paul B. Stephan, *Privatizing International Law*, 97 *Va. L. Rev.* 1573 (2011).

⁵² Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001).

used to be understood as an instrument to facilitate and moderate international transacting and commerce. But the doctrine virtually evaporates as the dichotomies between public and private, international and national, “there” and “here” dissolve. In other words, the more a transnational consensus on norms and policies can be found, the less need there seems to be for a “civilization” of international transacting and commerce. Succinctly put, there appears to be a substitution: what used to be a quest for nation-state consensus in the interest of convenient and utile international transacting in the seventeenth-century Dutch Republic has become a search for globally uniform and universal norms and policies in modern legal thought.

In the following, I will explore how transnationalization has come to herald the decline of nation-state conflicts law and choice of law. Before beginning my analysis on this topic, however, one final clarification is in order: of course, the concept of transnationalization encompasses more than the domestication of international legal norms or policies. Orders of transnational quality may implement norms of public international law origin, as well as private law norms unrelated to the law of nations or nation-state regimes. The latter category is usually discussed under the labels of the medieval *lex mercatoria* and its modern counterparts of the new law merchant. Mainly created by private parties, these regimes seek to govern interindividual relations.⁵³ They do not, however, encompass regulatory or policy-oriented subject matter beyond what is required for international commerce.⁵⁴ Third-party and public interests are seldom part of the contracting parties’ focus. Since these concerns are central to trademark and unfair competition law, both in substance and with respect to choice of law, however, the *lex mercatoria* is not important for this inquiry. Hence, I will focus on the debate’s “regulatory” side.

A Transnationalization: A Resurrection of the *Ius Cosmopoliticum*

As mentioned earlier, US conflicts theory witnessed an era of introspection. The mid-century conflicts revolution was described as a product of parochialism—reflecting a “time when interest in foreign law and transnational issues was at an all-time low among American conflicts thinkers.”⁵⁵

⁵³ Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* 7 *et seq.* (1983); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 *Law & Soc. Inquiry* 229, 232–233 (2012).

⁵⁴ Ralf Michaels, *The True Lex Mercatoria: Law beyond the State*, 14 *Ind. J. Glob. Leg. Stud.* 447, 457 (2007).

⁵⁵ Matthias Reimann, *A New Restatement—For the International Age*, 75 *Ind. L.J.* 575, 578 (2000).

But the 1950s were not an era of complete seclusion. On the contrary, the second half of the century saw a sketch of internationalism formulated by Philip C. Jessup in 1956. His ideas would come to dominate modern conflicts law theory in the late twentieth and early twenty-first centuries.⁵⁶ Jessup's idea of transnational law relied heavily on traditional categories of international legal orders, particularly in the field of maritime law.⁵⁷ But he also opened the door for a new and heretofore largely unanalyzed concept of a *Weltrecht*, or of a global *droit idéal*. As Jessup expected, national law and public international law would merge and bring out a new substance. This hybrid was what he explained as transnational law, comprising "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories."⁵⁸ Almost necessarily, this hybridity implied a universality (or near universality) of content. And inevitably, it seemed to dissolve conflicts law—when there is no longer a divergence on the substance of norms, the need for conflicts resolution disappears. In a sense, therefore, Jessup's theory of transnational law paved the way for modern concepts of the *ius cosmopoliticum*.

Of course, none of these ideas were new in 1956. In fact, the *ius cosmopoliticum*, understood as the legal order governing within an international community of private individuals, was already the basis of Savigny's system.⁵⁹ The expectation that conflicts law would become obsolete with the progress of substantive-norm harmonization had already been expressed.⁶⁰ What Jessup's twentieth-century formulation of transnational law and the *ius cosmopoliticum* brought to the fore, however, was an exclusivity of normative substance. Early conceptions of international comity, of the community of nation-states, and of an international consensus on conflicts law, all had a technical corrective in common. They were built on the idea that conflicts resolution would

⁵⁶ For an early comparative analysis of transnational legal norms and substantive law theory, see Rudolf Fränkel, *Der Irrgarten des internationalen Privatrechts*, 4 *RabelsZ* 239, 241–242 (1930). For later scholarship in Germany, see, e.g., Rudolf Wiethölter, *Zur Frage des internationalen ordre public*, 133, 158, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 7 (1967); Eugen Langen, *Vom Internationalen Privatrecht zum Transnationalen Handelsrecht*, 1969 *NJW* 358; Eugen Langen, *Transnationales Handelsrecht*, 1969 *NJW* 2229; Eugen Langen, *Transnationales Recht* (1981).

⁵⁷ See Philip C. Jessup, *Transnational Law (Storrs Lectures on Jurisprudence)* 108 *et seq.* (1956).

⁵⁸ *Id.* at 2.

⁵⁹ See, e.g., Klaus Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm* 220 (1965); Christian Joerges, *Die klassische Konzeption des internationalen Privatrechts und das Recht des unlauteren Wettbewerbs*, 36 *RabelsZ* 421, 434 (1972); Ernst-Joachim Mestmäcker, *Staatliche Souveränität und offene Märkte—Konflikte bei der extraterritorialen Anwendung von Wirtschaftsrecht*, 52 *RabelsZ* 205, 213 *et seq.* (1988).

⁶⁰ See *infra* p. 398 *et seq.*

always have to give regard to a fundamental interest: upholding the utility and convenience of international transactions and commercial exchanges. This aspect was dropped in the course of the twentieth-century transnationalization of the private and public international legal orders.

B The Historical Leitmotif: Convenience of International Transacting

The doctrine of international comity is inseparably connected with seventeenth-century scholar Huber.⁶¹ According to Huber, three axioms of interstate cooperation followed from the territorial sovereignty of the nation-state. In order to establish and maintain a functioning system of international law, the following had to be guaranteed:

- (1) the laws of sovereign nation-states have force within, but not beyond, states' boundaries;
- (2) only those individuals found within a nation-state's boundaries—regardless of whether they are there permanently or temporarily—are subject to the nation-state's authority; and
- (3) sovereign authority must be exercised by way of comity, and the laws of every nation-state should retain their effect everywhere as long as they do not prejudice the powers or rights of another state or its subjects.⁶²

In essence, a clear division exists between the sovereign state's internal affairs and the external domain of public international law. For the internal sphere, international comity is supposed to provide for rules of recognition and effectuation of another sovereign's acts or laws. This concerns, for instance, the recognition and enforcement of foreign courts' verdicts. In the external arena, the doctrine of comity prevents a state from extending its power to the territory governed by another sovereign.⁶³ This latter aspect is of interest for my analysis. Comity was usually understood as

⁶¹ For the Dutch school and its theorists' contributions, see, e.g., Kurt Lipstein, *The General Principles of Private International Law*, 135 *Recueil des Cours* 97, 121 *et seq.* (1972-I); Alex Mills, *The Private History of International Law*, 55 *I.C.L.Q.* 1, 24 *et seq.* (2006).

⁶² Translated in D. J. Llewelyn Davies, *The Influence of Huber's de Conflictu Legum on English Private International Law*, 18 *Brit. Y.B. Int'l L.* 49, 56–67 (1937). See also Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 136, 162 *et seq.*, in *Selected Articles on the Conflict of Laws* (Ernest G. Lorenzen ed., 1947).

⁶³ Huber's theses were incorporated into both civil law and common law theory and practice. See Joseph Story, *Commentaries on the Conflict of Laws* § 38, at 37 (1834) (with numerous references in n. 3). More recently, see, e.g., Kurt H. Nadelmann, *Introduction to Yntema, The Comity Doctrine*, 65 *Mich. L. Rev.* 1, 2 *et seq.* (1966); Joel R. Paul, *Comity in International Law*, 32 *Harv. Int'l L.J.* 1, 17 *et seq.* (1991). For an extensive discussion of the doctrine's history and development, see Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 136 *et seq.*, in *Selected Articles on the Conflict of Laws* (Ernest G. Lorenzen, 1947); D. J. Llewelyn Davies, *The Influence of Huber's de Conflictu Legum on English Private International Law*, 18 *Brit. Y.B. Int'l L.* 49, 52 (1937); Hessel E. Yntema, *The Comity*

offering a guideline for political decision making in the sense of providing a standard for a state's external conduct.⁶⁴ The doctrine was not seen as possessing a normative quality; it merely defined—not prescribed—a system of the international legal order.⁶⁵ This characteristic of unenforceable voluntariness, combined with a lack of clear structures, has been the major obstacle to the doctrine's practical implementation. As Harold Maier has sarcastically, yet fittingly, explained, comity doctrine has never overcome the stage of describing “an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.”⁶⁶

In the debate over whether comity is a doctrine of mere political content, however, one important aspect has often been neglected: Huber not only contended that comity was a corollary of nation-state sovereignty but also described compliance with the doctrine's requirements as a precondition for the unhindered functioning of international transacting and commerce. This understanding also surfaces in Story's and Savigny's later works on the conflict of laws. Even though their

Doctrine, 65 Mich. L. Rev. 9 (1966); more recently William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071 (2015).

⁶⁴ For the *Charming Betsy* doctrine and its function of avoiding conflicts with (stronger) foreign nations, see *Talbot v. Seeman*, 5 U.S. 1 (1801); Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 Am. J. Leg. Hist. 1, 18 (2001).

⁶⁵ See *Hilton v. Guyot*, 159 U.S. 113, 163–164 (1895) (“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”). See also Joseph H. Beale, *A Treatise on the Conflict of Laws*, vol. III: *Administration and Procedure* § 71 (1935) (“The doctrine [of comity] seems really 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. In other words, it is an enabling principle rather than one which in any particular case would determine the actual rule of law.”); Otto Kahn-Freund, *The Growth of Internationalism in English Private International Law (Lionel Cohen Lectures)* 8 (1960) (“[C]omity supplies a legislative motive rather than a legislative content. In this respect it is comparable to the ‘maxims of equity’ rather than to a particular legal norm.”); Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145, 215 *et seq.* (1972/73).

⁶⁶ Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982); see also Samuel Livermore, *Dissertations on the Questions which arise from the Contrariety of the Positive Laws of Different States and Nations* 27 (1828) (“Comity implies a right to reject; and the consequence of such rejection would probably be a judgment ordering a party to do that, which he had never obligated himself to do. This phrase has not always been harmless in its effects, for I have not unfrequently seen it inspire judges with so great confidence in their own authority, that arrogating to themselves sovereign power, they have disregarded the foreign law, which ought to have governed their decision, because of some fancied inconvenience, which might result to the citizens of their state.”); *Loucks v. Standard Oil Co.*, 120 N.E. 98, 201–202, 224 N.Y. 99, 111 (N.Y. 1918) (Cardozo, J.) (“The misleading word ‘comity’ has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles.”).

teachings have often been explained as founded on different conceptions of comity and of the relationship between private and public international law, they share common ground regarding the fact that the international consensus on jurisdiction is not a deontological concept based on axioms of territoriality and sovereignty alone. The doctrine of comity is also the means to an end insofar as it is supposed to guarantee useful and convenient international transacting and commerce.

1 *Joseph Story: The Consensual Administration of Conflicts*

Story's 1834 *Commentaries on the Conflict of Laws* was founded on the concept of private international law as a branch of both public law and public international law.⁶⁷ This was a consequence of his understanding that the central principle of the field was the "equality and independence of nations."⁶⁸ At the same time, it reflects a concern that private law conflicts avoidance was necessary to guarantee and maintain political order at the interstate level of the young American union. As is well explored, Story's understanding of comity was influenced by a conflict smoldering in the 1800s in the United States: frictions between free states and slave states within the union were commonplace.⁶⁹ The conflict between a slaveholder's assertion of property rights in slaves and a freed slave's right to personal liberty could not be resolved without leaving one side frustrated.⁷⁰ Under Story's concept, comity was conflicts resolution's lowest common denominator. It virtually guaranteed reconciling the irreconcilable by localizing slaveholder rights within their respective fora. Comity would neither require a free state to acknowledge property rights in slaves nor require a slave state to accept the liberty of recaptured slaves.⁷¹ In other words, there was no "absolute paramount obligation, superseding all discretion on the subject." Accordingly, the doctrine was

⁶⁷ Joseph Story, *Commentaries on the Conflict of Laws* § 9, at 9 (1834). For Story's understanding of public and private international law as part of the same field of law, see, e.g., F. A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *Recueil des Cours* 1, 33 (1964-I); Joel R. Paul, *Comity in International Law*, 32 *Harv. Int'l L.J.* 1, 25 and 78 (1991).

⁶⁸ Joseph Story, *Commentaries on the Conflict of Laws* § 8, at 8 (1834).

⁶⁹ For the historical background on Story's commentaries, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (1981); more recently, Paul Finkelman, *When International Law Was a Domestic Problem*, 44 *Val. U. L. Rev.* 779, 802 *et seq.* (2010); Joel R. Paul, *Comity in International Law*, 32 *Harv. Int'l L.J.* 1, 19 *et seq.* (1991); Joel R. Paul, *The Transformation of International Comity*, 71 *Law & Contemp. Probs.* 19, 24 (2008). For a critical assessment of this historical explanation, see, however, Alan Watson, *Joseph Story and the Comity of Errors—A Case Study in the Conflict of Laws* (1992).

⁷⁰ For Story's emphatic rejection of slavery while sitting as a justice in Massachusetts, see *U.S. v. the La Jeune Eugenie*, 26 *F. Cas.* 832, 845 (C.C.D. Mass. 1822).

⁷¹ Joel R. Paul, *Comity in International Law*, 32 *Harv. Int'l L.J.* 1, 24 (1991).

to be considered “not the comity of the courts, but the comity of the nation.”⁷²

Nevertheless, as Story also explained, comity had to be “administered, and ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided.”⁷³ Comity, hence, did have a normative character. Even though there was no absolute legal obligation to afford foreign laws a priority of application, deciding which law to apply and how far to extend a national regime was an issue of legal analysis. One aspect is important here. Story’s formulation of the function of the comity doctrine deeply embraced Huber’s conception. Avoiding the distortion of interstate transacting was paramount; anything else would be “inconvenient to commerce and to international usage.”⁷⁴ As Story put it:

The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.⁷⁵

Under this perspective, the patchwork of national regimes was held together by a system of self-restraint.⁷⁶ The doctrine of comity was a

⁷² Joseph Story, *Commentaries on the Conflict of Laws* § 33, at 33, and § 36, at 36 (1834). For the same interpretation and reference to Story in modern case law, see, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C.C., 1984) (with further case-law references).

⁷³ Joseph Story, *Commentaries on the Conflict of Laws* § 38, at 37 (1834).

⁷⁴ See Ulrich Huber, *De Conflictu Legum* (translation in Ernest G. Lorenzen, *Selected Articles on the Conflict of Laws* 164–165 (1947) (“[T]he solution to the [choice-of-law] problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.”).

⁷⁵ Joseph Story, *Commentaries on the Conflict of Laws* § 35, at 34 (1834) with reference to Samuel Livermore, among others. More than five years earlier, in similar words, Livermore had formulated this concern in his *Dissertations on the Questions which arise from the Contrariety of the Positive Laws of Different States and Nations* 27–28 (1828) (“Even with sovereigns it is not so clear, that the recognition of foreign laws is merely a matter of comity. . . . if a desire to promote their own interest induces them to cultivate an intercourse with other people, they must necessarily adopt such principles, as a sense of common utility and of justice will inspire. . . . It has not been from comity, but from a sense of mutual utility, that nations have admitted the extension of personal statutes. It has arisen from a sort of necessity, and from a sense of the inconveniences which would result from a contrary doctrine, by which the state and condition of a man, his capacity or incapacity, would change with every change of abode, for however short a time or transitory purpose.”).

⁷⁶ Ernest G. Lorenzen, *Story’s Commentaries on the Conflict of Laws—One Hundred Years After*, 48 Harv. L. Rev. 15, 35 (1934); see also Donald Earl Childress III, *Comity as*

true civilizer of international transacting. And Story qualified the system in one more respect: mutuality under the command of common utility further required that “the interest of all nations [be] consulted, and not that of only one.”⁷⁷ This interpretation of Huberian maxims made the consideration of genuinely internationalist concerns the paradigm of conflicts resolution. In addition, it implemented a dynamic method of interest reconciliation. The aim was not to achieve international fairness or to promulgate a one-size-fits-all rule⁷⁸—it was to establish a process-based model of interest balancing, which would guarantee the smooth functioning of international transacting.

2 *Friedrich Carl von Savigny: A Legal Community In Statu Nascendi* Prima facie, Savigny’s understanding of the international legal order and its impact on national choice of law was fundamentally different. As has often been explained, Savigny formally replaced comity and public international law with abstract and apolitical choice-of-law mechanics.⁷⁹ In his system of transmissive private law regimes, the equivalence and substitutability of domestic and foreign private law became the governing paradigm. Indeed, it almost seems as if he thereby emancipated choice-of-law theory from the need to consider comity and from the need to give regard to nation-state sovereignty. In essence, as is commonly contended, Savigny privatized the system of choice of law.⁸⁰

In this light, Savigny’s system appears to be anything but founded on public international law or comity.⁸¹ This is correct as far as his technique

Conflict: Resituating International Comity as Conflict of Laws, 44 U.C. Davis L. Rev. 11, 27 et seq. (2010).

⁷⁷ Joseph Story, *Commentaries on the Conflict of Laws* § 36, at 36 (1834).

⁷⁸ Against this idea, see *id.* at § 28, at 29.

⁷⁹ Paul Heinrich Neuhaus, *Savigny und die Rechtsfindung aus der Natur der Sache*, 15 *RabelsZ* 364, 372–373 (1949/50); Ulrike Seif, *Savigny und das Internationale Privatrecht des 19. Jahrhunderts*, 65 *RabelsZ* 492, 508 (2001).

⁸⁰ See, e.g., Christian Joerges, *Zum Funktionswandel des Kollisionsrechts—Die “Governmental Interest Analysis” und die “Krise des Internationalen Privatrechts”* 7 et seq. (1971); Fritz Sturm, *Savigny und das internationale Privatrecht seiner Zeit*, 92, 106, in *Ius Commune VIII (Vorträge zum 200. Geburtstag von F.C. von Savigny)* (Helmut Coing ed., 1979); Ralf Michaels, *Globalizing Savigny? The State in Savigny’s Private International Law and the Challenge from Europeanization and Globalization*, 119, 132, in *Aktuelle Fragen zu politischer und rechtlicher Steuerung im Kontext der Globalisierung* (Michael Stolleis & Wolfgang Streek eds., 2007); Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 *Tul. L. Rev.* 1607, 1613 (2008).

⁸¹ At least, this appears to be common ground among modern European scholars. See, e.g., Christian Joerges, *Zum Funktionswandel des Kollisionsrechts—Die “Governmental Interest Analysis” und die “Krise des Internationalen Privatrechts”* 7 et seq. (1971); Egon Lorenz, *Zur Struktur des Internationalen Privatrechts* 49–50 (1977); Paul Heinrich Neuhaus, *Der Beitrag des Völkerrechts zum internationalen Privatrecht*, 21 *German Y.B. of Int’l L.* 60, 62 (1978); Christian Joerges, *Vorüberlegungen zu einer Theorie des internationalen*

for conflicts resolution is concerned. Yet his conception, like Story's model of mutuality and utility, was still based on the idea of a legal community of nations. As he explained, what was to be achieved was a "*völkerrechtliche Gemeinschaft der miteinander verkehrenden Nationen*."⁸² Literally, this translates to a "public international law community of transacting nations."⁸³ In 1869, William Guthrie changed this into a slightly awkward sounding "international common law of nations having intercourse with one another."⁸⁴ But these ambiguities aside, the gist of what Savigny wanted to express remains untouched: he deemed the legal community

Wirtschaftsrechts, 43 RabelsZ 6, 11 et seq. (1979); Fritz Sturm, *Savigny und das internationale Privatrecht seiner Zeit*, 92, 106, in *Ius Commune VIII (Vorträge zum 200. Geburtstag von F. C. von Savigny)* (Helmut Coing ed., 1979); Gerhard Kegel, *Story and Savigny*, 37 Am. J. Comp. L. 39, 58–59 (1989); Ulrike Seif, *Savigny und das Internationale Privatrecht des 19. Jahrhunderts*, 65 RabelsZ 492, 508–509 (2001); Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 Tul. L. Rev. 1607, 1614 (2008); but see, e.g., Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 Colum. L. Rev. 189, 192 (1942) ("Savigny clearly agrees with the Dutch jurists in that, as a matter of principle, he puts the conflicts doctrine upon an international basis. He differs, however, from them in that he deems the independent nations bound by international law (rather than by comity) to apply in the appropriate cases the laws of other members of that international community."); John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 Colum. L. Rev. 561, 565 (1952) (explaining that the law-of-nations theory "received its initial impetus" from Savigny's writings); Max Gutzwiler, *Der Einfluß Savignys auf die Entwicklung des Internationalprivatrechts* 43–44 (1923) (*cf. id.* at 43: "Für Savigny ist die völkerrechtliche Gemeinschaft 'Grundlage und letztes Ziel unserer ganzen Lehre'; sie, und sie allein ermöglicht den selbständigen, eben internationalen Kern seiner Theorie . . ." with *id.* at 44: "Diese Rechtsgemeinschaft ist die nicht wegzudenkende Grundbedingung für die Möglichkeit einer allgemeingiltigen Theorie; Savigny zufolge soll sie die Basis sein, und er behauptet für diese Basis Positivität. Hier aber liegen die Grenzen seiner Lehre. In Wirklichkeit stehen seine völkerrechtliche Behauptung und die Ableitung seines Hauptsatzes vom 'Sitze' nebeneinander und sind durch keine juristische Konstruktion in Beziehung gesetzt. Savigny zieht aus seiner völkerrechtlichen Grundlage keine einzige der vielen denkbaren Folgerungen . . ."); Franz Kahn, *Gesetzeskollisionen—Ein Beitrag zur Lehre des internationalen Privatrechts*, 1, 3, in *Abhandlungen zum internationalen Privatrecht*, vol. I (Otto Lenel & Hans Lewald eds., 1928) ("[D]ie andere [Auffassung], welche man auf Savigny zurückführen kann, . . . erkennt darin ein internationales Recht im eigentlichsten Sinn, dessen Quelle außerhalb der einzelnen Territorialgesetzgebungen zu suchen ist, ein 'werdendes Weltrecht.'" (with numerous contemporary references)).

⁸² Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 348, at 27 (1849).

⁸³ For illustration of the so-called *Rechtsgemeinschaft der Völker*, see Friedrich K. Juenger, *Choice of Law and Multistate Justice* 36 (1993). For further reference to the legal community of nations ("*völkerrechtliche Gemeinschaft*") in volume VIII of Savigny's system, see Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 348 (at 27, 29, 30, 31), § 349 (at 35), § 360 (at 117), § 361 (at 128), § 365 (at 160), and § 374 (at 288 and 292–293) (1849).

⁸⁴ Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 348, at 70 (William Guthrie transl., 2nd edn., 1880).

or the international common law of nations not only the foundation but the ultimate goal (“highest aim”) of all conflicts and choice-of-law theory.⁸⁵ Indeed, this approach was distinctly internationalist: since the community of nations was governed by a paradigm of amenable relations among equal sovereigns, any member was encouraged to construct its conflicts regime accordingly.⁸⁶ This ultimately contradicts the conclusion that Savigny intended to jettison public international law and international comity as the basis of his system. Savigny’s idea of private law may have been apolitical,⁸⁷ but it did not require isolating choice of law from the influence of the sphere that constituted relations among sovereign nations.

Moreover, like Story, Savigny conceived of this community as being founded not only on common values and Christianity but also on a quest for mutual benefit and utility.⁸⁸ As he explained, in the absence of binding choice-of-law norms (and such an absence was regularly the case in his time), judges would not be free to ignore foreign law and revert to the *lex fori*.⁸⁹ On the contrary:

The more multifarious and active the intercourse between different nations, the more will . . . reciprocity in dealing with cases which is so desirable, and the consequent equality in judging between natives and foreigners, which, on the

⁸⁵ Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 360, at 138 (William Guthrie transl., 2nd edn., 1880). For the original text, see Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 360, at 117 (1849) (“[D]ie angenommene Gegenseitigkeit, die sich, allgemeiner aufgefaßt, in eine völkerrechtliche Gemeinschaft, als Grundlage und letztes Ziel unsrer ganzen Lehre auflöst (§ 348).”).

⁸⁶ Alexander N. Makarov, “Internationales Privatrecht und Völkerrecht,” 129, 129, in *Wörterbuch des Völkerrechts*, vol. II (Hans-Jürgen Schlochauer ed., 2nd edn., 1961); see also Ulrich Drobnig, *Private International Law*, 1115, 1115, in *Encyclopedia of Public International Law*, vol. III (R. Bernhardt ed., 1997).

⁸⁷ See, e.g., Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol. I § 9, at 22–23 (1840) (“[Das Privatrecht hat zum Gegenstand] die Gesamtheit der Rechtsverhältnisse, welche den einzelnen Menschen umgeben, damit er in ihnen sein inneres Leben führe und zu einer bestimmten Gestalt bilde . . . daß in dem Privatrecht der einzelne Mensch für sich Zweck ist, und jedes Rechtsverhältnis sich nur als Mittel auf sein Daseyn oder seine besonderen Zustände bezieht.”).

⁸⁸ See also Gerhard Kegel, *Story and Savigny*, 37 Am. J. Comp. L. 39, 57 n. 125 (1989) (on the wide contemporary agreement (with references) on the subject of mutual utility and convenience). Similar to Savigny, though prior to Story, see Samuel Livermore, *Dissertations on the Questions which arise from the Contrariety of the Positive Laws of Different States and Nations* 30 (1828).

⁸⁹ Savigny found the judge to be bound by domestic statutory law on the issue of conflicts. Yet, as he also explained, this obligation was not overly broad for want of a sophisticated contemporary doctrine on the issue. See Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 361, at 146 (William Guthrie transl., 2nd edn., 1880). For the original text, see Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 361, at 130 (1849).

whole, is dictated by the common interest of nations and of individuals ... [effectuate] that, in cases of conflict of laws, the same legal relations (cases) have to expect the same decision, whether the judgment be pronounced in this state or in that.

The standpoint to which this consideration leads us, is that of an international common law [i.e. a public international law community] of nations having intercourse with one another; and this view has in the course of time always obtained wider recognition, under the influence of a common Christian morality, and of the real advantage which results from it to all concerned.⁹⁰

The interest in a seamless functioning of the international system, understood in terms of socioeconomic transacting, was expressed in the concept of respecting foreign states' laws and of a harmony of decision making.

Finally, Savigny emphasized one aspect as being the most determinative: the evolution of legal doctrine on choice of law was expected to mirror nation-state consensus. As he explained, within the community, a constant evolution of choice-of-law norms toward a uniform system had already set in. The final stage of international uniformity should be established either by scholarly theory and its practical implementation or by means of international agreements and treaties. With respect to normative content, both ways would ultimately have to follow the same guideline. Each rule of choice of law would have to pass a test to determine whether it could be transformed into an international agreement:

If the development of the law thus begun is not disturbed by unforeseen external circumstances, it may be expected that it will at length lead to a complete accord in the treatment of questions of collision in all states. Such an accord might be brought about by means of juridical science, and the practice of the tribunals guided by it. It could also be effected by a positive law, agreed to and enacted by all states, with respect to the collision of territorial laws. I do not say that this is likely, or even that it would be more convenient and salutary than mere scientific agreement; but the notion of such a law may serve as a standard to test every rule that we shall lay down as to collision. We have always to ask ourselves whether such a rule would be well adapted for reception into that common statute law of all nations.⁹¹

⁹⁰ Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 348, at 69–70 (William Guthrie transl., 2nd edn., 1880). For the original text, see Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 348, at 26–27 (1849).

⁹¹ Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 360, at 137 (William Guthrie transl., 2nd edn., 1880). For the original text, see Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 360, at 114–115 (1849). See also *id.* at § 348, at 28 and 30–31. For an understanding of Savigny's reasoning as seeking a "pure law" and as an ontological concept (limited to analysis of § 348), see Joachim Rückert, *The Unrecognized Legacy: Savigny's Influence on German Jurisprudence after 1900*, 37 Am. J. Comp. L. 121, 136 (1989).

On this evolutionary basis, Savigny saw the complete disappearance of conflicts as a mere matter of time. He expected the number of conflicts between political and absolute norms outside the system of apolitical and interchangeable private law norms to shrink continuously:

These two cla[s]ses of absolute laws, however they may differ in other respects, agree in this: that they are withdrawn from that community of law between all states of which we have asserted the existence in regard to collisions; and they are therefore, in this respect, anomalous. It is to be expected, however, that these exceptional cases will gradually be diminished with the natural legal development of nations.⁹²

Gerhard Kegel later explained that “[t]he ‘völkerrechtliche Gemeinschaft’ thus has the double task of privatizing private international law and of driving it towards universal uniformity (so that it will be judged according to the same law everywhere).”⁹³ This understanding of an ultimate uniformity was further extended at the end of the nineteenth century.

3 Ernst Zitelmann: *The Weltrecht of Uniform Policy*

But the extension had a slightly different angle that would prove significant for the development of internationalist legal thought throughout the twentieth century. One example of the early conceptions of a transnational law—which lucidly illustrates the roots of modern legal thought on transnationalization and its deviation from earlier conflicts-based approaches—is Ernst Zitelmann’s 1888 proposal for a *Weltrecht*.

Zitelmann’s *Weltrecht* concerned more than a system of conflicts resolution and choice of law—it proposed the far more ambitious concept of *substantive* uniformity of norms and policies. At the same time, his suggestion stayed behind these earlier conceptions insofar as he did not describe uniformity as being founded on public international legal standards or the doctrine of comity; instead, he substituted the idea of interstate consensus and compromise with a new paradigm. The *Weltrecht*, Zitelmann explained, would be a uniform substantive law governing all nations, at least those with a Christian culture.⁹⁴ Focusing on private law, he called for distinguishing several aspects of uniformity and universality. His starting point was the assumption that the rules of logic and reason were universal in nature. Accordingly, any legal system would have to be

⁹² Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 349, at 80 (William Guthrie transl., 2nd edn., 1880). For the original text, see Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 349, at 38 (1849).

⁹³ Gerhard Kegel, *Story and Savigny*, 37 Am. J. Comp. L. 39, 59 (1989).

⁹⁴ Ernst Zitelmann, *Die Möglichkeit eines Weltrechts* 5 (1888).

founded on an identical structure of legal reasoning.⁹⁵ In an allegory, he compared the legal order to human language, describing the structure of a legal system as analogous to grammar. While the content of each system may vary, the overall structures of human expression (language/law) are the same.⁹⁶ Further, he identified several factors as determinative for unification toward a *Weltrecht*: ethics, religion, utility, and consistency.⁹⁷ Among these factors, Zitelmann found utility to be the most important with respect to the trend toward a global private law. He argued that whenever real-world circumstances in different states were identical or similar, these different states' legal norms would automatically find the one utile and consistent—hence, socioeconomically reasonable—legal solution.⁹⁸

In this respect, Zitelmann's *praesumptio similitudinis* anticipated the quintessence of modern transnational law theory. He provided the ground for a streamlining along the lines of globally uniform standards and metrics. The identity of real-world circumstances and structures was what accounted for the transnationalization of norms. Uniformity was no longer an issue of conflicts law or choice of law but a question of substantive law policy. Furthermore, unlike Storyan and Savignian concepts, Zitelmann's *Weltrecht* was detached from the law-of-nations paradigm and international comity.⁹⁹

4 Summary

A common theme among theorists since Huber was the idea that it was paramount for conflicts law and choice of law to guarantee frictionless

⁹⁵ *Id.* at 13 (“Damit ist die überall gleiche logische Form des Rechtssatzes gegeben: auch sie ist weltrechtlicher Natur.”).

⁹⁶ *Id.* at 9–10 (“Wir wollen ein neues Buch kennen lernen, wir ahnen nicht, welchen Gedankeninhalt es birgt—aber eines wissen wir sicher: die logische Gliederung der Satzteile wird die uns bekannte sein, Subjekte, Prädikate usw. werden auch hier unterschieden sein müssen. Das ganze Verstehenkönnen fremder Rede beruht darauf; es wäre unmöglich, wenn wir nicht von vornherein absolut sicher wären, dasselbe logische Gefüge, in dem wir selbst denken, auch in der fremden Gedankenmitteilung wiederzufinden. In diesem Sinne gibt es eine einheitliche Sprachlehre, in gleichem Sinne auch eine einheitliche Rechtslehre.”). For Zitelmann's rejection of natural law theory, see *id.* at 8–9.

⁹⁷ *Id.* at 14 *et seq.*, particularly *id.* at 17 (“Zu entscheiden haben die ethischen und religiösen Ideen, welche wir als wahr anerkennen, die Zweckmäßigkeitserwägungen, welche objektiv für die gegebenen Verhältnisse richtig sind, d.h. das wirklich Zweckmäßige treffen, und die Konsequenzziehungen, welche logisch gerechtfertigt sind.”).

⁹⁸ *Id.* at 19 (“Man wird vielmehr finden, daß einmal ein sehr großer Teil der grundlegenden Sätze unseres Privatrechts in seiner Wirkung, also in seiner Zweckmäßigkeit von Verhältnissen abhängt, die überall völlig einander konform sind: er bezieht sich auf wirtschaftliche Grundtatsachen, welche mit Notwendigkeit bei jedem Volke dieselben sind. Weil aber diese einfachsten Faktoren, mit denen der Rechtssatz zu rechnen hat, die gleichen sind, so kann auch der Rechtssatz der gleiche sein.”).

⁹⁹ *Id.* at 35 *et seq.*; see also Peter Klein, *Die Möglichkeit eines Weltprivatrechts*, 3, 6 *et seq.*, in *Festschrift für Ernst Zitelmann* (Fritz Stier-Somlo ed., 1913).

and convenient transacting in the international arena. Story was the first to convincingly explain this idea for conflicts law on the basis of nation-state consensus. Building on Story, Savigny further projected it into the concept of a legal community of sovereign nations. His ideal was to have nation-states agree on universal norms of choice of law. Most characteristic of this theory is its proponents' understanding of "consensus." As Huber, Story, and Savigny agreed, it was not actual consensus among nation-states or within the international community as such that was required; the aim was to simulate such a consensus in order to establish and maintain the utility and convenience of international transacting. Seen in this light, two aspects can be explained as characteristic of traditional doctrine. One is the function of nation-state sovereignty. Since nation-states constitute the international community, any model of conflicts law or choice of law must be founded on the principles of public international law and on the doctrine of international comity. The other aspect concerns the supra-positivistic side of conflicts law that aims to secure the utility and convenience of international transacting and commerce.

Comparing these traditional authorities with the modern debate on transnationalism highlights a phenomenon that has been largely overlooked: the quite practical concerns of facilitating and civilizing international transacting and commerce explained by Huber, Story, and Savigny seem to have virtually sunk into oblivion throughout the last century. This is most illustratively reflected in Zitelmann's *Weltrecht*. His concept of a global coalescence of private law norms is a theory of substantive uniformity. It was in his model where the most characteristic feature of transnationalization made its first appearance, which can actually be explained as an early parting of the ways: Zitelmann no longer required a context of public international law, nor did he conceive of conflicts law or choice of law as a functional element of international transacting and commerce. Modern theory has carried these ideas further.

C The Modernity of Transnational Law: An Apotheosis of Substantive Uniformity

The idea that national laws would converge over time always inspired theorists to search for a global uniformity of values and policies. In this regard, Jessup provided the theoretical foundation for the modern process of transnationalization. His concept of transnational law hybridity and uniformity implied an evolution toward a *droit idéal* of universal substantive norms. While early twentieth-century theory and practice had still been founded on the nation-state paradigm, Jessup's conceptual

framework changed the scenery. From then on, transnationalists no longer had to look through the magnifying glass of nation-state politics; state interests were no longer imperative. Instead, norms and policies created beyond the state and its institutions became the product of a new and increasingly homogeneous world society.

1 *Philip C. Jessup: The Hybridity and Universality
of Transnational Law*

According to Jessup, international consensus on regulatory standards and individual rights protection would grow continually over time. One example he used was the evolution of maritime law.¹⁰⁰ But he extended the perspective. Since the categorical confines (e.g., public/private and foreign/domestic) had been blurred, he suggested that the selection and promulgation of norms in conflicts cases follow a standard of convenience:

Transnational law . . . includes both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private. There is no inherent reason why a judicial tribunal, whether national or international, should not be authorized to choose from all of these bodies of law the rule considered to be most in conformity with reason and justice for the solution of any particular controversy.¹⁰¹

He prophesized that traditional categories of decision making in conflicts law would vanish.¹⁰² The new standard of decision making was “conformity with reason and justice.”¹⁰³ In a sense, this idea of conformity adopted and extended Savigny’s view of a shrinking domain of true conflicts. As Savigny had anticipated with respect to the doctrine of public policy (*ordre public*), the domain of absolute laws resisting classification under a multi-lateral system would ultimately be reduced in the course of the expansion of international transacting, the approximation of policies, and the repeated adjudication of international conflicts.¹⁰⁴ Under modern transnational law theory, it is not just the public policy exception that is supposed to disappear over time; the norms to be applied in transnationality will ultimately become universal. In the words of Anne-Marie Slaughter:

This . . . marks a move from comity among the “world’s legal systems,” in which judges view one another as operating in equal but distinct legal spheres, to the presumption of an integrated system. This presumption, in turn, rests on a

¹⁰⁰ Philip C. Jessup, *Transnational Law (Storrs Lectures on Jurisprudence)* 108 *et seq.* (1956).

¹⁰¹ *Id.* at 106.

¹⁰² *Id.* at 106–107 (“The choice need not be determined by territoriality, personality, nationality, domicile, jurisdiction, sovereignty, or any other rubric save as these labels are reasonable reflections of human experience with the absolute and relative convenience of the law and of the forum.”).

¹⁰³ *Id.* at 106. ¹⁰⁴ *See supra* p. 402 *et seq.*

conception of a single global economy, in which borders are increasingly irrelevant, and an accompanying legal system, in which litigants can choose from among multiple fora to resolve a dispute . . . Whereas a presumption of a world of separate sovereigns mandates transjudicial relations marked by courtesy and periodic deference, the presumption of an integrated system takes mutual respect for granted and focuses instead on how well the system works.¹⁰⁵

Here again, Zitelmann's *Weltrecht* comes to mind. The concept of an integrated system of global norms no longer follows the primary aim of securing the utility and convenience of international transacting. It has become an aim in itself. The universality of norms and policies is the ultimate goal.

2 Twentieth Century: Conflicts Doctrine Internationalized

As we have seen, traditional European choice of law in the Savignian tradition is structurally indifferent to substantive law policy. It also rarely gives regard to public international law or international comity. Similarly, US theory, notably the American revolutionists, rejected a consideration of public international law.¹⁰⁶ Brainerd Currie may have adopted Story's comity-founded concept insofar as he described sovereign "governmental" interests as determinative. But this was more a technical aspect than a matter of the international legal order. Giving regard to the interests of the community of nation-states or to international comity, as Currie understood, was too vague and speculative to allow for a jettisoning of more concrete domestic concerns.¹⁰⁷ Nevertheless, time and again, public international law and international comity have made inroads into national choice-of-law doctrine. I will focus on the most important examples of these inroads that share a distinct element of internationalism—their ultimate goal is the promulgation of universal norms of conflicts resolution. In a sense, all these approaches have attempted to materialize the contents of international comity. Yet during the twentieth century, this doctrine lost much of its initial gloss when the concept of a truly universal legal order, widely detached from the sphere of nation-state politics and from enforcement issues, made its first appearance in practice.

¹⁰⁵ Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191, 204–205 (2003).

¹⁰⁶ See *supra* p. 384 *et seq.*

¹⁰⁷ For Currie's parallels to *comitas* theory, see, e.g., Albert A. Ehrenzweig, *A Treatise on the Conflict of Laws* § 122, at 348–349 (1962); see also Christian Joerges, *Zum Funktionswandel des Kollisionsrechts—Die "Governmental Interest Analysis" und die "Krise des Internationalen Privatrechts"* 61, 83, and 154 *et seq.* (1971); Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. Davis L. Rev. 11, 42 *et seq.* (2010).

a *Maritime Internationalism: The Lauritzen Doctrine* The American conflicts revolution broke up traditional structures concerning the private/public law distinction, private rights adjudication, and territoriality. Even though interest analysis acknowledged multistate policies and, accordingly, did not exclude the application of foreign law *ab initio*,¹⁰⁸ *lex fori* prevalence in true-conflict and unprovided-for cases made the consideration of multi-state policies just one among several concerns. Around the same time, at the peak of American conflicts parochialism, Jessup coined the concept of transnationalization. He described maritime conflicts cases as a prime example of what had been “predominantly transnational” since antiquity.¹⁰⁹ And, indeed, the US Supreme Court followed a truly internationalist approach in a number of maritime cases beginning in the 1950s. A concern for the functioning of international commerce and transacting was the basic purpose behind this practical internationalism.

In the 1953 case *Lauritzen v. Larsen*,¹¹⁰ the Supreme Court was tasked with deciding on the application of the Jones Act, a maritime workers’ compensation statute. The case centered on a Danish seaman’s claim against the Danish owner of a vessel on which he had been employed. The seaman had suffered injuries in the course of this employment. The court deemed the Jones Act inapplicable. Instead, the law of the ship’s flag (Danish law) was to be applied. Although the act literally applied to “every seaman,” Justice Jackson pointed out that Congress had used such broad language with the understanding that courts would read it to accommodate US interests with those of other countries in light of international legal principles. International maritime law was a universally acknowledged system of regulating international maritime activities:

It 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 designed to foster amicable and workable commercial relations.¹¹¹

The decision formally entailed choice-of-law determination,¹¹² yet defied both contemporary vested-rights theory and interest analysis. Repeating

¹⁰⁸ See, e.g., Brainerd Currie, *The Disinterested Third State*, 28 *Law & Contemp. Probs.* 754, 757 *et seq.* (1963); David F. Cavers, *The Choice-of-Law Process* 120–121 (1965); Luther L. McDougal III, *Comprehensive Interest Analysis versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 *UCLA L. Rev.* 439, 448–449 (1979); Joseph William Singer, *Real Conflicts*, 69 *B.U. L. Rev.* 1, 47 *et seq.* (1989).

¹⁰⁹ Philip C. Jessup, *Transnational Law (Storrs Lectures on Jurisprudence)* 109–110 (1956).

¹¹⁰ *Lauritzen v. Larsen*, 345 U.S. 571 (1953). ¹¹¹ *Id.* at 582.

¹¹² Maier, however, characterizes *Lauritzen* and *Romero* (see *infra* p. 412–413) as transnational regulatory cases. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An*

the oft-enunciated dichotomy of public and private international law, the court rejected a narrowly nationalistic and territorial approach in favor of a systemic analysis. “[C]onsiderations of comity, reciprocity and long-range interests”¹¹³ dominated the court’s argument.

Similar regard to the “legitimate concern of the international community” was paid a few years later in *Romero v. International Terminal Operating Co.*¹¹⁴ Again, the court refused to apply the Jones Act, this time to a claim brought by a Spanish seaman on a Spanish-flagged ship owned by a Spanish corporation (even though the injury had occurred in a US port). The *Romero* reasoning made it clear that the court would not undertake a comparative weighing of nation-state interests—instead, the aim was to uphold a reciprocally fair system of international regulation:

[W]e must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community. These principles do not depend upon a mechanical application of a doctrine like that of *lex loci delicti commissi*. The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations.¹¹⁵

Again, the court’s reasons were devoid of what the contemporary approach of interest analysis demanded.¹¹⁶ Instead, the court established a conflicts resolution paradigm focused on an entirety of international interests.¹¹⁷ Nevertheless it is important to note (since that would soon

Intersection between Public and Private International Law, 76 Am. J. Int’l L. 280, 303–304 (1982). Applying Maier’s own definition and distinction between choice of law and regulatory law, however, leads to a different conclusion: both disputes were about private parties’ rights and obligations (i.e., interests) in tort suits. Correspondingly, the Supreme Court used choice-of-law language. See *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953) (“We therefore review the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim.”). See also Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 195–196 and 207 (interpreting the issue as a choice-of-law problem).

¹¹³ *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953).

¹¹⁴ *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

¹¹⁵ *Id.* at 382–383.

¹¹⁶ Cf. also Brainerd Currie, *Selected Essays on the Conflict of Laws*, ch. 7: *The Silver Oar and All That: A Study of the Romero Case*, 361, 364, 366–367 and *passim* (1963) (describing both cases as textbook illustrations of how to analyze choice-of-law problems after having discarded traditional theory); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 196.

¹¹⁷ This point was also explained in *M/S Bremen v. Zapata Off-Shore Co.* The majority emphasized the aim of supporting an efficient international system of transacting. An oft-cited passage of the decision reads: “The expansion of American business and

change) that the court's concerns were still founded on the idea of state-promulgated policies and interests. In other words, the court maintained the model of a community of nation-states and a resolution of conflicts with regard to what different national policy makers considered important.

b Savigny Diluted: A Theory of Separate Attachment Around the same time, a similar approach evolved in Europe. As we have seen, civil law conflicts doctrine does not subject issues of public, economic, or regulatory law to choice-of-law mechanics. Usually, forum law applies. But the dissolution of the private/public law dichotomy called this practice into question.¹¹⁸

An early strand of theory challenging this inconsistency was enunciated by Konrad Zweigert, Karl Neumayer, and Wilhelm Wengler. It became known as the theory of separate attachment or special connection theory (*Sonderanknüpfung* or *lois d'application immédiate*).¹¹⁹ While many variants of this theory exist,¹²⁰ they all share the technique of implementing universal policies in national law. The theory of separate attachment largely rejects the presumption that foreign public law must not be applied in a domestic forum.¹²¹ Nonetheless, the application of foreign

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." See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). For similar language, see *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–517 (1974).

¹¹⁸ See *supra* p. 384 *et seq.*

¹¹⁹ See, e.g., Wilhelm Wengler, *Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht*, 54 ZVglRWiss 168 (1941); Konrad Zweigert, *Nichterfüllung auf Grund ausländischer Leistungsverbote*, 14 RabelsZ 283 (1942); Karl H. Neumayer, *Die Notgesetzgebung des Wirtschaftsrechts im internationalen Privatrecht*, 35, 44 *et seq.*, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 2 (1958); Konrad Zweigert, *Internationales Privatrecht und öffentliches Recht*, 124, in *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel* (Max Sörensens et al. eds., 1965). For the terminology of "special connection," see also Jürgen Basedow, *The Law of Open Societies—Private Ordering and Public Regulation of International Relations*, *Recueil des Cours* 360 (2012), 1, 330 *et seq.*

¹²⁰ For an overview of scholarly theory and practice, see Walter J. Habscheid, *Territoriale Grenzen der staatlichen Rechtsetzung*, 47, 49 *et seq.*, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 11 (1973); Ivo Schwander, *Lois d'application immédiate, Sonderanknüpfung, IPR-Sachnormen und andere Ausnahmen von der gewöhnlichen Anknüpfung im internationalen Privatrecht* (1975); Karl Kreuzer, *Ausländisches Wirtschaftsrecht vor deutschen Gerichten* 55 *et seq.* (1986).

¹²¹ See, e.g., Walter Rudolf, *Territoriale Grenzen der staatlichen Rechtsetzung*, 7, 37, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 11 (1973); Kurt Lipstein, *Conflict of Public Laws—Visions and Realities*, 357, 357, in *Festschrift für Imre Zajtay* (Ronald H. Graveson et al. eds., 1982); Kurt Siehr, *Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht*, 52 RabelsZ 41, 73 (1988). Most prominently, the Institut de Droit International voted on a corresponding resolution in 1975 (17 ArchVölkR 130,

public or mandatory norms—in modern European Union terms, overriding mandatory provisions—must not contradict the forum state’s interests or its *ordre public*.¹²² In order to avoid such a conflict, Zweigert suggested a distinction: looking at conflicts on a mere case-by-case basis, he explained, would yield a nationalist and possibly parochial approach. While this may be justified in areas where national interests have traditionally prevailed (e.g., family law), it unduly restricts the harmony and uniformity of decision making where no such prevalence exists. In these cases, he instead considered it necessary to identify an internationally acknowledged interest (*international-typisches Interesse*). Depending on the identification of such a global or universal interest conformity, one would decide in favor or against the application of foreign regulatory law. By this means, the handling of such “political” norms would resemble the standard treatment of pure private law collisions in the Savignian system.¹²³

In essence, subjecting both private and public norms to the same model of conflicts mechanics dilutes Savignian mechanics. It also replicates and verifies his prophecy: as Savigny explained, the field of public law constitutes an exception to multilateralism. Hence, “laws of a strictly positive, imperative nature” should be treated differently from private legal norms.¹²⁴ The reason is evident: public law norms were emanations of lawmakers’ regulatory will and were thus to be understood as a class of rules beyond the apolitical regime of private law norms.¹²⁵ At the same time, Savigny expected the category of such norms to shrink and

135 (1976)). For an extensive critique, see F. A. Mann, *Conflict of Laws and Public Law*, 132 *Recueil des Cours* 107 (1971-I).

¹²² Frank Vischer, *Zwingendes Recht und Eingriffsgesetze nach dem schweizerischen IPR-Gesetz*, 53 *RabelsZ* 438, 451–452 (1989); Christian von Bar & Peter Mankowski, *Internationales Privatrecht—vol. I: Allgemeine Lehren* § 4 para. 105 (2nd edn., 2003).

¹²³ Konrad Zweigert, *Nichterfüllung auf Grund ausländischer Leistungsverbote*, 14 *RabelsZ* 283, 291 (1942) (“Dieser Widerspruch [i.e., durch Anwendung des fremden Rechts] kann vermieden werden, weil der international verbreiteten ablehnenden Reaktion auf ausländische Verbotsgesetze eines bestimmten Typs offenbar nicht eigenwillig nationale Interessen zugrunde liegen, sondern international-typische Interessen aller Staaten, in denen die Frage der Anwendung ausländischer Verbotsgesetze zur Sprache kommt. Gelingt es, diese international-typische Interessenlage zu ermitteln, kraft deren irgendein Staat bei der Würdigung eines ausländischen Verbotsgesetzes den Grundsatz der Entscheidungsharmonie zurückstellen, das ausländische Verbotsgesetz als Rechtssatz also nicht berücksichtigen wird, so ist damit die gesuchte Kollisionsnorm für die Anwendung ausländischer Verbotsgesetze gefunden.”).

¹²⁴ See *supra* p. 384 *et seq.*

¹²⁵ Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 349, at 78 (William Guthrie transl., 2nd edn., 1880). For the original text, see Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 349, at 35–36 (1849).

disappear over time. The constant evolution of the international community would eventually dissolve the dichotomy. Members states' legal regimes would grow increasingly similar during the course of international transacting and commerce, and, in the end, a transnational *ordre public* would set a uniform standard of regulation.¹²⁶

As in the US Supreme Court's concept of maritime law, however, despite the universality that was expected to evolve, norm and policy promulgation in separate-attachment theory remained an issue of nation-state politics. The theory's underlying model was still state-community founded. Attachment in accordance with a classification of foreign states as either congenial or alien divides national regimes along the lines of shared socioeconomic and political values.¹²⁷ However, at this point, one may nonetheless be inclined to find the beginning of a dissolution. The perspective no longer seems solely state-centered and political—it is increasingly drawn toward an informal group consensus. Indeed, a more destatized perspective was to take over in judicial practice.

c *Public International Law Osmosis: The Ordre Public International* Internalization of a then new and innovative kind concerned the implementation of public international law in the form of an *ordre public international* in conflicts law.¹²⁸ In principle, the doctrine of *ordre public* is limited to two understandings. It has a negative side, correcting the result of multilateral conflicts rules. Foreign norms found to be incompatible with the national regime's fundamental values will then not be applied. And it has a positive side, embracing foundational rules of the forum that must be applied regardless of what choice of law would actually require.¹²⁹ In addition, however, the doctrine of *ordre public* has tacitly been turned into another rule of the internalization of internationally common policies.

¹²⁶ See *supra* p. 402 *et seq.*

¹²⁷ See Konrad Zweigert, *Internationales Privatrecht und öffentliches Recht*, 124, 131, in *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel* (Max Sörensen et al. 1965). This segmentation had already been described by Franz Kahn in his 1900 report for the Congrès international de droit comparé as a phenomenon of partial internationality (“partielle Internationalität”) of the *ordre public*. See Franz Kahn, *Bedeutung der Rechtsvergleichung mit Bezug auf das internationale Privatrecht*, 491, 501, in *Abhandlungen zum internationalen Privatrecht*, vol. I (Otto Lenel & Hans Lewald eds., 1928).

¹²⁸ Kahn had already explained that the law of nations might sometimes exert an impact on national regimes by requiring minimum consistency with standards of the international community. See Franz Kahn, *Über Inhalt, Natur und Methode des internationalen Privatrechts*, 255, 288 *et seq.*, in *Abhandlungen zum internationalen Privatrecht*, vol. I (Otto Lenel & Hans Lewald eds., 1928) (*id.* at 290: “Dieser wirklich internationale *ordre public* ist überhaupt keine Materie des internationalen Privatrechts, sondern ausschließlich des Völkerrechts.”).

¹²⁹ See, e.g., Paul Lagarde, *Public Policy*, in *International Encyclopedia of Comparative Law*, vol. III, ch.11, sect. 2 (Kurt Lipstein et al. eds., 1994).

A splendid example is the Bundesgerichtshof's 1972 *Nigerian Masks* case, in which the court decided on the validity of a transportation insurance contract for African art. Since the export had violated Nigerian law, the court found the insurance contract invalid. While the decision was based on the German Civil Code's provision on public policy,¹³⁰ the court's interpretation was sensitive to international concerns. It referred to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,¹³¹ despite the fact that Germany had not yet acceded to the treaty at the time of the court's decision. According to the court, the convention illustrated that

the circumvention of such a protective [Nigerian] statute must be regarded as reprehensible; it contradicts the interests of all people in the preservation of their cultural heritage in its original environment, an interest that according to modern standards must be generally respected. Certain basic convictions exist within the community of nations concerning the right of each country to protect its cultural heritage and regarding as reprehensible practices which interfere with this heritage; accordingly these practices must be prevented.¹³²

The court did not directly implement public international law. Rather, it applied forum law as the *lex causae*.¹³³ The court's motivation, however,

¹³⁰ Section 138 German Civil Code (BGB).

¹³¹ United Nations, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1971, in force 24 April 1972, 823 U.N.T.S. 231, 10 ILM (1971), 289. Article 2 of the Convention reads: "1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom. 2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations." Under article 3 of the Convention, "[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto" is defined to "be illicit." Specific obligations of member states to prevent exportation and importation can be found in art. 6 *et seq.* For an extended illustration, see, e.g., Albert Bleckmann, *Sittenwidrigkeit wegen Verstoßes gegen den ordre public international*, 34 ZaöRV 112, 120 *et seq.* (1974).

¹³² BGHZ vol. 59, 82, 85–86 (22 June 1972) (the translation is borrowed from Bernhard Großfeld & C. Paul Rogers, *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law*, 32 I.C.L.Q. 931, 938 (1983)). For further case law, see, e.g., RGZ vol. 108, 241, 243–244 (3 October 1923); RGZ vol. 161, 296, 299–300 (17 June 1939); BGHZ vol. 34, 169, 178 (21 December 1960). For later cases, see, e.g., BGHZ vol. 64, 183—*August Vierzehn* (16 April 1975); BGHZ vol. 69, 295, 298 (29 September 1977); BGHZ vol. 94, 268 (8 May 1985).

¹³³ Kurt Siehr, *Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht*, 52 *RebelsZ* 41, 79 (1988).

was not to prevent a breach of national law.¹³⁴ Nor was it to protect a specifically domestic interest.¹³⁵ Instead, the court took an internationalist perspective, allowing public international law to enter the national regime and thus acknowledging an international *ordre public*.¹³⁶ Courts in other jurisdictions have similarly adjudicated in light of the comity of nations.¹³⁷ In this regard, *Nigerian Masks* represents another step toward the truly universal normativity of transnational law. The sovereign nation-state and its internal political process may still form the foundation of “internationalism.” After all, it is the “community of nations” that determines what is part of the *ordre public international*. Yet reference to the “interests of all people” is all too evident. This is an aspect of the global legal order that lies beyond the nation-state paradigm. And this destatization took over only a few years later in scholarly attempts to conceive of a non-state-founded model of transnationalization.

3 Turn of the Century: The Unearthly Detachment of Transnationalization

Recent decades have witnessed a large array of innovative attempts to reconceptualize conflicts theory and choice of law. However, none of these attempts have proved ideal, for breaking the chains of established theory and practice generally leaves a void that cannot be filled swiftly, easily, and with guidelines that guarantee clarity and workability. Many deficits of recent approaches are well known and need not be explored here. One aspect in particular calls our attention: with the modern-day dissolution of the Westphalian state, as transnationalists argue, global and community-centered norms, rights, and policies have replaced or are about to replace state-founded political processes. In what can be seen as a reinterpretation of the Savignian world view on a *ius cosmopolitanicum*, liberal regimes of private law and individual rights have become detached from their former foundations on state sovereignty and governance. With

¹³⁴ For a different opinion, see, e.g., Kirsten Anderegg, *Ausländische Eingriffsnormen im internationalen Vertragsrecht* 169 et seq. (1989); Christian von Bar & Peter Mankowski, *Internationales Privatrecht—vol. I: Allgemeine Lehren* § 4 para. 129 (2nd edn., 2003).

¹³⁵ Daniel Busse, *Die Berücksichtigung ausländischer „Eingriffsnormen“ durch die deutsche Rechtsprechung*, 95 ZVglRWiss 386, 406 (1996).

¹³⁶ Albert Bleckmann, *Sittenwidrigkeit wegen Verstoßes gegen den ordre public international*, 34 ZaöRV 112, 113, 124 et seq. (1974). For an extensive discussion of the international *ordre public*, see Günther Jaenicke, *Zur Frage des internationalen ordre public*, 77, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 7 (1967); Rudolf Wiethölter, *Zur Frage des internationalen ordre public*, 133, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 7 (1967) (conflict of laws in *statu nascendi*).

¹³⁷ See, e.g., *Regazzoni v. KC Sethia (1944) Ltd.* [1958] A.C. 301, 318–319; *Foster v. Driscoll and Others* [1929] 1 K.B. 470; *De Wut v. Hendricks* [1824] 2 Bing. 314, 315 et seq., 130 E.R. 326.

this new paradigm, a quest for super-values has begun. These super-values are supposed to substitute traditional mechanisms of civilizing international conflicts by giving regard to principles of international law. In other words, these values—as protagonists of the new transnational legal order suggest—provide the metric and standard to resolve international norm conflicts. From the plethora of scholarly voices, a few are particularly illustrative for the challenges that exist. Next, I will examine three examples, starting with a more traditional model of nation-state policy analysis and its extension into law and economics, and ending with a look at the large strand of scholarship in global legal pluralist theory.

a The Odyssey of Interest Analysis: Currie's Game-Theoretical Return to Savigny The basic difference between the Savignian system of choice of law and Currie's interest analysis is the treatment of state policies. Interest analysis is politicized—it accords ultimate regard to the policies involved, notably those of the forum state. Yet there are voices in post-Currian scholarship that, while still adhering to policy analysis, have again depoliticized conflicts law through the back door. William Baxter's approach and its advancement by Larry Kramer are one example of a more rule-based, almost neo-formalistic approach. Their suggestions illustrate the conundrum presented by the quest for an alternative to the Savignian system.¹³⁸

Baxter's analysis of US conflicts law in the 1960s and his suggestion for a modified interest analysis became known as the comparative-impairment approach.¹³⁹ He largely followed Currie's interest analysis by looking at governmental interests and classifying their conflicts as either "true" or "false." Since in false conflicts, only one state actually had an interest in the application of its law, there were no conflicting policies to be reconciled, and the interested state's law could be applied. The situation was different for true conflicts and "unprovided for" cases. Currie had suggested applying forum law in such cases, for whenever the forum state had an actual interest in a case's outcome, application of forum law would avoid super-value judgments that domestic judges were neither qualified nor authorized to make.¹⁴⁰ This is where Baxter's criticism started. He

¹³⁸ One must be aware of the fact that, as Friedrich Juenger explained, "[t]here are almost as many approaches as there are legal writers" (see Friedrich K. Juenger, *General Course on Private International Law*, 193 *Recueil des Cours* 119, 219 (1985-IV)). I will thus focus on the most illustrative examples.

¹³⁹ William F. Baxter, *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1 (1963).

¹⁴⁰ In cases where none of the states involved have an actual stake in the outcome, forum law should also apply, mainly for reasons of practicability. See, e.g., Brainerd Currie, *Selected Essays on the Conflict of Laws*, ch. 2: *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 76 *et seq.*, ch. 4: *Notes on Methods and Objectives in the Conflict of Laws*, 177,

rejected a simple interest analysis, considering its results to be arbitrary.¹⁴¹ Baxter instead suggested maximizing utility on the basis of simulated negotiations between the jurisdictions involved. Essentially, this meant applying the law of the state whose policy would be most seriously impaired by nonapplication. Unlike Currie, therefore, Baxter ultimately accepted the challenge of *weighing* the conflicting policies at stake.¹⁴² And this was what made finding a substitute for Currie's super-value rule of *lex fori* preference necessary. He found it in a process-oriented model: if states could negotiate each case, they would forfeit less important domestic concerns for the sake of more important interests. This "policy trading," as Baxter posited, would result in an optimal compromise on the enforcement of different legal purposes.¹⁴³

This last aspect highlights the game-theoretical nature of Baxter's approach. Parallels to the traditional doctrine of international comity are obvious. Just as game theory in choice of law deals with optimization (whether of individual interests or of state policies), the doctrine of comity was initially designed to foster the utility and convenience of international transacting and commerce.¹⁴⁴ In addition, this illustrates that Baxter's exploration of nation-state policies and their hierarchy aimed for a long-term equilibrium of maximum utility for all actors. In this regard, his model actually provided for a conceptual framework necessary for an international order to evolve.¹⁴⁵ The idea of a common law of nations, as conceived of by Savigny, loomed again.¹⁴⁶

181 *et seq.*, and ch. 5: *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 188, 188 *et seq.* (1963).

¹⁴¹ William F. Baxter, *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1, 9, 19 (1963).

¹⁴² Albeit only in the form of comparing the loss ensuing from their hypothetical impairment. See Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, *Conflict of Laws* § 2.9, 33–34 (5th edn., 2010).

¹⁴³ See William F. Baxter, *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1, 10 *et seq.*, 18 (1963); see also Larry Kramer, *Rethinking Choice of Law*, 90 *Colum. L. Rev.* 277, 315 *et seq.* (1990).

¹⁴⁴ See also Lea Brilmayer, *Conflict of Laws: Foundations and Future Directions* 157–158 (1991) ("What makes the game theory literature so helpful is that it illustrates the possibility of developing rational strategies that achieve better results through cooperation than through short-run pursuit of selfish gains. Even in a situation where there is no authoritative enforcer of choice of law rules, states may in some circumstances be able to do significantly better in achieving their own goals if they act with awareness of the goals they share with others. In older choice of law cases, this point was intuitively described in terms of comity and reciprocity.").

¹⁴⁵ Quite differently, Currie expressly rejected inclusion of multistate interests—in his words, policies of "deliberate altruism"—into his equation. See, e.g., Brainerd Currie, *Selected Essays on the Conflict of Laws* 616–617 (1963).

¹⁴⁶ For the process orientation of international comity, see Tim W. Dornis, *Comity*, in *Encyclopedia of Private International Law* (Jürgen Basedow et al. eds., forthcoming 2017).

This neo-traditional model has been further developed in recent decades, as extensions of game theory in choice of law have eliminated the state and its political process from the ledger. Kramer has undertaken such a modification of Baxter's model, with the primary aim of achieving more practicability. In essence, he agrees with Baxter that there is no general theory of the "better law" that could be employed to resolve conflicts.¹⁴⁷ Since states are equal sovereigns, true conflicts will always constitute situations where at least two equally legitimate solutions can be found.¹⁴⁸ To escape this conundrum, Kramer suggests adjudicating on the basis of a hypothetical multistate agreement. He formulates canons of construction reflecting the kind of compromises that equal sovereign states negotiating multistate conflicts would be likely to make.¹⁴⁹ As he explains, the ideal solution to conflicts problems is always a negotiated compromise. Courts confronted with choice-of-law issues should thus ask what lawmakers would likely have achieved from a multistate agreement.¹⁵⁰

Both Baxter's theory and Kramer's extension still formally reject genuine super-value judgments.¹⁵¹ Yet Kramer goes one step further, bringing interest analysis almost back to where it started. He describes conflicts as encompassing the prisoner's dilemma: if a state decides to yield to another state's interests or to a multistate concern, reciprocity is not guaranteed. Indeed, a state might actually be more successful in advancing its own policies if it unilaterally applies forum law.¹⁵² In order to break this vicious circle of nonreciprocity, Kramer counsels states to apply a common canon of interpretation rules. Mutual application of

¹⁴⁷ Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 339 (1990) ("[T]here is no theory of 'conflicts justice' against which courts can measure the conflicting laws of different states."). See also Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. Rev. 979, 1015 *et seq.* (1991); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 221 *et seq.*

¹⁴⁸ See, e.g., Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 280 (1990); Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 Mich. L. Rev. 2134, 2140 (1991).

¹⁴⁹ Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 318 *et seq.* (1990); Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 Mich. L. Rev. 2134, 2140–2141 (1991).

¹⁵⁰ Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 315–316 (1990); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 218.

¹⁵¹ Both theories are largely founded on the concept of states within a federation. But the assumption of states being equal sovereigns with equivalent policies is not unlike scenarios of international conflicts. As Kramer submits, a general condition of anarchy exists among both federal states and nation-states. There is no source of principles to resolve the regulatory conflict. Even the US Constitution, as Kramer explains, is devoid of a conflicts resolution mechanism. See Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 339 n. 223 (1990).

¹⁵² For an extensive discussion, see *id.* at 339 *et seq.*, 342.

the canon would help avoid the dilemma. Since all states must repeatedly decide under identical conflicts rules, they would, over time, discover the benefits of cooperation. A uniform canon would secure the advancement of multistate policies, reduce forum shopping, and provide greater assurance that a state's law will be applied in those cases that the state cares most about.¹⁵³ Among the canon rules he suggests are, inter alia, rules of party choice for contract conflicts, of the *favor negotii*,¹⁵⁴ and of applying the law upon which the parties to a transaction have actually relied.¹⁵⁵

Ultimately, and perhaps unintendedly, Kramer's approach comes full circle in terms of doctrinal history. He starts on the basis of interest analysis by accepting the relevance of governmental interests. This can be duly called a revolutionist starting point. In the end, however, he arrives at a concept that essentially mirrors Savigny's system of an international common law of nations. This common law of the international community of nation-states, as we have seen, not only sought to replicate international agreement among sovereign entities but also aimed at a harmony of decision making by providing for the same international conflicts rules everywhere.¹⁵⁶ Like the Savignian system, conflicts resolution under Kramer's canons of construction eventually invalidates regard for public policy and state interests through reference to more technical and content-neutral rules. By this means, Kramer makes legal certainty, predictability, and harmony of decision making on the interstate and international level the basis for a reconceptualized choice-of-law theory.¹⁵⁷ Savigny would surely have concurred.

b Law and Economics: The Super-Value of Welfare Maximization

The destatization of choice of law did not end with Kramer. In fact, the technique of state-policy substitution has evolved from simulated negotiations and canons of interpretation to the computation and maximization of agglomerated individual economic welfare. The most prominent strand of conflicts theory in this regard was suggested by Andrew Guzman

¹⁵³ *Id.* at 314 *et seq.* and 341 *et seq.*; see also Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 Mich. L. Rev. 2134, 2146 *et seq.* (1991) (suggesting a choice-of-law code by a decentralized decision-making body); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 222.

¹⁵⁴ See Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 329 *et seq.* (1990).

¹⁵⁵ See *id.* at 336 *et seq.*

¹⁵⁶ Friedrich Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes—A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* § 360, at 137 (William Guthrie transl., 2nd edn. 1880). For the original text, see Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. VIII § 360, at 114–115 (1849). See also *id.* at § 348, at 28 and 30–31.

¹⁵⁷ Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 320, 322, and 330 (1990).

in 2002.¹⁵⁸ At its core, Baxter's model was an early formulation of law and economics theory.¹⁵⁹ Guzman has brought these modest beginnings to an interim peak.

Above all, Guzman's model aims to maximize global welfare.¹⁶⁰ As he explains, choice of law determines the applicable substantive law and therefore also "regulates" at the international level.¹⁶¹ Choice of law must not be understood as a system of content-neutral and outcome-indifferent mechanics. On the contrary, the meta-regulatory character of conflicts law requires that particular regard be given to the economic interests involved. And even though, in this regard, Guzman's theory actually resembles traditional interest analysis, it departs significantly from Currie's approach. First, Guzman bases his concept on the welfare of private individuals, not on the interests of states.¹⁶² In addition, he concretely connects private individuals' welfare with the notion of effects. When a certain conduct has no effect on individuals within a certain state, there is no reason to regulate this conduct. Conversely, any effect on residents within a jurisdiction generally provides an interest of the respective state in regulating the conduct at issue.¹⁶³ As Guzman assumes, however, any state will usually pursue its own self-interest. This means that it will rationally aim at a maximum benefit for its residents. Its choice-

¹⁵⁸ Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883 (2002).

¹⁵⁹ Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 Vand. J. Transnat'l L. 975, 1017 (1994); William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 Stan. L. Rev. 1011, 1014 (1999).

¹⁶⁰ Similar approaches have been suggested. Luther L. McDougal III is one example that goes beyond contemporary substantive law approaches of searching for the "better law." McDougal liberates courts from the duty to promulgate new rules from among the legal regimes involved in a conflict. Instead, he describes the optimum rule as the "one that best promotes net aggregate long-term common interests." See Luther McDougal III, *Toward the Application of the Best Rule of Law in Choice of Law Cases*, 35 Mercer L. Rev. 483, 483–484 (1984). Regarding the interests a court should take into account, he explains that it should be "the interests asserted by the decisionmakers of all significantly affected states, any interests decisionmakers of the various states have asserted concerning the resolution of transstate cases, interests of the significantly affected states reflected in applicable community policies, and multistate interests of the collective community of states." See *id.* at 484. Moreover, McDougal's approach also contains an element of transnationalization: even though a single conflicts decision may not significantly influence collective community interests, the "whole flow of decisions over time does have substantial effects on collective community value processes." See *id.* at 496–497. For the maximization of global welfare, see also Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 Vand. J. Transnat'l L. 975, 1032 *et seq.* (1994).

¹⁶¹ Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883, 885 (2002).

¹⁶² Notions such as national interest and comity are regarded only if and to the extent that they affect the overall assessment of welfare. *Id.* at 894.

¹⁶³ *Id.* at 894–895.

of-law rules will thus be chosen with an eye toward an internalization of benefits and an externalization of costs. In other words, a rational law-maker, when determining the applicable law, will take into account only the effects on its own residents and will ignore effects on nonresidents.¹⁶⁴

This potential conflict of interests on behalf of national lawmakers makes conflicts law and choice of law an unruly horse. The challenge in constructing an efficient and welfare-maximizing system of conflicts law is thus to “align national interests with those of the global community.”¹⁶⁵ Since the global-welfare effect must consider all individual effects resulting worldwide, national governments must be encouraged—against their rational self-interest—to internalize costs instead of externalizing negative effects to foreigners.¹⁶⁶ Ultimately, this implies that an ideal rule of conflicts determination permits transactions only when their impact on global welfare is positive. Vice versa, it will prevent a transaction when its net effect on global welfare is negative.

In essence, this concept of welfare-enhancement sits on well-known foundations. Huber, Story, and Savigny believed that international welfare was founded on nation-states’ unimpeded and consensual transacting. Ever since Adam Smith, liberalist theory has suggested that the market and its mechanism should serve as the ultimate and determinative institution for legitimizing the allocation and distribution of wealth.¹⁶⁷ With Guzman’s efficiency-based approach, belief in the superiority of an unhindered market mechanism is projected into conflicts resolution. The individual’s freedom of transacting provides the starting point and analytical tool for liberalizing international relations.¹⁶⁸ For conflicts resolution theory, this means that nation-state policies, rules of public international law, and the doctrine of international comity have been substituted by economics. And indeed, Guzman’s approach comes closer to a universal theory than those of many of his predecessors. Looking at global welfare directs the decision maker’s perspective away from potential national or even parochial biases and other imprecisions in interest balancing or comparative impairment analysis. Yet making efficiency the guideline imports defects of its own kind. A theory of welfare maximization through choice of law reflects general deficits of law and economics

¹⁶⁴ *Id.* at 899. ¹⁶⁵ *Id.* at 886. ¹⁶⁶ *Id.* at 885 n. 5.

¹⁶⁷ For European and German legal thought, see Christian Joerges, *Die klassische Konzeption des internationalen Privatrechts und das Recht des unlauteren Wettbewerbs*, 36 *RabelsZ* 421, 432 *et seq.* (1972); for the United States, see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1423, 1424 (1982).

¹⁶⁸ See Christian Joerges, *Die klassische Konzeption des internationalen Privatrechts und das Recht des unlauteren Wettbewerbs*, 36 *RabelsZ* 421, 437 (1972); Christian Joerges, *Vorüberlegungen zu einer Theorie des internationalen Wirtschaftsrechts*, 43 *RabelsZ* 6, 11 *et seq.* (1979).

theory.¹⁶⁹ Although my focus here is not on the utility of efficiency as an analytical tool *in toto*,¹⁷⁰ one aspect is important: what is most problematic for Guzman's model is the unfeasibility of comparing utility and welfare at the interindividual level across different jurisdictions. Even if we are willing to acknowledge economic effects and efficiency as a general metric, a cross-border or global utility comparison is still—and may remain for many more decades—unfeasible. Computing costs across countries and their populations must take national socioeconomic differences into account. But there is no appropriate index or metric for comparing or measuring different nations' welfare.¹⁷¹ One problematic consequence is inevitable: since different states' (and their residents') welfare differs, a simple nominal comparison of the respective welfare status will favor wealthy states over poorer ones.¹⁷² As long as there is no universally acknowledged metric, disparities cannot be resolved.¹⁷³

Not surprisingly, therefore, Guzman must conjure a hypothetical "single benevolent and well-informed global policymaker"¹⁷⁴ to resolve international conflicts. Under his model, individual interests are still "administered" in national systems. The reallocation of gains and losses requires a corresponding political solution. Like his predecessors, therefore, he must acknowledge that nation-states function as the definitive policy makers. Ultimately, Guzman must even recur to international cooperation as a method of conflicts resolution when he explains that only state-to-state negotiations will yield balanced results under a

¹⁶⁹ The question "Why efficiency?" has been extensively debated elsewhere. See, e.g., Ronald M. Dworkin, *Why Efficiency?*, 8 Hofstra L. Rev. 563 (1980); Horst Eidenmüller, *Effizienz als Rechtsprinzip—Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts* 169 *et seq.* (3rd edn., 2005) (with further references).

¹⁷⁰ For an extensive analysis, see Gisela Rühl, *Statut und Effizienz—Ökonomische Grundlagen des Internationalen Privatrechts* 146 *et seq.*, and *passim* (2011).

¹⁷¹ Guzman concedes this only in passing. See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883, 898 n. 60 (2002); for an instructive analysis, see Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 Harv. L. Rev. 1137, 1139 *et seq.* (2007).

¹⁷² Law and economics theory has explained problems of diminishing marginal utility in the context of comparing different individuals' private utility. The same problem arises in the international context. Similarly, an assessment of welfare that considers the situation only at the time of decision making will neglect effects that occur over time.

¹⁷³ This has been pointed out most clearly in the context of internationally uniform antitrust policies. See Eleanor M. Fox, *Trade, Competition, and Intellectual Property—TRIPS and its Antitrust Counterparts*, 29 Vand. J. Transnat'l L. 481, 499 (1996) ("Most [less developed countries] have no interest in following a muse of increased aggregate wealth in the world when their own people lag at the low end of wealth and opportunity."); see also Kazuaki Kagami, *The Systematic Choice of Legal Rules for Private International Law: An Economic Approach*, 15, 23, in *An Economic Analysis of Private International Law* (Jürgen Basedow & Toshiyuki Kono eds., 2006).

¹⁷⁴ Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883, 898 (2002).

do-ut-des mechanism.¹⁷⁵ Hence, even though Guzman starts with the express assumption that an efficiency-based choice of law would “abandon” the “traditional and almost universal reliance on notions of sovereignty,”¹⁷⁶ his welfare analysis does not do away with the paradigm. On the contrary, aligning national interests with those of the global community stands at the heart of global-welfare theory. Accordingly, nation-state policy making is still front and center.

c *Global Legal Pluralism: Fragmentation, Functionality, and Universality*
This last stand of the nation-state’s sovereign powers has also eroded. Since the 1990s, attempts to retheorize the nation-state paradigm and to reinvent the concept of jurisdiction in an era of globalization have blossomed.¹⁷⁷ Common to all approaches is the alteration of normativity in conflicts resolution. Concepts of nation-state sovereignty and of a world that consists of a segmented checkerboard of regulatory units have given way to a theory of transnational legal orders. As we have just seen, all critics of traditional choice of law have ultimately returned to the idea that interstate agreements and their simulation are determinative. More recent concepts, however, have taken the destatization of conflicts law and choice of law, as well as the absolutization of universality, to an extreme. One variant of these theories in the tradition of socio-legal studies is “global legal pluralism” as suggested most prominently by Paul Schiff Berman.¹⁷⁸ His model seeks to change the system of

¹⁷⁵ *Id.* at 932 *et seq.*; see also Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 Va. J. Int’l L. 1, 57 *et seq.*, 66 *et seq.* (2002); Eleanor M. Fox, *Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked*, 42 N.Y.U. J. Int’l L. & Pol. 159, 169 and *passim* (2009); Edward T. Swaine, *Cooperation, Comity, and Competition Policy: United States*, 1, 18 *et seq.*, in *Cooperation, Comity, and Competition Policy* (Andrew T. Guzman ed., 2010).

¹⁷⁶ Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883, 884 (2002).

¹⁷⁷ See, e.g., Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 Mich. L. Rev. 843 (1999); Saskia Sassen, *Territory and Territoriality in the Global Economy*, 15 Int’l Soc. 372 (2000); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. Pa. L. Rev. 311 (2002); Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2548 and 2555 (2005); for an overview, see, e.g., Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism*, 21 Transnat’l L. & Contemp. Probs. 305 (2012). For an early and prominent analysis on the issue of “law beyond the state,” see Gunther Teubner (ed.), *Global Law without a State* (1997).

¹⁷⁸ See his comprehensive monograph on the issue: Paul Schiff Berman, *Global Legal Pluralism—A Jurisprudence of Law beyond Borders* (2012). For the earliest description of legal pluralism—albeit not yet much “globalized”—see the German jurist Eugen Ehrlich and his foundations on socio-legal theory in Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (1913), and also Eugen Ehrlich, *Das lebende Recht der Völker der Bukowina*, in *Recht und Wirtschaft* 1 (1912), 273 *et seq.* and 322 *et seq.* (reprinted in *Eugen Ehrlich—Recht und Leben, Gesammelte Schriften zur Rechtsstatsachenforschung und zur Freirechtslehre* (Manfred Rehbinder ed., 1967)).

geographically segmented territories as basic constituents of traditional conflicts resolution into a dynamic model of relationships between different communities (local, national, transnational, international, and cosmopolitan). By this means, Berman disregards the territorial characteristics of disputes. He instead “conceptualize[s] legal jurisdiction in terms of social interactions that are fluid processes, not motionless demarcations frozen in time and space.”¹⁷⁹ He argues that the courts must no longer look at territory or nationality to establish the relevant legal ties for an assertion of jurisdictional authority over transnational processes. The outcome of cross-border conflicts should be determined not by an objectivized “counting of contacts” but by the “normative desirability of conceptualizing the parties before a court as members of the same legal jurisdiction.”¹⁸⁰ Of course, even under Berman’s conception, a “choice” of laws or of relevant norms is still the *a priori* issue in conflicts resolution. But community affiliation—and not the state-centered paradigm of a Westphalian world—now governs the analysis.¹⁸¹

And it is not just with respect to the normative sources that destatization has been advanced. The process of norm promulgation has also been subjected to a new paradigm: not only is the state dissolved as an institution, but norm creation is further detached from the political—and also democratic—processes within national boundaries. This idea has been brought forward, among others, by Gunther Teubner and Andreas Fischer-Lescano.¹⁸² Like Berman, they call for disconnecting conflicts resolution from the political process and establishing a new system of normativity and community affiliation.¹⁸³ Building on Niklas Luhmann’s 1970s theorization of a world society and its sectorial fragmentation, they

¹⁷⁹ Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. Pa. L. Rev. 311, 322, 472 *et seq.* (2002).

¹⁸⁰ *Id.* at 322–323; Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. Pa. L. Rev. 1819, 1822 (2005). For the significance of jurisdictional architecture in creating group statuses, see Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 Mich. L. Rev. 843, 922 *et seq.* (1999).

¹⁸¹ Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. Pa. L. Rev. 1819, 1845, 1857 *et seq.*, 1863 *et seq.* (2005); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal. L. Rev. 1155, 1169 *et seq.* (2007); Paul Schiff Berman, *Towards a Jurisprudence of Hybridity*, 2010 Utah L. Rev. 11.

¹⁸² Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Mich. J. Int’l L. 999, 1012, 1039 and *passim* (2004). For the foundation of Teubner’s conception, see Gunther Teubner, “Global Bukovina”: *Legal Pluralism in the World Society*, 3 *et seq.*, in *Global Law Without a State* (Gunther Teubner ed., 1997).

¹⁸³ See, e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Mich. J. Int’l L. 999, 1012 and *passim* (2004).

propose developing an intersystemic conflicts approach.¹⁸⁴ The only way to overcome the fragmentation of legal structures, they explain, is through a process of networking between the fragments and their separated substantive private law regimes.¹⁸⁵ Of course, with a decentering of politics, there is no single authority that can provide for a hierarchy among legal norms and systems. Norm creation and promulgation will thus become an issue of re-relating the splintered sectorial regimes.

Teubner and Fischer-Lescano exemplify their model with an example from international copyright conflicts. Similar to Graeme B. Dinwoodie and Berman, they suggest that conflicts resolution should choose among functional regimes, not national laws.¹⁸⁶ Ultimately, this will result in the development of “substantive rules through the law of inter-regime-conflicts itself.”¹⁸⁷ As a result, ad hoc norm promulgation will create a transnational body of law beyond “territorial, organizational and institutional legal spheres.”¹⁸⁸ One section of their explanation in particular warrants quotation:

[T]he goal would be a strange legal Esperanto of regimes within which national, international and trans-national legal acts clamor for attention. Concerned courts—national courts and transnational instances of conflict resolution—would be required to meet the challenges of creating transnational substantive norms out of this chaos.¹⁸⁹

I have already addressed the practical obstacles to such a “legal Esperanto,”¹⁹⁰ which, at its core, is not even a new idea. Instead, let us recall Jessup’s discussion of transnational norm hybridity:

There is no inherent reason why a judicial tribunal, whether national or international, should not be authorized to choose from all of these bodies of law the rule considered to be most in conformity with reason and justice for the solution of any particular controversy.¹⁹¹

¹⁸⁴ *Id.* at 1000. For Luhmann’s world society, see Niklas Luhmann, *Die Weltgesellschaft*, 57 *Archiv für Rechts- und Sozialphilosophie* 1 (1971).

¹⁸⁵ Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *Mich. J. Int’l L.* 999, 1017 (2004). For the fundamentals of a networked world order, see Anne-Marie Slaughter, *A New World Order* 15 *et seq.*, and *passim* (2004).

¹⁸⁶ Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *Mich. J. Int’l L.* 999, 1021 (2004). For Dinwoodie’s substantive law theory, see *supra* p. 258 *et seq.*

¹⁸⁷ Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *Mich. J. Int’l L.* 999, 1022 (2004).

¹⁸⁸ *Id.* at 1022–1023. ¹⁸⁹ *Id.* ¹⁹⁰ See *supra* p. 265–268.

¹⁹¹ Philip C. Jessup, *Transnational Law (Storrs Lectures on Jurisprudence)* 2–3 and 106 (1956).

The concept is not too different from Zitelmann's 1888 prophesy, which drew a similar allegoric comparison between law and language.¹⁹² As Zitelmann argued, whenever socioeconomic circumstances are similar, legal norms should and will comply.¹⁹³ In the same vein, just to illustrate that these ideas are far from new, John Henry Merryman described the homogenization of culture and growing international exchanges as providing an impetus for the natural convergence of legal systems.¹⁹⁴ In sum, under all theories of global legal pluralism, both classic and modern, functionality is paramount: socioeconomic context determines norm structure and content.¹⁹⁵

But the extension of concepts for normative sources and their creation is not the only alteration of traditional conflicts and choice-of-law theory that has been suggested. While Berman, Teubner, and Fischer-Lescano are still critical of the idea of a completely universal and uniform global legal order,¹⁹⁶ others are not. One such approach suggesting the evolution of a truly uniform order has been put forth by Anne-Marie Slaughter in the larger context of a "new world order."¹⁹⁷ Like Berman, she argues that judicial comity is what the global community of courts exercises in its dialogue on transnational conflicts resolution. She expects that judges will increasingly feel as "participants in the same dispute resolution system."¹⁹⁸ This cooperation is founded on "common principles and an awareness of a common enterprise that will help make simple participation in transnational litigation into an engine of common identity and

¹⁹² He explained that content may vary in both language and law but that overall structures of human expression would always be the same. See Ernst Zitelmann, *Die Möglichkeit eines Weltrechts* 9–10 (1888). For another allegory of language and (transnational) law, see Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 *Stan. J. Int'l L.* 65, 67 and 76 (1996).

¹⁹³ Ernst Zitelmann, *Die Möglichkeit eines Weltrechts* 19 (1888).

¹⁹⁴ See John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 *Stan. J. Int'l L.* 357, 365 *et seq.* (1981).

¹⁹⁵ For a lucid illustration of a new global legal order in terms of culture (production, consumption, entertainment, and so on), see Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 *Stan. J. Int'l L.* 347 (2001).

¹⁹⁶ See, e.g., Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 *U. Pa. L. Rev.* 1819, 1860 *et seq.* (2005); Paul Schiff Berman, *Global Legal Pluralism*, 80 *S. Cal. L. Rev.* 1155, 1180 *et seq.*, 1192 (2007); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *Mich. J. Int'l L.* 999, 1004, 1007–1008 (2004).

¹⁹⁷ See Anne-Marie Slaughter, *A New World Order* (2004).

¹⁹⁸ Anne-Marie Slaughter, *A Global Community of Courts*, 44 *Harv. Int'l L.J.* 191, 193–194 (2003); see also chapter 2 ("Judges: Constructing a Global Legal System") in Anne-Marie Slaughter, *A New World Order* 65 *et seq.* (2004). For procedural aspects of the emerging international judicial system, see, e.g., Jenny S. Martinez, *Towards an International Judicial System*, 56 *Stan. L. Rev.* 429 (2003).

community.”¹⁹⁹ In the tradition of universalist theories, Slaughter focuses on transnational uniformity and consensus. The emergence of judicial comity and the creation of a “global legal system,”²⁰⁰ she explains, should result from the repetitive process of norm promulgation, approximation, and transnationalization. Ultimately, she expects this process to “meld[] the once distinct planes of national and international law.”²⁰¹ In this regard, her concept corresponds to what Harold Hongju Koh has characterized as the transnational legal process:

Transnational legal process describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.²⁰²

More concretely, Koh expects transnational legal norms to materialize “through repeated cycles of ‘interaction-interpretation-internalization.’” By this means, he prophesizes, “interpretations of applicable global norms are eventually internalized into states’ domestic regimes.”²⁰³ His exemplification using computer imagery is particularly illustrative: the repetitive “downloading” of international norms to the national level, along with the “uploading” of national norms to the international sphere, will ultimately generate wide-ranging homogeneity among formerly autonomous and heterogeneous domestic laws.²⁰⁴

Both Koh and Slaughter represent a strand of theory that extends the idea of hybrid norms to incorporate fluidity and norm blending—with an ultimate creation of global uniformity. The constant evolution of norms, as demonstrated by the international human rights framework, is expected to result in “public law concepts . . . , rooted in shared national norms and emerging international norms, that have similar or identical

¹⁹⁹ Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int’l L.J. 191, 196 (2003). For a critical assessment of the “global judicial dialogue” on empirical grounds, see David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 Wash. L. Rev. 523 (2011).

²⁰⁰ Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int’l L.J. 191, 218 (2003).

²⁰¹ *Id.* at 196.

²⁰² Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 183–184 (1996); see also Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn. St. Int’l L. Rev. 745, 746 (2006).

²⁰³ Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn. St. Int’l L. Rev. 745, 747 (2006).

²⁰⁴ For the computer imagery, see *id.* at 745–746. See also Mayo Moran, *An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law*, 661, 680, in *Torture as Tort* (C. Scott ed., 2001).

meaning in every national system.”²⁰⁵ Mayo Moran has described this development as a shifting of normativity from the domestic to the supra-national sphere. While domestic law still provides the machinery for enforcement, normativity becomes an issue of international law.²⁰⁶ The hybridity, interpenetration, and convergence of different orders will then automatically suggest jettisoning the traditional method of choosing among different and mutually exclusive regimes of law. Choice of law will disappear, giving way to a cosmopolitan and integrative blend of substantive norms.²⁰⁷ The universality of norms and policies—a true transnational *droit idéal*—is the final stage in a constant game of norm generation and optimization.

While many questions have been left unanswered, a full-fledged critique of cosmopolitanism and pluralist theory is not necessary here.²⁰⁸ The big picture projected by transnational common law is hard to reject for being illogical or inconsistent. Rather, it is the microperspective where problems are manifest. The problem of practicality is particularly important for this inquiry. Applicability is a general problem. How is the domestic judge supposed to contribute to a global legal order if she must cope with the scarcity of time, information, knowledge, and authority?²⁰⁹ Furthermore, more specifically, the problem of a dichotomy

²⁰⁵ Harold Hongju Koh, *The Globalization of Freedom*, 26 Yale J. Int'l L. 305, 306 (2001).

²⁰⁶ Mayo Moran, *An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law*, 661, 668–669, in *Torture as Tort* (C. Scott ed., 2001).

²⁰⁷ *Id.* at 683.

²⁰⁸ One must not be as sarcastic as Kegel when he formulated his 1964 critique of the then-still-young Currian analysis. With regard to the trouble of rejecting innovative theories, however, the situation has not changed much. See Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 Recueil des Cours 91, 206 (1964-II) (“[C]onflicts law is complicated and sensitive. Bold theories are easy to conceive and difficult to reject.”). For a biting modern critique of transnational law and alternative approaches, see Christian von Bar & Peter Mankowski, *Internationales Privatrecht—vol. I: Allgemeine Lehren* § 2 para. 94 (2nd edn., 2003).

²⁰⁹ See *supra* p. 265 *et seq.* See also Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal. L. Rev. 1155, 1196 *et seq.* (2007) (particularly *id.* at 1195: “[A] pluralist framework must always be understood as a middle ground between strict territorialism on the one hand and universalism on the other. The key, therefore, is to try to articulate and maintain a balance between these two poles. As such, successful mechanisms, institutions, or practices will be those that simultaneously celebrate both local variation and international order, and recognize the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange. Of course, actually doing that in difficult cases is a Herculean and perhaps impossible task.” And also *id.* at 1197: “[E]ach of the mechanisms described . . . encounter excruciatingly difficult and probably impossible to resolve problems as to how best to determine when norms of one community should give way to norms of another and when, in contrast, pluralism can be maintained. This sort of line-drawing question can never be resolved definitively or satisfactorily because there is at root level no way to ‘solve’ problems of hybridity; the debates are ongoing.”).

between substance and procedure looms. This has seldom been explained with clarity. But the ultimate step toward a true *Weltrecht* has not yet been taken: the foundations for the legitimacy and authority of transnational norms and policies may have moved beyond the state. But the nation-state continues to serve as the primary repository of processes for litigation and often as the only purveyor of enforcement services. Since national courts still decide the bulk of international conflicts cases, there is hardly a comprehensive system of conflicts resolution covering both substantive norms and policies as well as procedural norms and enforcement structures. This, as the rest of this chapter will show, is a crucial aspect, notably with regard to the extension of a state's regulatory laws to transactions beyond national borders.

III Summary

The nineteenth-century nationalization and codification of national private law and choice of law temporarily isolated nation-states' internal systems of choice of law from the external structures of conflicts resolution—particularly from the law of nations. But this was not the final word. International economic law always cultivated an inherent doctrine of jurisdictional limitations under principles of public international law and comity. Further, the twentieth-century publicization of private international law and the privatization of public international law have brought the quest for universality back to the fore. The paradigm of a transnational common law of conflicts resolution, and—ultimately—the quest for a *Weltrecht* of universal norms and policies are examples of such “new” old ideas. Yet, although widely unnoticed, the modern debate has suppressed an important characteristic of the Huberian, Storyan, and Savignian models. In particular, US theory has undergone a shift toward nation-state dissolution and normative universalism. As is commonly assumed, international consensus and the ensuing universality of norms and policies are the panacea to all jurisdictional issues. In other words, if content is universally agreed on, there will be no more conflicts. But this perspective overlooks one important aspect. It is not just the universality of substantive law that accounts for the functioning of the transnational legal order. The mirror image to substantive law doctrine is its procedural enforcement. This was considered in the works of early theorists. Even though they may not have analyzed issues of enforcement efficiency at length, the requirement that conflicts law and choice of law had to provide for convenience in international transacting and commerce provided for a safeguard mechanism. With the twentieth-century destatization of conflicts law and choice of law, this element of “civilization by comity” got lost. This defect of modern

theory will be the focus of the following sections. As a look at international antitrust conflicts and human rights litigation illustrates, the optimism of universalist transnationalism has given way to a sobering interpretation of international comity that adopts a more balanced rule of jurisdictional self-restraint.

Section 2 Transnationalization Exhausted

For quite some time, courts around the world seemed to follow suit in the apotheosis of substantive law universality. Only recently, however, has the pluralist and transnationalist Camelot begun to disappear—at least to a certain extent. This development is due to a number of reasons. In the United States, it has been explained as a success of isolationist or anti-internationalist tendencies, particularly as an expression of the general discontent with the US judiciary's being the battleground for foreign disputes.²¹⁰ But this is not the only explanation. The phenomenon can—indeed, *must*—also be characterized under a less provocative and politicized lens. Such a more neutral view on the mechanics of international conflicts resolution leads us back to the beginnings of choice of law and conflicts law, when the law of nations, especially the doctrine of international comity, was still used as a civilizing element of international transacting and commerce. There are a number of areas where a tendency of retraction can be found. Two are particularly illustrative and shall therefore serve as *pars pro toto* for the resurrection of moderating instruments in conflicts law. The first is international antitrust law, with its reliance on effects testing and a significant overlap with trademark and unfair competition conflicts doctrine. As a closer analysis highlights, international antitrust law has evolved from an initial concept of almost nonexistent limitations on regulatory jurisdiction all the way to a practice of jurisdictional self-restraint. The second field is international human rights litigation under the rubric of the Alien Tort Statute (ATS). As a sector of international tort doctrine, human rights protection appears to be an issue of individual rights protection and thus nonregulatory. A closer look, however, reveals that this impression is incorrect. Here, too, it is no surprise that recent developments illustrate a trend toward more comity-based self-restraint. Seen in combination, both international antitrust and international tort law thus illustrate a resurrection of the doctrine of

²¹⁰ See, e.g., Vivian Grosswald Curran, *Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co.*, 28 Md. J. Int'l L. 76, 81 (2013); Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 Md. J. Int'l L. 208, 226 *et seq.* (2013).

international comity, notably its instrumental function of civilizing international transacting and commerce.²¹¹

I International Antitrust: A History of Effects, Public International Law, and Comity

Disputes in international economic law are often characterized as transnational regulatory conflicts or transnational regulatory litigation.²¹² This terminology implies that the conflict is of public or regulatory nature (rather than a dispute between private parties). In addition, more recently, it has begun to convey something more. As a result of the increasing approximation of national regimes and the growing harmonization of substantive law policies around the world, the resolution of conflicts between different regimes is deemed an issue of globally uniform regulation.²¹³ Courts adjudicating cases of transnational regulatory litigation seem to act in the interest of an international community, even though their decisions refer to the application of domestic law. This interest, it is contended, is reflected in a global consensus on norms and policies.²¹⁴ Accordingly, as the argument goes, the consolidation of litigation in fora with efficient civil procedure systems fosters the enforcement of universally acknowledged standards.²¹⁵ A rigid adherence to territoriality will only inhibit the benefits of extended domestic jurisdiction.²¹⁶

In this light, the international convergence of policies appears to have led to a new stage of transnationalization—a global system of regulation in the common interest. But the picture is not that simple. Indeed, many sectors of international economic law may be on a path toward convergence. This

²¹¹ In addition, of course, other areas of conflicts law and international regulatory law can be seen as representative for this development. One example is international securities regulation. See, e.g., *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010). For a comprehensive overview on the Supreme Court's more recent handling of these areas, see Stephen Breyer, *The Court and the World—American Law and the New Global Realities* 89–164 (2015).

²¹² See, e.g., Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 Am. J. Int'l L. 280, 283 and 289 (1982).

²¹³ Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 Va. J. Int'l L. 251, 255 (2006).

²¹⁴ This was the plaintiffs' argument in *Empagran* when they pointed out that pricing cartels are condemned under virtually all antitrust regimes around the world. See *Brief for Respondents, F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03–724), 2004 WL 533935 (U.S.), at *47. For a detailed analysis, see *infra* p. 453 *et seq.*

²¹⁵ For a closer analysis of efficient “deterrence” in international antitrust enforcement, see *Brief of Amici Curiae* (by Joseph E. Stiglitz & Peter R. Orszag), *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03–724), 2004 WL 533934, at *8.

²¹⁶ Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 Va. J. Int'l L. 251, 283 (2006).

does not guarantee, however, that the enforcement of universal policies will always maximize global welfare. Nor does it guarantee that national welfare will be enhanced. An overview of the development of antitrust conflicts doctrine illustrates this problem.

A Lotus Isolationism: A Lacuna of Nation-State Sovereignty

The Permanent Court of International Justice's *S.S. Lotus*²¹⁷ decision is central to a theory of limitations regarding state sovereignty under public international law. The case was the starting point for effects testing under public international law. It centered on a French steamer that had collided with a Turkish ship on high seas. The Turkish ship sank, and eight crew members lost their lives. Upon entering the port of Constantinople, one of the French officers was arrested, prosecuted, and convicted of manslaughter under Turkish criminal law. The court had to decide whether the exertion of jurisdiction by Turkish authorities was in accordance with public international law. The judges held in favor of Turkey, finding the country's exercise of jurisdictional powers to fall within the jurisdictional limitations set by international law. Regardless of the debate over the holding,²¹⁸ the court's reasoning has become famous for the theory of international jurisdiction. The decision has been understood as having pronounced a principle of presumptive freedom of state action. Under this principle, there exists no limitation to a state's jurisdictional power; in particular, a state can regulate conduct occurring outside its territory that causes harmful results within.²¹⁹ One passage of the court's decision is well-known:

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

²¹⁷ P.C.I.J. Series A.—No. 10 (7 September 1927), *The Case of the S.S. "Lotus"*.

²¹⁸ For a summary critique, see, e.g., Viktor Bruns, *Völkerrecht als Rechtsordnung I*, 1 ZaöRV 1, 50 *et seq.* (1929); F. A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *Recueil des Cours* 1, 35 (1964-I).

²¹⁹ See, e.g., R. Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 *Brit. Y.B. Int'l L.* 146, 149 (1957); Walter Rudolf, *Territoriale Grenzen der staatlichen Rechtsetzung*, 7, 18, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 11 (1973); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C.C. 1984).

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.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; . . . In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.²²⁰

The practical implications of *Lotus* have been debated ever since. While an overriding consensus still appears to favor the concept of absolute state sovereignty,²²¹ critical voices have challenged unrestricted jurisdictional authority. In general, these critics call such authority into question by referring to public international law's role as the provider of peace and legal certainty. If the international legal order assigns sovereignty rights to its members, as the critics argue, these members can exert their powers only within the confines set by the granting regime.²²² Consensual conflicts resolution and self-restraint are therefore inherent to a system of public international law that is built on the concept of nation-state sovereignty.²²³ But even though critics acknowledge that jurisdictional self-restraint is required, for a long while they could not agree on how to define restrictions.

B General Principles: The *Droit Idéal* of Public International Law

It is broadly acknowledged that, in principle, national choice of law is not limited by any rule of public international law.²²⁴ International economic law, however, is different. There, the scope of nation-state jurisdiction is limited according to certain principles of public international law and international comity. In general terms, a "genuine link" must be found

²²⁰ P.C.I.J. Series A.—No. 10 (7 September 1927), *The Case of the S.S. "Lotus,"* at 19.

²²¹ See, e.g., Harold G. Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 Va. J. Int'l L. 7, 12 (1984).

²²² See Viktor Bruns, *Völkerrecht als Rechtsordnung I*, 1 ZaöRV 1, 35 (1929) ("Die freie Selbstbestimmung steht dem Staat, der Mitglied dieser Rechtsgemeinschaft ist, nicht zu; seine Mitgliedschaft bedeutet ein Unterworfensein unter die Völkerrechtsordnung. . . . Der Völkerrechtsjurist hat also nicht nach Beschränkungen der ursprünglichen Unabhängigkeit des Staates zu fragen. Er muß vielmehr die von der Völkerrechtsordnung geschaffenen Rechte und Pflichten feststellen.")

²²³ See, e.g., Hermann Mosler, *Völkerrecht als Rechtsordnung*, 36 ZaöRV 6, 40–41 (1976); Sir Gerald Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, 196, 216–217, in *Institut de Droit International, Livre du Centenaire 1873–1973* (1973); Luzius Wildhaber, *Jurisdiktionsgrundsätze und Jurisdiktionsgrenzen im Völkerrecht*, 41 SchwJbIntR 99, 104 (1985).

²²⁴ See *supra* p. 385 et seq.

between the regulating state and the facts of the case in order for an exertion of jurisdiction to be considered legitimate.²²⁵ The genuine-link requirement is said to be based on two International Court of Justice cases, *Nottebohm* and *Barcelona Traction*.

In *Nottebohm*, the court explained that a genuine connection was required in order for a state to effectively confer nationality and grant consular protection.²²⁶ Sir Gerald Fitzmaurice applied the same reasoning in his individual opinion in *Barcelona Traction*:

[I]nternational law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters . . . , but leaves to States a wide discretion in the matter. It does however (a) postulate the *existence* of limits—though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.²²⁷

On this basis, legal scholars have construed different bases for jurisdictional self-restraint, notably with respect to principles against *abus de droit*, cooperation, and noninterference. The literature is extensive.²²⁸ Frederick A. Mann's 1964 description succinctly summarizes the various suggestions brought forward:

It must be possible to point to a reasonable relation, that is to say, to the absence of abuse of rights or of arbitrariness. In the final analysis, however, the question will be whether international law, as embodied in the sources enumerated by Art. 38 [of the International Court of Justice Statute], sanctions the exercise of jurisdiction, special regard being had to the practice of States and the general principles of law recognised by civilised nations. There will thus be definite barriers beyond which

²²⁵ See, e.g., Alfred Verdross & Bruno Simma, *Universelles Völkerrecht*, § 1183 (3rd edn., 1984); Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* 541 et seq. (1994); Ian Brownlie, *Principles of Public International Law* 311–312 (7th edn., 2008).

²²⁶ See I.C.J., *Nottebohm Case (Liechtenstein v. Guatemala)*, second phase, 6 April 1955, I.C.J. Reports 1955, at 4, 24.

²²⁷ I.C.J., *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, second phase, 5 February 1970, Separate Opinion of Judge Sir Gerald Fitzmaurice, I.C.J. Reports 1970, at 64, 105.

²²⁸ See, e.g., Eckard Rehinder, *Extraterritoriale Wirkungen des deutschen Kartellrechts* 55 et seq. (1965); Rolf Bär, *Kartellrecht und Internationales Privatrecht* 327 et seq. (1965); Otto Sandrock, *Neuere Entwicklungen im Internationalen Verwaltungs-, insbesondere im Internationalen Kartellrecht*, 69 ZVglRWiss 1, 10–11 (1968); Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145, 189 (1972/73); Rainer Deville, *Die Konkretisierung des Abwägungsgebotes im internationalen Kartellrecht* 9–10 (1990); Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* 569 et seq. (1994); Ian Brownlie, *Principles of Public International Law* 311–312 (7th edn., 2008).

the exercise of jurisdiction is unlawful ... The reference to the paramountcy of international law implies what one may call the requirement of non-interference in the affairs of foreign States. ... In the last resort it is good faith and reasonableness in international relations that will be the rule of decision. A further significant element in the process of assessing the closeness of connection will be ... the universality or mutuality of the character of jurisdiction. ... International lawyers know that the remedy again lies in a policy of tolerance, reasonableness and good faith.²²⁹

The principle of good faith has received particular attention. It is commonly considered part of the reserve of general principles of international law and national regimes.²³⁰ The principle does not create rights or obligations—it only restricts their scope. The main problem with the good-faith principle, however, is that it is designed as a standard of wide discretion; it seldom works as a concrete guideline. Similarly problematic is the theory that attempts to restrict national jurisdiction on the basis of a principle preventing the abuse of rights.²³¹ Most fundamentally, it is questionable whether the principle preventing the abuse of rights is part of public international law at all.²³² By and large, therefore, recourse to general principles of public international law has only sporadically, if at all, proven fruitful for formulating clear and workable rules of conflicts resolution. General principles will usually provide a solution only for extreme and exceptional cases of overreach. In sum, however, the principles of public international law provide neither a consistent nor a comprehensive system of rules limiting national jurisdiction.

C The Practical Proxy: Interest Balancing

In order to overcome the normative vacuum, courts and scholars have developed more concrete methods of conflicts resolution. One mostly

²²⁹ F. A. Mann, *The Doctrine of Jurisdiction of International Law*, 111 *Recueil des Cours* 1, 46–48 (1964-I).

²³⁰ See Hermann Mosler, *Völkerrecht als Rechtsordnung*, 36 *ZaöRV* 6, 44–45 (1976); Alfred Verdross & Bruno Simma, *Universelles Völkerrecht*, §§ 459–462 (3rd edn., 1984); Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* 587–588 (1994).

²³¹ For an early discussion, see, e.g., Nicolas-Socrate Politis, *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*, 6 *Recueil des Cours* 5 (1925-I); Gerhard Leibholz, *Das Verbot der Willkür und des Ermessensmißbrauches im völkerrechtlichen Verkehr der Staaten*, 1 *ZaöRV* 77 (1929); with regard to antitrust extraterritoriality, see R. Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 *Brit. Y.B. Int'l L.* 146, 152 *et seq.* (1957).

²³² Scholarly commentary has refused to find an established rule against an abuse of rights in international law. See, e.g., Walter Rudolf, *Territoriale Grenzen der staatlichen Rechtssetzung*, 7, 21, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 11 (1973); Winfried Veelken, *Interessenabwägung im Wirtschaftskollisionsrecht* 147 (1988); but see Michael Akehurst, *Jurisdiction in International Law*, 46 *Brit. Y.B. Int'l L.* 145, 189 (1972/73); Alfred Verdross & Bruno Simma, *Universelles Völkerrecht* § 60 *et seq.* (3rd edn, 1984).

practical approach is that of interest balancing. Per se, interest balancing is not a rule of international law²³³ but a practical tool to help determine the limitations of nation-state jurisdiction. Even though the technique of balancing has been described as requiring a judge “to take all relevant considerations into account and tailor them to the particular case,”²³⁴ balancing is inherently noninternationalist. This means that it is often characterized by a domestic view. In addition, it is designed to resolve concrete conflicts, not to establish a universal jurisdictional conflicts resolution system. Three major variants of interest balancing can be distinguished.²³⁵ The first variant addresses just nation-state concerns, whether at the domestic or international level, and is based entirely on public international law. The second approach addresses both state and private-party concerns. This approach was famously applied in *Timberlane*. Finally, the third approach represents a symbiosis of public international law, choice of law, and substantive law policy balancing; this variant can be found in Andreas F. Lowenfeld’s interpretation of the Restatement of Foreign Relations Law.

1 Theoretical Approaches

Karl M. Meessen has suggested a method of interest balancing in antitrust conflicts on the basis of the rule of noninterference, or nonintervention.²³⁶ As he posits, public international law requires considering the principle of sovereign equality. Each state thus must have an equal opportunity to regulate what it deems relevant for its economy.²³⁷ In cases of conflicting regulatory interests, Meessen explains, “a state is prohibited from taking measures of antitrust law if the regulatory interests it is pursuing are outweighed by the interests of one or more foreign states likely to be seriously

²³³ See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C.C., 1984) (“[T]here is no evidence that interest balancing represents a rule of international law.”); Karl Matthias Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 Am. J. Int’l L. 783, 786, 801–802 (1984); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 Am. J. Comp. L. 631, 649 (2009); but see Restatement (Third) of Foreign Relations Law, § 403 comment a (balancing under the rule of reason “has emerged as a principle of international law”).

²³⁴ See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 207–221.

²³⁵ Ernst-Joachim Mestmäcker, *Staatliche Souveränität und offene Märkte—Konflikte bei der extraterritorialen Anwendung von Wirtschaftsrecht*, 52 RabelsZ 205, 241–242 (1988).

²³⁶ See, e.g., Karl M. Meessen, *Völkerrechtliche Grundsätze des internationalen Kartellrechts* 202–203, 231–232 et passim (1975); Karl M. Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 Am. J. Int’l L. 783, 804 et seq. (1984); Karl M. Meessen, *Kollisionsrecht der Zusammenschlußkontrolle* 26 et seq. (1984).

²³⁷ Karl M. Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 Am. J. Int’l L. 783, 804 (1984).

injured by those measures.”²³⁸ Repeated decision making under this rule of interest balancing will, over time, establish a general principle of public international law.²³⁹ Meessen openly admits the fundamental problem of balancing: “There is indeed no universal standard and usually no standard common to the states party to the particular dispute that would allow interests to be measured and compared in a satisfactory manner.”²⁴⁰ As an escape, he suggests that states involved enter into direct negotiations. Domestic jurisdiction should be upheld only if actual negotiations are unsuccessful.²⁴¹

Another approach for overcoming the subjectivity of interest evaluation has been suggested by Bernhard Großfeld and C. Paul Rogers. Under their variant, reference to foreign mandatory law may have some merit if it is based on values that are shared among the states involved in the conflict.²⁴² Whenever the values match, the manner of expressing these values is irrelevant.²⁴³ This approach strongly replicates the internationalist structures shown in US maritime law and under the theory of separate attachment.²⁴⁴ While searching for common values appears to be a more systematic and structured approach than interest balancing, this approach nevertheless has to revert to ad hoc discretion in cases where values and policies differ. Even though common values may sometimes exist, complete consensus on detailed policies and on the means necessary to achieve common goals will be an exception.²⁴⁵

In the end, these vagaries are a problem inherent in all balancing approaches. Not only is it difficult to evaluate foreign interests and policies under a domestic perspective, but it also requires a certain trade-off

²³⁸ *Id.*

²³⁹ Karl M. Meessen, *Völkerrechtliche Grundsätze des internationalen Kartellrechts* 232 (1975); see also R. Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 *Brit. Y.B. Int'l L.* 146, 153 (1957).

²⁴⁰ Karl M. Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 *Am. J. Int'l L.* 783, 808 (1984).

²⁴¹ *Id.*

²⁴² Bernhard Großfeld & C. Paul Rogers, *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law*, 32 *I.C.L.Q.* 931, 939 (1983).

²⁴³ One prime example that Großfeld and Rogers provide for the practicality of their theory is the application of foreign bank secrecy laws by forum courts. These laws should be recognized as directly applicable when they correspond to similar provisions in forum law. Since the similarity reflects shared values among legal systems, minor deviations should not stand in the way of an application of the foreign legal norm. *Id.* at 941–942; see also Franz Gamillscheg, *Gedanken zu einem System des internationalen Arbeitsrechts*, 23 *RabelsZ* 819, 837 (1958).

²⁴⁴ See *supra* p. 410 *et seq.*

²⁴⁵ Jean-Gabriel Castel, *The Extraterritorial Effects of Antitrust Laws*, 179 *Recueil des Cours* 9, 21 (1983-I).

between foreign and domestic concerns.²⁴⁶ Interest balancing may thus sometimes provide more clarity and predictability than the general principles of public international law. Nevertheless, the methodology of balancing will not (and in fact, cannot) implement an all-encompassing conflicts resolution approach. Apart from the few situations where shared values exist, interest balancing remains an issue of ad hoc decision making that neglects the development of systemic structures. This is actually the major flaw of all balancing techniques, and it has been particularly visible in their practical application.

2 *The Practice: Timberlane and Mannington Mills*

By the 1970s, the extraterritorial extension of US antitrust law, which had begun after the Second World War, had started to lead to political frictions.²⁴⁷ In reaction, other nations enacted “blocking statutes” to cut short US discovery rules, refused to recognize or enforce US treble-damage awards, and allowed defendants to “claw back” judgments that had been rendered against them.²⁴⁸ This international discord spurred attempts in the United States to curb extraterritoriality.²⁴⁹ In two famous cases from the 1970s—*Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*²⁵⁰ and *Mannington Mills, Inc. v. Congoleum Corp.*²⁵¹—the courts undertook a balancing of nation-state interests in order to establish a reasonable self-limitation of judicial powers.

²⁴⁶ See, e.g., Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 Am. J. Int'l L. 280, 317 (1982); see also Herbert Hovenkamp, *Federal Antitrust Policy—The Law of Competition and Its Practice* § 21.2b (3rd edn., 2005) (“The degree of conflict with foreign law cannot be measured in pounds, and the relevant weight to be given to conduct in the United States cannot be measured in inches. Even if they could be, we could still not balance pounds against inches.”).

²⁴⁷ See *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 609 (9th Cir. 1976). Apparently, according to a list promulgated by the then chief of the Foreign Commerce Section of the Antitrust Division, none of the more than 200 institutions and dispositions of foreign trade cases brought by the US Department of Justice before 1973 were dismissed for lack of jurisdiction. See Wilbur Lindsay Fugate, *Foreign Commerce and the Antitrust Laws*, Appendix B, 498 *et seq.* (2nd edn., 1973); for a general overview, see Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 680 *et seq.* (5th edn., 2011).

²⁴⁸ For an extensive discussion of the European perspective, see Anton K. Schnyder, „Gegenmassnahmen“ im Internationalen Privat- und Zivilverfahrensrecht, 73, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 37 (1998); see also Edward T. Swaine, *Cooperation, Comity, and Competition Policy: United States*, 1, 10, in *Cooperation, Comity, and Competition Policy* (Andrew T. Guzman ed., 2011); Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 682 (5th edn., 2011).

²⁴⁹ Edward T. Swaine, *Cooperation, Comity, and Competition Policy: United States*, 1, 10, in *Cooperation, Comity, and Competition Policy* (Andrew T. Guzman ed., 2011).

²⁵⁰ *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

²⁵¹ *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979).

In *Timberlane*, the plaintiffs alleged a number of conspiratorial acts that had resulted in impediments to Timberlane's export of lumber from Honduras.²⁵² In its analysis, the Ninth Circuit clarified that mere testing of "direct and substantial effect[s]" would never suffice to determine the reach of US antitrust law.²⁵³ Instead, the court recommended a tripartite analysis for deciding whether to apply US antitrust regulation. The first two parts determine whether an effect exists and whether such an effect is sufficiently large to present a cognizable injury. The third part determines

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 of extraterritorial authority.²⁵⁴

The evaluation and balancing required under this test included the consideration of seven factors:

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.²⁵⁵

The court described its approach as taking account of "international comity and fairness"; it argued that the United States should not be allowed to exercise jurisdictional powers beyond the "point [where] 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."²⁵⁶ A few years after this decision, the Third Circuit adopted the *Timberlane* analysis in *Mannington Mills*. As the court explained, it would be "unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction."²⁵⁷ Interestingly, even though both courts explicitly based their analyses on the concept of international comity, neither mentioned an interest of the international community as a separate factor to be regarded and weighed. Neither in *Timberlane* nor in *Mannington Mills* did the court search for a transnational or universal policy. This changed with the restatement's rule-of-reason approach.

²⁵² *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 604–605 (9th Cir. 1976).

²⁵³ *Id.* at 610 and 611–612. ²⁵⁴ *Id.* at 613. ²⁵⁵ *Id.* at 614. ²⁵⁶ *Id.* at 613 and 609.

²⁵⁷ *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3rd Cir. 1979).

3 *The Rule of Reason*

In 1958, Kingman Brewster, credited as the first to propose a jurisdictional rule of reason,²⁵⁸ brought forward a resolution scheme for international antitrust conflicts. As he posited, “Ad hoc weighing of conflicting interests at both the level of administration and judicial determination seems better suited to antitrust than would any hard-and-fast jurisdictional rule based on territoriality or nationality.”²⁵⁹ He further specified that officials, enforcement officers, and judges weigh a number of different constituent variables. Some of the factors he conceived subsequently found their way into court practice—namely, the *Timberlane* standard.²⁶⁰ Brewster’s analysis, however, was still limited. It was the interests of the United States and the interests of states involved in the conflict that had to be submitted to the balancing. There was no express regard for an international community or the functioning of international commerce and transacting.

Nor did this change in 1965, when the American Law Institute published the Restatement (Second) of Foreign Relations Law. Acknowledging that the principles of territoriality, personality, and effects testing are fundamental to the scope of legislative jurisdiction, section 40 of the restatement limited the exertion of jurisdiction:

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.²⁶¹

²⁵⁸ *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976).

²⁵⁹ Kingman Brewster, Jr., *Antitrust and American Business Abroad* 445 (1958).

²⁶⁰ *See id.* at 446 (his list of factors includes “(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 opportunity; (c) the relative seriousness of effects on the United States as compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, 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.”).

²⁶¹ Restatement (Second) of Foreign Relations Law of the United States (1965), § 40.

Like Brewster's compilation, the list did not include a concern for systemic values of the international order or a community of nation-states. Only when Andreas F. Lowenfeld analyzed the restatement in 1979 did a different element enter the stage.²⁶² Lowenfeld introduced a truly innovative perspective into the rule-of-reason approach when he suggested that the exercise of legislative jurisdiction required a finding of internationalist reasonableness.²⁶³ As Brewster had done before, he also proposed a list of factors to be regarded but amended it in one critical aspect (see item (iv)):

(i) the character of the activity to be regulated; (ii) the basic policies underlying the regulation; (iii) the link between the State under whose authority the regulation is to be carried out and the person or persons principally responsible for the activity to be regulated; (iv) the needs and traditions of the international political, legal and economic system; (v) the protection of justified expectations; (vi) the conflicts, if any, between the regulation in question and the exercise of legislative jurisdiction pursuant to the authority of another State; (vii) the conflicts, if any, between the regulation in question and the potential exercise of legislative jurisdiction pursuant to the authority of another State; (viii) the territory in which the activity is principally carried on; (ix) the direct and foreseeable effect of the activity; (x) in the case of exercise of delegated authority, the intention of the person or body that has delegated the authority.²⁶⁴

The "needs and traditions of the international political, legal and economic system" may not have been very important for Lowenfeld. In fact, in an analysis of case law and legal thought on the issue, he barely made reference to international aspects of the argument.²⁶⁵ As a result, his internationalist amendment to the list of factors passed largely unnoticed.

Even the reasonableness analysis implemented in the current restatement is still somewhat ambiguous. Yet it still features prominently. Section 402 of the restatement provides for different bases of jurisdiction to prescribe. Under the territoriality principle, for instance, a state has jurisdiction with respect to conduct, persons, and things within its territory. Under the effects principle, conduct outside the state's territory will be subject to the state's jurisdiction if the conduct has or is intended to have effects within the national territory. Under the nationality principle, a citizen's

²⁶² See Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 *Recueil des Cours* 313, 400 *et seq.* (1979-II).

²⁶³ *Id.* at 329, 401–402. ²⁶⁴ *Id.* at 328–329.

²⁶⁵ See *id.* at 383 (in his analysis of the *Alcoa* case, Lowenfeld addressed the international system as one factor to be regarded, but downplayed its relevance: "As for the traditions of the international system, one could have different views: my own would be that trade in non-ferrous metals . . . does not come within the category of special concern of the international system.").

activities, interests, status, and relations outside and inside the territory are subject to the state's jurisdiction.²⁶⁶ Even when one of these grounds for jurisdiction is present, however, a state may not exercise jurisdiction over a person or conduct connected with another state when the exercise of such jurisdiction would be unreasonable (section 403(1)). The restatement provides for a definition of reasonableness in section 403(2). The list of factors to be considered is extensive. Yet similar to Lowenfeld's formulation, "the importance of the regulation to the international political, legal, or economic system" (lit. e) and "the extent to which the regulation is consistent with the traditions of the international system" (lit. f) must be considered.

This reference to reasonableness factors involving an "international political, legal, or economic system" and "traditions of the international system" forms the crucial difference vis-à-vis earlier versions of balancing tests and the rule of reason.²⁶⁷ Granted, there may still be ample factors favoring a traditional conflicts resolution scheme of balancing only those national interests that are concretely involved. Furthermore, the factors are not listed in any order of priority, and not all factors may have the same weight. Balancing still depends on the circumstances.²⁶⁸ But the section's language expressly recognizes an internationalist approach. As Harold Maier has correctly pointed out, the restatement can be interpreted as requiring courts to fashion decisions in a way that contributes incrementally to the construction of an internationalist norm of jurisdictional authority and allocation.²⁶⁹

Nevertheless, one aspect remains to be noted: neither Lowenfeld's suggestion of internationalism nor the restatement's factors favoring a more comprehensive analysis have been prominently featured in practice.

²⁶⁶ Finally, the protective principle subjects certain conduct directed against a limited class of state interests (e.g., security) to domestic jurisdiction.

²⁶⁷ A similar concept reflecting a comparably benevolent stance toward the international system can be found in the Restatement (Second) of Conflict of Laws. Comment (d) to its section 6 states, under the heading "Needs of the interstate and international systems": "Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result." (Restatement (Second) of Conflict of Laws § 6 (1971)).

²⁶⁸ See Restatement (Third) of Foreign Relations Law, Part IV, Chapter 1, Sub-Chapter A, § 403 comment b.

²⁶⁹ Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 Am. J. Int'l L. 280, 301 (1982).

On the contrary, all variants of interest balancing, as well as the rule-of-reason approach in action, suffer from the same deficit. Practical interest balancing and reasonableness analysis show a distinct disregard for internationalist and communitarian concerns. For want of an actual substantive guideline for decision making, courts faced with balancing interests or applying a rule of reason have tended to adopt a case-by-case approach.²⁷⁰ As long as the internationalist concern is just one of many factors, the overall picture of an international community will be neglected.²⁷¹ Hence, it is of little surprise that none of the approaches explored above have established a universal and universalist system of allocating jurisdictional authority.

D The Effects Principle: From Unboundedness to Self-Restraint

The 1987 Restatement (Third) of Foreign Relations Law did more than implement an elaborate reasonableness approach. It also expressly endorsed territorial effects as a legitimate basis of prescriptive jurisdiction.²⁷² This approval reflects a change in twentieth-century international economic law. With the growing globalization of communication and socioeconomic transacting, commercial effects had to become the dominant element of jurisdictional analyses. Of course, effects had never been blindly acknowledged as a legitimate basis of jurisdiction under public international law. For a long time, it was contested whether effects should qualify as a factor at all.²⁷³ Today, however, the assertion of jurisdiction based on effects is no longer seen as illegitimate.²⁷⁴ International antitrust law is the field where the issue has been most extensively debated.

²⁷⁰ See Frank Vischer, *Das neue Restatement "Conflict of Laws,"* 38 *RabelsZ* 128, 149 (1974); Harold G. Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 *Va. J. Int'l L.* 7, 10 (1984).

²⁷¹ For a critique of the Restatement (Second) of Foreign Relations Law in this regard, see, e.g., Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law,* 76 *Am. J. Int'l L.* 280, 295 (1982). For similar restrictions of the Restatement (Second) of Conflict of Laws, see, e.g., Arthur Taylor von Mehren, *Choice-of-Law Theories and the Comparative-Law-Problem,* 23 *Am. J. Comp. L.* 751, 755 (1975).

²⁷² Restatement (Third) of Foreign Relations Law § 402 (1987), comment d.

²⁷³ For a critique, see, e.g., Luzius Wildhaber, *Jurisdiktionsgrundsätze und Jurisdiktionsgrenzen im Völkerrecht,* 41 *SchwJbIntR* 99, 105–106 (1985); Ernst-Joachim Mestmäcker, *Staatliche Souveränität und offene Märkte—Konflikte bei der extraterritorialen Anwendung von Wirtschaftsrecht,* 52 *RabelsZ* 205, 220 (1988).

²⁷⁴ See, e.g., Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law,* 24 *Law & Pol'y Int'l Bus.* 1, 69 *et seq.* (1992); Jürgen Basedow, *Weltkartellrecht* 19 *et seq.* (1998); Eleanor M. Fox, *Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked,* 42 *N.Y.U. J. Int'l L. & Pol.* 159, 167 (2009); Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-*

1 *Europe: A Theory of Public International Law Limitations*

Antitrust effects testing has a longer and arguably richer practical and scholarly history in US doctrine. Nevertheless, a look at European antitrust is warranted. Several characteristics are fundamental. Public international law limitations and substantive antitrust policy have been determinants from the beginning. Antitrust law has traditionally been conceived of as belonging to public law enforcement. Since private litigation has only recently become a part of European antitrust doctrines,²⁷⁵ the primary emphasis has historically been on limitations to the reach of administrative and regulatory state actions.²⁷⁶ Particularly in Germany, lawmakers implemented the effects principle quite early on as a key instrument for the allocation of prescriptive jurisdiction. The 1957 German Act against Restraints on Competition provides for the application of German law based on inland effects but has not laid out an explicit limitation to the quality or quantity of such effects necessary to trigger its application.²⁷⁷ These limitations were left to be developed by scholarly commentary and courts. One voice on the issue was Eckard Rehbinder, who explained in 1965 that the scope of German antitrust law could never be an issue of self-determined jurisdictional authority alone. As he contended, constitutional law stipulated a prevalence of public international law, so any excess of jurisdictional limitations under public international law would also void the statutory provision or administrative act at issue.²⁷⁸ I have already mentioned similar theories in the field.²⁷⁹ The idea that public international law limited jurisdictional authority had several consequences. In general, it was clear that insignificant effects alone could not trigger the application of domestic law.²⁸⁰ More

First Century, 533, 537, in *International Law in the U.S. Supreme Court—Continuity and Change* (David L. Sloss et al. eds., 2011).

²⁷⁵ See *supra* p. 315–317. See also Andreas Heinemann, *The Rise of a Private Competition Law Culture: Experience and Visions*, 218 *et seq.*, in *Private Enforcement of Competition Law* (Jürgen Basedow et al. eds., 2011).

²⁷⁶ David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 *Am. J. Int'l L.* 756, 758 (1983); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 *Am. J. Comp. L.* 631, 661–662 (2009).

²⁷⁷ Now section 130 para. 2 GWB. The code was enacted on 27 July 1957 (BGBl. I 1957, 1081). The act has actually been interpreted as establishing a genuine effects principle. See David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 *Am. J. Int'l L.* 756, 761 (1983).

²⁷⁸ Eckard Rehbinder, *Extraterritoriale Wirkungen des deutschen Kartellrechts* 30–31, 47–48 and *passim* (1965); Ivo E. Schwartz, *Deutsches Internationales Kartellrecht* 29 *et seq.*, and *passim* (2nd edn., 1968); for an extensive discussion, see Ivo E. Schwartz & Jürgen Basedow, *Restrictions on Competition* (ch. 35), in *International Encyclopedia of Comparative Law*, vol. III: *Private International Law* (Kurt Lipstein ed., 2011).

²⁷⁹ With regard to nonintervention, see Meessen's approach *supra* p. 438–440.

²⁸⁰ See Eckard Rehbinder, *Extraterritoriale Wirkungen des deutschen Kartellrechts* 155 *et seq.* and *passim* (1965).

specifically, Reh binder and, shortly after, Ivo E. Schwartz proposed distinct policy-oriented restrictions. Thus, the quality and quantity of effects were to be determined according to the particular kind of violation and policy at issue.²⁸¹ This approach was also adopted in practice.²⁸² Ultimately, a detailed system of different minimum thresholds evolved in case law and commentary. What is required for the application of German antitrust law are—with some simplification—direct, actual, considerable, and foreseeable effects within German territory.²⁸³

Modern European antitrust doctrine does not differ much. Articles 101 and 102 of the Treaty on the Functioning of the European Union fail to expressly indicate when to regulate extraterritorially. Nonetheless, several doctrines allow for an extension beyond European borders.²⁸⁴ Since the 1960s, the European Commission has embraced a broad conception of effects.²⁸⁵ In 1988, the Court of Justice followed suit—if not literally, then at least with respect to the practical results. In *Wood Pulp*, the court was concerned with price-fixing agreements among wood-pulp producers. Non-European Union entities sued by the European Commission were accused of having restrained trade within the European Union. The Court of Justice rejected the defendants' argument that jurisdiction was amiss since they were located outside the territory of the European Union. Although the court did not refer to effects, it found the "implementation" of anticompetitive agreements within European territory sufficient to trigger the application of European antitrust principles. Selling to purchasers within the European Union

²⁸¹ See Eckard Reh binder, *Extraterritoriale Wirkungen des deutschen Kartellrechts* 30–31, 47–48 and *passim* (1965); Ivo E. Schwartz, *Deutsches Internationales Kartellrecht* 29 *et seq.*, and *passim* (2nd edn., 1968); for modern commentary see, e.g., Florian Wagner-von Papp & Wolfgang Wurmnest, in *Münchener Kommentar—Europäisches und Deutsches Wettbewerbsrecht*, vol. I: *Europäisches Wettbewerbsrecht*, Einl. para. 1543 and 1631 (Günter Hirsch ed., 2nd edn., 2015).

²⁸² See, e.g., BGH 1973 WM 1070, 1071—*Ölfeldrohre* (12 July 1973). For further illustration, see, e.g., David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 *Am. J. Int'l L.* 756, 764–765 (1983) (including a partial translation of the *Ölfeldrohre* decision); Jürgen Basedow, *Entwicklungslinien des internationalen Kartellrechts—Ausbau und Ausdifferenzierung des Auswirkungsprinzips*, 1989 *NJW* 627, 628 *et seq.*; Anton K. Schnyder, *Wirtschaftskollisionsrecht—Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter besonderer Berücksichtigung von Marktrecht* § 6 para. 162 *et seq.* (1990); Dietmar Baetge, *Globalisierung des Wettbewerbsrechts* 272–273 (2009).

²⁸³ For modern commentary, see, e.g., Eckard Reh binder, in *Kommentar zum Europäischen Kartellrecht (Wettbewerbsrecht, vol. I: EU/part 1)*, IntWbR para. 13 *et seq.* (Ulrich Immenga & Ernst-Joachim Mestmäcker eds., 5th ed., 2012).

²⁸⁴ For an extensive discussion, see Damien Geradin, Marc Reysen & David Henry, *Extraterritoriality, Comity, and Cooperation in EU Competition Law*, 21, 21 *et seq.*, in *Cooperation, Comity, and Competition Policy* (Andrew T. Guzman ed., 2011).

²⁸⁵ See, e.g., Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 *Antitrust L.J.* 159, 173 (1999) (with further references).

would thus suffice.²⁸⁶ Notwithstanding this apparent hesitation to base extraterritorial regulation expressly on effects,²⁸⁷ *Wood Pulp* has been widely interpreted as having established an effects-based principle of jurisdiction.²⁸⁸

2 Alcoa to Hartford Fire: From Unlimited to Substantial Effects

The practical history of effects testing in US antitrust doctrine was longer and arguably more troubled than in Europe. For this reason, along with some determinative differences, it is particularly illustrative for my analysis. One aspect that has had a significant impact on legal doctrine—and that may account for the major differences between Europe and the United States—is the paradigm of a private attorney general. Antitrust in the United States has traditionally been enforced not only by public authorities but also through civil actions by private litigants injured by anticompetitive conduct.²⁸⁹ Another aspect is the doctrine of international comity, which still prevails in the analysis of jurisdictional self-restraint. In the United States, unlike in Europe, antitrust regulation and its territorial scope of application have only rarely been found directly limited by principles of public international law. Instead, the doctrine of

²⁸⁶ See *Ahlström Osakeyhtiö et al. v. Commission*, C-89/85, para. 16 (27 September 1988), [1988] E.C.R. 5193. The Court of First Instance went even further toward acknowledging a genuine effects doctrine in a merger-control case, holding that the European Commission had jurisdiction in a case where activities outside the common market had an “immediate and substantial effect in the Community,” significantly impeding effective competition within the common market (*Gencor v. Commission*, T-102/96, para. 89 *et seq.* (25 March 1999), [1999] E.C.R. II-753).

²⁸⁷ See 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, 47 (1995) (“In contrast to the European Court of Justice, which is still reluctant to pronounce the E word, the U.S. Supreme Court takes the effects doctrine for granted.”).

²⁸⁸ See, e.g., Eleanor M. Fox, *Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked*, 42 N.Y.U. J. Int’l L. & Pol. 159, 165 (2009); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 Am. J. Comp. L. 631, 642 (2009); less convinced, e.g., Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 186 *et seq.* (1999); for a critique, see Anton K. Schnyder, *Gemeinschaftsrechtliches Kollisionsrecht?—Zur Anwendbarkeit des EG-Wettbewerbsrechts bei Sachverhalten mit Beziehungen zu Drittstaaten*, 3, 6 *et seq.*, in *Europäisches Gemeinschaftsrecht und Internationales Privatrecht* (Christian von Bar ed., 1991); see also Damien Geradin, Marc Reysen & David Henry, *Extraterritoriality, Comity, and Cooperation in EU Competition Law*, 21, 26 *et seq.*, in *Cooperation, Comity, and Competition Policy* (Andrew T. Guzman ed., 2011).

²⁸⁹ The Clayton Act is the statutory foundation of private litigation. For the private attorney general in domestic antitrust law, see, e.g., David J. Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, 431 *et seq.*, in *The Enforcement of Competition Law in Europe* (Thomas M. J. Möllers & Andreas Heinemann eds., 2007); for international antitrust, see 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).

international comity has been at the center of the debate. Both the private attorney general and the doctrine of international comity have led to a different understanding of limitations to jurisdictional authority and of the relevance of substantive law policy on the scope of legislative jurisdiction.

The first milestone for the doctrine of US antitrust conflicts was set by the Supreme Court in 1909. In *American Banana*, Justice Holmes explained that “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. ‘All legislation is *prima facie* territorial.’”²⁹⁰ Since the defendant had not acted within US territory (but rather in Panama and Costa Rica), Holmes denied jurisdiction and rejected the application of the Sherman Act. Of course, this limited understanding of regulatory power did not endure the socioeconomic developments of the twentieth century. During the first decades of the century, US antitrust law began to witness a number of cases that eroded the strict *American Banana* territoriality.²⁹¹ The about-face occurred in 1945. In *U.S. v. Aluminum Co. of America*²⁹² (*Alcoa*), the Second Circuit had to decide on a typical phenomenon of the antitrust detachment between conduct and effects. Judge Learned Hand, speaking for the Second Circuit as the court of final appeal, essentially reversed Justice Holmes’s approach to conduct-related territoriality.²⁹³ Ever since, the effects test has dominated the analysis in antitrust conflicts.

The *Alcoa* facts are complex. In a nutshell, European and Canadian aluminum companies had agreed on quotas for aluminum production. If a party exceeded its allocated quota, it had to pay royalties, which were distributed among the others. Although the agreement did not expressly cover imports into the United States, it was clear that such imports should be included. The intended result was to discourage the production of aluminum. In what has become one of the most frequently cited passages from the case, Judge Learned Hand explained that neither effects absent intent nor intent absent effects would trigger jurisdiction.²⁹⁴ This result was based on a general explanation of limitations on extraterritoriality. Learned Hand started with the question whether Congress (within limitations set by the constitution) had intended for a statutory provision to

²⁹⁰ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

²⁹¹ See, e.g., *U.S. v. Pacific & Arctic Railway & Navigation Co.*, 228 U.S. 87 (1913); *Thomsen v. Caysner*, 243 U.S. 66 (1917); *U.S. v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

²⁹² *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945) (L. Hand, J.).

²⁹³ For an extensive discussion, see Edward T. Swaine, *Cooperation, Comity, and Competition Policy: United States*, 1, 5, in *Cooperation, Comity, and Competition Policy* (Andrew T. Guzman ed., 2011). Since the Supreme Court lacked a quorum to decide the *Alcoa* case, the Second Circuit acted as the court of last instance.

²⁹⁴ *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 443–444 (2nd Cir. 1945) (L. Hand, J.).

reach beyond national borders. He considered himself bound by the constitutional standard, but went on to explain that

we are not to read general words, such as those in this 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.” We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.²⁹⁵

Ultimately, it may have been the particular case and its specific outcome that has made *Alcoa* a paradigm of unbounded effects testing. The scope of Learned Hand’s effects test, however, was not without a limit. After all, it required giving regard to the principles of the “conflict of laws.” In addition, Learned Hand’s approach was intended to stay within the confines of an internationally acknowledged standard:

[I]t 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.²⁹⁶

What he did not spell out was an express definition of the necessary quantity and quality of effects.²⁹⁷ This eventually became the test’s major flaw. Later courts and lawmakers had to refine the standard.²⁹⁸ We have already seen how the interest-balancing approach under *Timberlane* and *Mannington Mills* developed in response to the overextension of antitrust effects.²⁹⁹ But the balancing of interests soon stopped dominating. One famous example that illustrates the practical failure and rejection of the balancing approach can be found in the District Court for the District of Columbia’s 1984 decision in *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*.³⁰⁰ The problem of how far US antitrust laws would extend was debated in the context of a dispute over adjudicatory jurisdiction.³⁰¹ *Laker Airways* claimed that several competitors, both American and foreign based, were violating antitrust regulations. It further contended that the

²⁹⁵ *Id.* at 443. ²⁹⁶ *Id.*

²⁹⁷ Yet he described an implicit limitation: “Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.” (*Id.*)

²⁹⁸ For the development, see, e.g., Herbert Hovenkamp, *Federal Antitrust Policy—The Law of Competition and Its Practice* § 21.2a *et seq.* (3rd edn., 2005).

²⁹⁹ See *supra* p. 440–441.

³⁰⁰ *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C.C., 1984).

³⁰¹ *Id.* at 917 *et seq.*; for a succinct litigation history and case review, see 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, 232 *et seq.* (2001).

defendants had driven it out of the transatlantic air travel market and, ultimately, out of business.³⁰² The parties' concrete conflict before the district court arose from the defendants' attempt to block US proceedings via a UK antisuit injunction. The district court had to decide whether it could properly issue an injunction to protect domestic jurisdiction on the issue against interference by a UK injunction. On the merits, the court rejected interest balancing and the reasonableness test. As Judge Wilkey elaborated, not only were courts ill-equipped to neutrally balance conflicting state interests, but balancing as such was inadequate to promote international comity.³⁰³ In his extensive critique of contemporary interest-balancing theory and practice, he pointed out that courts were unqualified and lacked the necessary time and resources to undertake a full-fledged evaluation and balancing of political issues. In addition, and as a result of this judicial inability to handle political issues, he found a *favor legis fori* to govern in almost all cases: "When push comes to shove, the domestic forum is rarely unseated."³⁰⁴

In addition to *Laker Airways*, contemporary federal case law contributed to the practical elimination of interest-balancing approaches.³⁰⁵ And statutory law, too, has circumscribed attempts to balance conflicting interests. The 1982 Foreign Trade Antitrust Improvements Act is one example of the shift toward "unbalanced" effects testing. The act provides that US antitrust laws "shall not apply to conduct involving trade or commerce . . . with foreign nations."³⁰⁶ Hence, the act should not apply to export trade from the United States. However, an exception to this limited scope exists where the export trade at issue also harms imports, domestic commerce, or American exporters.³⁰⁷ Such effects on US commerce, however, must overcome a threshold. They must be "direct, substantial, and reasonably foreseeable."³⁰⁸ At least formally, no more balancing is required.

This was also the result when the Supreme Court had to decide on the issue of international antitrust jurisdiction in *Hartford Fire* in 1993. The case involved claims by several US states and private parties that a group of domestic and foreign insurers, reinsurers, and brokers had violated the

³⁰² *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 916 *et seq.* (D.C.C., 1984).

³⁰³ *Id.* at 948. ³⁰⁴ *Id.* at 948 *et seq.*, 951.

³⁰⁵ For further examples, see, e.g., 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, 233 *et seq.* (2001).

³⁰⁶ 15 U.S.C. § 6a.

³⁰⁷ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004).

³⁰⁸ 15 U.S.C. § 6a. See also *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004).

Sherman Act by engaging in conspiracies designed to force other insurers to change the terms of their insurance policies.³⁰⁹ Justice Souter's opinion for the majority held that it is "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."³¹⁰ After finding sufficient effect in the United States, he left it open whether Congress had intended for courts to decline to exercise jurisdiction on the grounds of international comity. He reduced this analysis to a question of foreign sovereign compulsion (i.e., testing whether the defendant's allegedly violative conduct was *required* by foreign law). As Souter concluded, in accordance with the then current restatement, "no conflict exists . . . 'where a person subject to regulation by two states can comply with the laws of both.'"³¹¹ In the end, denying that a true conflict existed allowed for a detour around international comity analysis.³¹²

Not so for Justice Scalia's dissenting opinion. He took a different approach, emphasizing international comity. Scalia recognized Congress's broad legislative jurisdiction over acts on foreign territories under the Sherman Act; indeed, congressional intent to apply US anti-trust law extraterritorially was not to be doubted.³¹³ But he established a second level of analysis: in statutory construction, a court would first have to give regard to the presumption of territoriality. Only if the presumption is rebutted (as he deemed to be the case in *Hartford Fire*) would a "second canon of statutory construction" become relevant.³¹⁴ Here, he referred to the *Charming Betsy* standard that the Supreme Court had set in 1804: "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains."³¹⁵ In other words, this meant that public international law, including "customary international law," provides limitations to the exercise of prescriptive jurisdiction. In principle, Congress has the

³⁰⁹ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 764 (1993). ³¹⁰ *Id.* at 796.

³¹¹ *Id.* at 799.

³¹² For a critique, 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); Joel R. Paul, *The Transformation of International Comity*, 71 Law & Contemp. Probs. 19, 35 *et seq.* (2008); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 Am. J. Comp. L. 631, 651 (2009).

³¹³ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

³¹⁴ *Id.* at 814–815.

³¹⁵ *Id.* For the *Charming Betsy* decision, see *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.) ("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, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.").

authority to overstep these limitations. But it should never be presumed to intend such a violation.

Scalia's references are revealing. His solution was based not only on Story's conception of the "comity of nations"³¹⁶ but also on Learned Hand's (often overlooked) explanation that limitations to antitrust effects testing existed under the principles of "conflict of laws."³¹⁷ He also drew heavily on Supreme Court precedents in maritime law cases, particularly *Lauritzen* and *Romero*. On this basis of international comity, Scalia harshly rejected the majority's conclusion that no "true conflict" existed:

That breathtakingly broad proposition [that a conflict exists only if compliance with US law constitutes a violation of foreign law] . . . will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners.³¹⁸

But this remained the dissenting opinion only. And courts after *Hartford Fire* failed to develop a consistent approach to issues of antitrust effects and international comity. Indeed, as it appeared at the end of the century, comity was considered to have little impact on the future of antitrust effects testing. But that only seemed to be.

3 Empagran: *The About-Face toward Comity*

In the 2004 case *Hoffmann-La Roche Ltd. v. Empagran S.A.*,³¹⁹ the Supreme Court reestablished the doctrine of international comity, similar to Justice Scalia's approach in *Hartford Fire*.³²⁰ In the case, the plaintiffs brought a class-action suit alleging that the defendants—foreign and domestic vitamin manufacturers and distributors—had conspired to fix prices in the global vitamin market. They sought, among other things, compensation for damages resulting from purchases outside the United States. Even though the cartelization had also affected the American market, the court denied jurisdiction over the foreign plaintiffs' claims, arguing that effects in the United States caused by the defendants' cartelization were independent of any effects occurring abroad. Thus, under the Foreign Antitrust Improvements Act of 1982, a Sherman Act claim would not arise on the basis of effects of a foreign price-fixing scheme if this scheme did not have immediate domestic effects. Mere effects in the

³¹⁶ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

³¹⁷ *Id.* ³¹⁸ *Id.* at 820.

³¹⁹ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

³²⁰ The *Empagran* majority cited to Scalia's dissent in *Hartford Fire*. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). For the change in directions, see Herbert Hovenkamp, *Federal Antitrust Policy—The Law of Competition and Its Practice* § 21.2b (3rd edn., 2005); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 Am. J. Comp. L. 631, 652 (2009).

United States would not suffice to trigger jurisdiction of the US antitrust regime.³²¹ Apart from this civil lawsuit, other types of law enforcement had taken place on the issue. One of these was a class-action suit initiated in the United States by American purchasers, which ended with a billion-dollar settlement. In addition, in other countries, private litigation had resulted in further (albeit smaller) payments by the violators. Finally, antitrust agencies in the United States, Europe, and other jurisdictions had imposed administrative fines.³²²

Writing for a unanimous court, and contrary to the *Hartford Fire* majority, Justice Breyer put forth what can be characterized as a public international law framework for antitrust conflicts. Analyzing the Supreme Court's *Charming Betsy* standard, he explained that ambiguous statutes must always be construed in order to "avoid unreasonable interference with the sovereign authority of other nations."³²³ As he continued, this "rule of construction reflects principles of customary international law—law that . . . Congress ordinarily seeks to follow."³²⁴ By this means, the majority's theoretical foundation has come full circle with regard to implementing the limitations of public international law in the analysis of jurisdictional powers. With *Empagran*, the Supreme Court appears to have abandoned extraterritorial overregulation and returned to the Storyan virtues of intersovereign respect and equality. In fact, Justice Breyer's explanation echoes traditional conflicts and comity doctrine and its consideration of the utility and convenience of international transacting and commerce:

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.³²⁵

³²¹ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004). For more details and a critique, see, e.g., Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 Va. J. Int'l L. 251, 273 *et seq.* (2006).

³²² Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, 533, 533, in *International Law in the U.S. Supreme Court—Continuity and Change* (David L. Sloss et al. eds., 2011).

³²³ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). For the *Charming Betsy* standard, see *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.) ("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, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.")

³²⁴ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

³²⁵ *Id.* at 164–165.

But the impression of an overarching *comitas* is fleeting. A closer look at the decision reveals that the court did not develop its analysis into a coherent system of conflicts resolution. While there is some reference to what could be characterized as a concept of a global trading of regulatory orders,³²⁶ nothing implies that the court intended to create a universal system for allocating jurisdictional authority. As Justice Breyer explained, national antitrust laws may be converging across the globe, with the potential for policy conflicts shrinking. Nevertheless, crucial differences still exist. Not only do national regimes disagree on appropriate remedies, but also the system of civil litigation in American courts creates the risk of interference with other countries' administrative and criminal law enforcement procedures.

This last aspect is important. As the US government argued as *amicus curiae* in *Empagran*, the threat of private enforcement could detrimentally interfere with the executive's proceedings of investigation and enforcement: if a defendant fears having to pay massive private compensation and damages as the result of a future civil lawsuit in the United States, cooperation with other states' government agencies in prior proceedings will no longer be attractive.³²⁷ In the end, the court rejected a detailed analysis comparing foreign and domestic antitrust policies:

[T]his approach is too complex to prove workable. The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements . . . , in respect to both primary conduct and remedy. The legally and economically technical nature of the enterprise means lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system.³²⁸

³²⁶ *Id.* at 167 (“Congress might have hoped that America’s antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.”).

³²⁷ *Id.* at 167–168; see also *Brief of the United States as Amicus Curiae, F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03–724), 2004 WL 234125, at *19–25 (*id.* at 20: “The court of appeals’ interpretation of Section 6a would undermine the effectiveness of the government’s amnesty program. Even those conspirators who come forward and receive amnesty from criminal prosecution still face exposure to private treble damage actions under 15 U.S.C. 15(a).”).

³²⁸ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168–169 (2004). See also Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 *Hastings Int’l & Comp. L. Rev.* 205, 220 *et seq.* (2005).

4 *The Empagran Critique: Capitulation, Isolationism, and Imperialism* Conceiving of a universal jurisdictional order was not the aim in *Empagran*. The doctrine of comity was used, at best, as an escape technique, not as a constructive concept.³²⁹ This preference for caution over activity has been harshly criticized. One example is Joel R. Paul's rejection of *Empagran's* regard for a "highly interdependent commercial world." Such deference to the requirements of a global market, he explains, risks sacrificing important domestic policies.³³⁰ As he concludes, limiting jurisdiction on account of globalized markets and international transactions reflects the decline of domestic autonomy: "In this globalized economy, courts serve a higher master and the sovereign's will must yield to the will of the market."³³¹ Indeed, Paul's critique of *Empagran* and of the court's apparently new formulation of comity is striking, at least at first glance. The plaintiffs in the case had argued, quite similarly, that antitrust deterrence may be massively impaired by a strictly territorial understanding of domestic jurisdiction. If developed countries' antitrust enforcers turn their back to violations in developing countries, where no real threat of prosecution and enforcement exists, perpetrators can offset their liability for violations imposed in, for example, the United States, by undiminished gains in those other jurisdictions. In the end, therefore, protecting consumers in foreign markets may also protect American interests.³³² Consequently, deference to anything other than genuine state interests and policies (particularly to the intricacies of what Justice Breyer called an "interdependent commercial world") appears to unduly subvert national interests.

A similar argument has been put forth from a different angle, one with a more internationalist flavor. Hannah L. Buxbaum and Ralf Michaels have characterized the Supreme Court's new comity approach as isolationist. As Buxbaum explains, *Empagran* presented a situation of transnational regulatory litigation where the rules to be applied would have been, in principle, largely agreed on by the international community. In fact, the case did not present a "true" conflict between nation-state policies but

³²⁹ *But cf.* Justice Breyer's slightly different explanation in *The Court and the World—American Law and the New Global Realities* 133 (2015) ("The Court's changing approach tracks a similar change in its conception of comity—from one emphasizing the more formal objective of simple conflict avoidance to the more practical objective of maintaining cooperative working arrangements with corresponding enforcement authorities of different nations.").

³³⁰ Joel R. Paul, *The Transformation of International Comity*, 71 *Law & Contemp. Probs.* 19, 36 (2008).

³³¹ *Id.* at 37 and 38.

³³² For a similar argument, see *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314–315 (1978); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 403 (2nd Cir. 2002).

rather offered an opportunity to enhance global procedural efficiency and deterrence on the basis of a universally acknowledged rule prohibiting hard-core pricing cartels. Had the Supreme Court applied domestic antitrust law to the global cartel, consumer protection worldwide—and, ultimately, global welfare—would have improved.³³³ The court's abstention, therefore, was a missed opportunity. Michaels has further extended this point. What the court actually did, he argues, was interpret comity in the sense that each country must regulate its own market and nothing else; each state must "act in isolation for itself."³³⁴ Even though the court turned comity into a doctrine of international policy and thereby assumed the role of a global governor, it nonetheless rejected taking responsibility by retreating to an approach of strict territoriality.³³⁵ In the end, Michaels concludes, isolationism turns into hegemonialism by restricting foreign private plaintiffs' access to US law. Even though there exists a universal consensus on substantive law policies such as price fixing, the court's denial of access to efficient enforcement ultimately leaves many countries unprotected against the power of transnational antitrust perpetrators—often US corporate actors.³³⁶ In the end, a retreat to nineteenth-century territoriality amounts to an imperialistic denial of justice to developing countries' consumers, even though these countries may be interested in the enforcement of US antitrust policies.³³⁷

5 *The Comity of Self-Defense: Ostracizing the Private Attorney General*

This critique is not to be rejected per se. Of course, the prohibition of pricing cartels is a virtually universally acknowledged standard, and the efficient enforcement of US antitrust law would have been largely in compliance with other nations' policies and, arguably, public international law. But the internationalist critics overlook an important aspect: the universality of substantive law policies should not be used as an

³³³ Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 Va. J. Int'l L. 251, 260–261, 270 *et seq.*, 283 and *passim* (2006).

³³⁴ Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, 533, 538, in *International Law in the U.S. Supreme Court—Continuity and Change* (David L. Sloss et al. eds., 2011).

³³⁵ *Id.* at 539.

³³⁶ For a similar conclusion, see Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 *Hastings Int'l & Comp. L. Rev.* 205, 216 (2005).

³³⁷ As Michaels explains, today's imperialism is not like the old-fashioned imperialism that sought to impose US law on the rest of the world. It is the rejection of the access to justice necessary to protect the world against "Western corporate actors." See Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, 533, 541 *et seq.*, in *International Law in the U.S. Supreme Court—Continuity and Change* (David L. Sloss et al. eds., 2011).

argument for overriding the limitations of international comity, especially in its traditional Huberian and Storyan shape. One consequence of a more traditional perspective is that comity analysis—beyond giving regard to substantive norms and policies—must also give regard to potential distortions resulting from an international divergence of procedural and enforcement structures. This means that even if a domestic policy at issue is in compliance with internationally acknowledged standards, its stringent extraterritorial enforcement may backfire. In international antitrust cases, the problem has several facets.

One facet of the argument has been put forth by Paul B. Stephan under a national-welfare perspective. As Stephan explains, the environment in American courts is highly favorable to civil-litigation plaintiffs. The right to a jury trial, the “American rule” on attorney fees, pretrial discovery, the class-action device, and overcompensatory recoveries are characteristics that contribute to what Stephan describes as a “gap between the U.S. mechanisms of civil justice and those of the rest of the world.”³³⁸ One consequence of this gap is the increased “settlement value” of claims brought before US courts compared with litigation in a foreign forum.³³⁹ Granting forum jurisdiction too generously, he concludes, will ultimately run the risk of overdeterrence on the domestic market. This risk is aggravated by the fact that the determination of whether certain practices constitute an antitrust violation is difficult due to the general ambiguity of the substantive law policies at play. This is the well-known phenomenon of overinclusive law enforcement. If enforced to the letter, most rules may be found to encompass more fact patterns than intended by policy makers.³⁴⁰ The policy implemented will then be overextended, with all its negative effects attached. Hence, had *Empagran* found sufficient effects to exist, many potentially beneficial activities could have been challenged before the courts. As Stephan argues, therefore, allowing broad jurisdictional interference can result in a “tax on potentially

³³⁸ Paul B. Stephan, *Empagran: Empire Building or Judicial Modesty*, 553, 554, in *International Law in the U.S. Supreme Court—Continuity and Change* (David L. Sloss et al. eds., 2011). See also Jean-Gabriel Castel, *The Extraterritorial Effects of Antitrust Laws*, 179 *Recueil des Cours* 9, 39 (1983-I); P. M. Roth, *Reasonable Extraterritoriality: Correcting the “Balance of Interests,”* 41 *I.C.L.Q.* 245, 249 (1992).

³³⁹ Justice Scalia made a similar point with his Shangri-La allegory in *Morrison*. See *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010) (“While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”).

³⁴⁰ William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 *J. Legal Stud.* 1, 38 (1975).

desirable economic behavior.”³⁴¹ Conversely, narrowing jurisdiction contributes to deregulation and ultimately protects the domestic economy.³⁴²

Yet the *Empagran* impetus to limit access to the courthouse can also be seen in a more comprehensive light than that suggested by simple reference to an aim of protecting domestic competitiveness. There is also a global-welfare concern—and this brings international comity to the fore. The issue must be explained in light of procedural rules: in order to come to a verdict in an international antitrust case, a forum court must first establish personal jurisdiction over an alleged violator.³⁴³ One might thus assume that the bulk of defendants in US courts consist of domestic entities. But this is not the case. Modern antitrust litigation regularly also features multinational entities and foreign corporate actors. Particularly in countries where the number of foreign companies doing business is high, as in the United States, establishing personal jurisdiction is not an insurmountable obstacle. Often, sufficient contacts or assets within the domestic territory exist.³⁴⁴ Notably, the doctrine of minimum contacts allows for an exercise of personal jurisdiction if a foreign defendant transacts business in the forum or is the parent corporation of a domestic subsidiary.³⁴⁵ Hence, in international antitrust cases, domestic defendants are not the only actors who must bear a tax on potentially desirable operations. A national-welfare perspective may thus be too narrow, for the problem of overinclusive law enforcement and the ensuing risk of stifling beneficial competition are global in scope.

Furthermore, a look at the divergence of enforcement structures in different jurisdictions highlights another potential drawback of the

³⁴¹ Paul B. Stephan, *Empagran: Empire Building or Judicial Modesty*, 553, 556, in *International Law in the U.S. Supreme Court—Continuity and Change* (David L. Sloss et al. eds., 2011). For the chilling effect of overdeterrence in antitrust enforcement, see Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 SMU L. Rev. 103, 114 *et seq.* (2007).

³⁴² Paul B. Stephan, *Empagran: Empire Building or Judicial Modesty*, 553, 557–558, in *International Law in the U.S. Supreme Court—Continuity and Change* (David L. Sloss et al. eds., 2011).

³⁴³ Also, an enforcement of the forum court’s judgment will be possible only if there is sufficient international cooperation or if the defendant has assets in the forum state that can be seized. See William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 Law & Pol’y Int’l Bus. 363, 366 (2001).

³⁴⁴ See Rolf Bär, *Kartellrecht und Internationales Privatrecht* 24 (1965). More recently, see, e.g., William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int’l L.J. 161, 223–224 (2002); William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 Law & Pol’y Int’l Bus. 363, 364 *et seq.* (2001).

³⁴⁵ For an extensive overview of the doctrine of personal jurisdiction in international antitrust cases and references to case law, see Herbert Hovenkamp, *Federal Antitrust Policy—The Law of Competition and Its Practice* § 21.3 (3rd edn., 2005).

transnational enforcement paradigm. Antitrust regulation in Europe is still largely within the hands of public authorities. Private litigation has long been the exception rather than the rule.³⁴⁶ This is different in the United States, where public and private enforcement structures coexist and where the magnitude of private actions even exceeds the government's enforcement efforts.³⁴⁷ It is this privatization of regulation that leads to problems on the international plane. In fact, it is mainly the private attorney general who enforces antitrust policies in the United States. The idea is that personal interest in seeking redress provides a sufficiently strong incentive for private parties to vindicate their rights. Governmental enforcement is then no longer needed (or can be reduced) since the litigant concurrently asserts a cause of action in her own interest *and* vindicates an interest of the public.³⁴⁸ Yet the private attorney general has no obligation to sue.³⁴⁹ And in contrast to a public prosecutor or state official, she will give primary or even exclusive regard to her private interests—in other words, profit maximization.³⁵⁰ This is where the problem looms. While the nonexistence of a cooperating or controlling instance for the private-attorney-general mechanism is a key part of the concept in the domestic sphere, the lack of effective control is a major drawback in the international arena. In economic terms, again, in a system of private enforcement, all laws will be enforced as long as their enforcement provides a positive expected net return. In contrast to public officials, private attorney generals will rarely undertake “discretionary nonenforcement” for reasons beyond the economic

³⁴⁶ See *supra* p. 315–317.

³⁴⁷ See, e.g., Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 Loy. Consumer L. Rev. 409, 411 (2004).

³⁴⁸ For an early and famous description of the technique, see *Associated Indus. of New York State v. Ickes*, 134 F.2d 694, 704 (2nd Cir. 1943) (“Instead of designating the Attorney General, or some other public officer . . . , Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit . . . , and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.”). See also John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215 (1983); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 342–343 and 345 (1989); 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, 222 *et seq.* (2001).

³⁴⁹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

³⁵⁰ See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 15 (1975); David J. Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, 431, 440, in *The Enforcement of Competition Law in Europe* (Thomas M.J. Möllers & Andreas Heinemann eds., 2007).

rationale.³⁵¹ Hence, they will not abstain from a lawsuit as long as it seems profitable—regardless of whether it is in the interest of third parties or the public. Judicial self-restraint and the consideration of foreign policies or governmental interests are the last things the private attorney general cares about in international litigation.³⁵²

Of course, courts should be and often are a “controlling” instance in private-attorney-general litigation with regard to concepts of public policy, equity, and comity. But their effectiveness must be doubted—particularly in the international arena. In my historical account, I analyzed problems of proprietization in US trademark law. During the twentieth century, domestic law concepts of equity and goodwill protection were not suitable to prevent the growing extension of trademark rights.³⁵³ Extraterritoriality in international economic law is no different. On the contrary, the problem is even more virulent here. The courts’ perspective is too narrow: they are generally at risk of overlooking political and economic concerns since their focus is usually on the parties’ individual rights, not on the larger political and economic context.³⁵⁴ Distortions beyond the setting of the lawsuit and the individual parties’ interests will thus often remain invisible until after a decision is made. In addition, long-term drawbacks of extensive jurisdiction are regularly more difficult to evaluate than short-term benefits.³⁵⁵ Hence, it is the lack of a coordinating and controlling instance among the group of private attorneys general or within the judiciary that accounts for the risk of extraterritorial overextension of regulatory policies. Seen in this light, a traditional reading of the principle of international comity counsels jurisdictional self-restraint and abstention—just as the Supreme Court did in *Empagran*.

Such a concept of international comity is also in line with other recent developments in international antitrust law. The general trend here as well is toward cooperative self-discipline. One aspect is the shift from judicial conflicts resolution to affirmative administrative and regulatory

³⁵¹ William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 38 *et seq.* (1975).

³⁵² See also Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999); 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, 236–237, 253 (2001); Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 SMU L. Rev. 103, 114 (2007).

³⁵³ See *supra* p. 110 *et seq.*

³⁵⁴ Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int’l L. 457, 459 (2001).

³⁵⁵ Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 Law & Contemp. Probs. 11, 20 (1987).

cooperation, sometimes also termed “positive comity.”³⁵⁶ Under a positive-comity approach, antitrust regulation in the international arena has become a question of administrative and political consultation and collaboration.³⁵⁷ This is particularly important since antitrust enforcement in many jurisdictions has been increasingly transformed from civil litigation into criminal prosecution.³⁵⁸ As mentioned earlier, in *Empagran*, the German, Canadian, and US governments contended that the interference of extended civil litigation in criminal law enforcement mechanisms would distort their regulatory systems.³⁵⁹ This phenomenon is known as inverse deterrence: excessive civil liability may decrease a violator’s incentive to participate in leniency programs in an effort to avoid criminal sanctions. In the end, overregulation will result in underdeterrence.³⁶⁰ In fact, the civil-to-criminal shift has led to an increase in public enforcement and a concurrent relocation of antitrust conflicts resolution to the executive and administrative levels.³⁶¹

Against this backdrop, one further point of the *Empagran* criticism can be clarified. As Ralf Michaels has explained, the Supreme Court missed a dutiful exercise of its self-assigned role as a “global governor.”³⁶² As he

³⁵⁶ For international antitrust law, see, e.g., Jean-Gabriel Castel, *The Extraterritorial Effects of Antitrust Laws*, 179 *Recueil des Cours* 9, 93 *et seq.* (1983-I). More recently, e.g., Anne-Marie Slaughter, *A New World Order* 30 (2004).

³⁵⁷ See, e.g., Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 *Antitrust L.J.* 159, 180 *et seq.* (1999); Eleanor M. Fox, *Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked*, 42 *N.Y.U. J. Int’l L. & Pol.* 159, 169 *et seq.* (2009); Dietmar Baetge, *Globalisierung des Wettbewerbsrechts* 301 *et seq.* (2009); *Developments in the Law—Extraterritoriality, Comity and Extraterritoriality in Antitrust Enforcement*, 124 *Harv. L. Rev.* 1269, 1276–1277 (2011).

³⁵⁸ *Developments in the Law—Extraterritoriality, Comity and Extraterritoriality in Antitrust Enforcement*, 124 *Harv. L. Rev.* 1269, 1271 and 1274 *et seq.* (2011).

³⁵⁹ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004).

³⁶⁰ See Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 *SMU L. Rev.* 103, 115–116 (2007); for an overview, see Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 *Hastings Int’l & Comp. L. Rev.* 205, 212 *et seq.* (2005).

³⁶¹ Even though enforcement might be less efficient in administrative proceedings compared to plaintiffs’ extended options in civil litigation (see Jürgen Basedow, *Weltkartellrecht* 31–33 (1998) (illustrating the difference between public/criminal law enforcement and enforcement through private litigation in the United States)), scholarly commentary appears to agree that the shift was successful. As has been contended, the shift has actually led to an optimization of international deterrence. See, e.g., Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 *SMU L. Rev.* 103, 116 (2007); *Developments in the Law—Extraterritoriality, Comity and Extraterritoriality in Antitrust Enforcement*, 124 *Harv. L. Rev.* 1269, 1279 (2011); but see also Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 *Va. J. Int’l L.* 251, 295–296 (2006).

³⁶² Ralf Michaels, *Empagran’s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, 533, 536, and 541 *et seq.*, in *International Law in the U.S. Supreme Court—Continuity and Change* (David L. Sloss et al. eds., 2011).

concludes, the *Empagran* outcome thus resulted in an imperialistic denial of justice to Third World countries and their consumers. But the court did not necessarily trifle with this issue. First of all, US courts have no mandate or duty to heal the world. This is a concern particularly if such altruism comes at the cost of entertaining an expensive federal judiciary as a forum for foreign parties' claims. This perspective may be debatable with regard to human rights violations.³⁶³ Yet there is no compelling reason to risk causing more damage than benefits when confronted with the far more mundane issues of international economic law. This is all the more true in light of existing alternatives. The US federal judiciary may well fill the role of a global enforcer. But the question remains whether the courtroom is the right stage in which to act. As we have just seen, the drawbacks of international private-attorney-general litigation are significant. A better alternative—particularly with regard to its political controllability—could thus be to extend public authorities' capacity to consider transactions and improper gains outside the domestic sphere when determining the remedies required to establish a sufficiently strong deterrent.³⁶⁴ Far less exposed to the risks of private-attorney-general usurpation, this variant can guarantee efficient enforcement by developed countries' antitrust authorities and protect markets and consumers in developing countries. The danger of distortion in other jurisdictions' enforcement systems—and with respect to the utility and convenience of international transacting—is accordingly reduced.

E Summary

The effects test, as illustrated by my exploration of international antitrust doctrine, has become the preeminent determinant of legislative, or prescriptive, jurisdiction in regulatory conflicts. The scope of jurisdiction, if tested on the basis of economic, commercial, or marketplace effects, has always been restricted by principles of public international law and comity. Yet the idea of transnational regulation and of a universality of policies has increasingly gained hold. If consensus on policies exists, as some have suggested, there is no further risk of jurisdictional conflict. Accordingly, domestic courts should be authorized to enforce such “global” policies both territorially and extraterritorially. However, a more fundamental and traditional aspect of limitations to legislative jurisdiction has recently emerged. With the Supreme Court's 2004 *Empagran* decision, antitrust conflicts doctrine in the United States has returned to a

³⁶³ See *infra* p. 464 *et seq.*

³⁶⁴ For a similar approach in Europe, see Michaels, Buxbaum, and Muir Watt in their *Brief of Amici Curiae, F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 542780, at *16-17.

more cogent understanding of international comity, quite similar to what Huber, Story, and Savigny had conceived of as necessary for the utility and convenience of international transacting and commerce. As *Empagran* illustrates, the problem of finding adequate limitations to jurisdiction cannot be resolved by mere reference to a global uniformity of substantive law policies. As long as nation-states' enforcement systems diverge, even universal policies cannot be extended extraterritorially without causing a distortion of international competition.

II *The Zenith of Transnationalization: A Story of Alien Tort Statute Contraction*

For decades, international human rights litigation has been transnationalists' favorite plaything. Private-party litigation in this field somewhat reflects the growing dissolution and fragmentation of the nation-state. In particular, the American variant of international human rights litigation, under the rubric of the ATS, has been described as transforming national courts into fora of interconnected decision makers who are creating a transnational common law. But not only have human rights become a universal currency in many national regimes; more generally, normativity has become independent of nation-state politics and has therefore become a truly universalist matter. In this light, the end of choice of law seems to have arrived. Transcendental norms are internalized *eo instanti* and without modification. Yet a closer look at the landscape of ATS litigation implies that the pendulum is about to swing back—or has already done so.

A **The “Legal Lohengrin”: From Comity to Settled International Law**

The US Judiciary Act of 1789 provides for federal courts' jurisdiction over “any civil action by an alien for a tort only, committed in violation of the Law of Nations or a Treaty of the United States.”³⁶⁵ Today, this provision is known as the Alien Tort Statute. The statute was regarded as largely obsolete and remained unapplied for almost two centuries before the Second Circuit Court of Appeals decided on its resurrection—one could say “Lohengrin style”³⁶⁶—in 1980.³⁶⁷

³⁶⁵ Judiciary Act of 1789, § 9, 1 Stat. 73, 76–77 (28 U.S.C. § 1350).

³⁶⁶ *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2nd Cir. 1975) (“This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came.” (Friendly, J.)).

³⁶⁷ For the statute's history, see, e.g., Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 4 n. 15 (1985); Beth Stephens, *Translating Filártiga: A Comparative and*

In *Filártiga v. Peña-Irala*,³⁶⁸ the plaintiffs, citizens of Paraguay, inter alia alleged that the defendant, a former Paraguayan police officer, had kidnapped their son and tortured him to death in 1976. The defendant had come to the United States in 1978 and was living in New York at the time of the case's filing. The key issue confronting the court was how to determine the requirements for a tort in violation of the law of nations. The District Court for the Eastern District of New York in the first instance had held that a foreign government's treatment of its own citizens did not constitute such a violation. The Second Circuit reversed the decision, finding jurisdiction under the ATS since "official torture is . . . prohibited by the law of nations."³⁶⁹ Chief Judge Kaufman, writing for the court, explained that "the general assent of civilized nations" could turn a "standard that began as one of comity only" and transform it "into 'a settled rule of international law.'"³⁷⁰ Any norm not founded on such a consensus, he pointed out, would run the risk of imposing idiosyncratic legal rules in the name of applying international law. Hence, it was important to determine a clear framework for categorizing public international law norms. In this regard, Kaufman referred to the 1964 Supreme Court decision in *Banco Nacional de Cuba v. Sabbatino*,³⁷¹ where a court majority had declined to rule on the validity of the Cuban government's expropriation of a foreign-owned corporation's assets. The issue had been whether the act-of-state doctrine would preclude a determination that the expropriation had violated international law. *Sabbatino* repeated a frequently occurring theme in transnational litigation:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.³⁷²

Taking this *Sabbatino* continuum of international consensus as his starting point, Kaufman found the case scenario in *Filártiga* to reflect a

International Law Analysis of Domestic Remedies for International Human Rights Violations, 27 Yale J. Int'l L. 1, 7 (2002); William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 635 (2006); for a general overview, see also Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 33 et seq. (5th edn., 2011).

³⁶⁸ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2nd Cir. 1980). ³⁶⁹ *Id.* at 884.

³⁷⁰ *Id.* at 880–881; *The Paquete Habana*, 175 U.S. 677, 700 (1900).

³⁷¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). ³⁷² *Id.* at 428.

sufficiently developed international agreement. As he elaborated, “there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state’s power to torture persons held in its custody.”³⁷³ Interestingly, the *Sabbatino* majority had actually refused to decide on the legitimacy of the Cuban expropriation at issue, making an express reference to the aim of preserving international and political stability. Abstention was said to be in the interests of the United States and the international community.³⁷⁴ As would soon become apparent, *Filártiga* established the contrary approach using the same argument.

Since *Filártiga*, as has often been said, US federal courts have been “flooded” with civil human rights litigation.³⁷⁵ While this is an exaggeration considering the actual case numbers,³⁷⁶ the scope of ATS lawsuits has indeed increased. Courts have assumed jurisdiction over, inter alia, cases of alleged genocide, summary execution, disappearance, and arbitrary detention, as well as slave labor, apartheid war crimes, and torture. The categories of defendants subject to the act’s reach have been understood to include officers and officials of the United States, representatives of foreign and de facto governments, and—particularly important in more recent case law—corporate entities. In this respect, the issue is usually the corporate defendants’ alleged aiding and abetting of foreign governments’ human rights violations.³⁷⁷ Among this plethora of issues, one aspect is important here: the hybridity and universality of norms that have been acknowledged for internalization under the ATS illustrates a facet of transnationalism that works at the expense of comity. The Supreme Court provided an insight in 2004.

B The *Sosa* Transnationalization: Hybridity, Universality, and Specificity

The line of events that resulted in *Sosa v. Alvarez-Machain*³⁷⁸ began in 1985 when a US drug enforcement agent was tortured and murdered in Mexico. A Mexican physician, Humberto Álvarez-Machain, was suspected

³⁷³ *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2nd Cir. 1980).

³⁷⁴ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436–437 (1964).

³⁷⁵ Tara Elliott, *Risky Business: The Alien Tort Claims Act and the Foreign Corrupt Practices Act Expand the Reach of U.S. Courts in a Global Economy*, 62 Rutgers L. Rev. 211, 225 (2009); *Developments in the Law—Extraterritoriality, Comity and Extraterritoriality in Antitrust Enforcement*, 124 Harv. L. Rev. 1226, 1234 *et seq.* (2011).

³⁷⁶ Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 Notre Dame L. Rev. 1467, 1487 (2014).

³⁷⁷ Tara Elliott, *Risky Business: The Alien Tort Claims Act and the Foreign Corrupt Practices Act Expand the Reach of U.S. Courts in a Global Economy*, 62 Rutgers L. Rev. 211, 224–225 (2009); Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 Am. J. Int’l L. 601, 604 (2013) (both with references to case law).

³⁷⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

as having assisted in the crime. The US Drug Enforcement Administration hired a group of Mexican nationals, including the later defendant José Francisco Sosa, to kidnap Álvarez-Machain in Mexico and bring him to the United States. However, the government failed to present sufficient evidence for a conviction, and, after his acquittal, Álvarez-Machain sued the United States and Sosa under the ATS. Even though the Supreme Court ultimately rejected the claim, finding that the kidnapping had not violated a norm of international law,³⁷⁹ the majority's analysis represents the concept of transnational law. Hybridity and universality are the governing paradigms.

At the time of the ATS's enactment in the late eighteenth century, the majority explained, American legal thought held the law of nations to comprise not only norms governing relations among nation-state sovereigns but also judge-made rules for international individual transacting—so to speak, a law merchant for international commerce.³⁸⁰ In addition to these intercountry and interindividual norms, however, was a third category. These “hybrid international norms” were found in an area of overlap that concurrently governed both state relationships and individual rights and duties.³⁸¹ On this basis, as the *Sosa* majority concluded, the ATS was not only a jurisdictional grant but also

best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.³⁸²

In his concurring opinion, Justice Scalia rejected this concept of “internalization” of customary international law. The court's internal dispute on this issue evolved primarily around questions of judicial powers and constitutional limitations—however, it also reveals the ideas of transnationalization that had captured the US judiciary at the turn of the century. Indeed, the hybridity of national and international law was a key point of contention.

Scalia rejected the majority's concept of norm hybridization by focusing on the post-*Erie* paradigm of internalization. The conception of law as preexisting—and hence potentially universal—rather than a product of the national legislature, he explained, had been jettisoned in 1938. Ever since the Supreme Court's *Erie* decision, “the law is not so much found or

³⁷⁹ *Id.* at 725.

³⁸⁰ *Id.* at 714–715. See also Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1557–1558 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1830 (1998).

³⁸¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004). ³⁸² *Id.* at 724.

discovered as it is either made or created.”³⁸³ In this regard, Scalia also made reference to Justice Holmes’s oft-enunciated dissent in *Black and White Taxicab & Transfer Co.*, critically depicting the traditional view of the common law as a “transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”³⁸⁴ After the death of this old conception of the general common law in *Erie*, as Scalia then went on to explain, the federal judiciary would need a new “federal-common-law-making authority”—without such a constitutional foundation, it could not materialize norms of the international legal order into national law. Accordingly, the mere existence of external rules of customary international law would never suffice to implement it in American law.³⁸⁵ In sum, this meant that national law was isolated from a transnationalist osmosis—legal norms, according to Justice Scalia, are the product of national politics rather than an obscure world community consensus.

In response to this critique, the majority noted that judicial power was not completely barred by *Erie*. On the contrary, as they understood, it still allowed for the recognition of new substantive federal common law rules, since that was what the court had done for two centuries and was what Congress had always tolerated. With respect to norm internalization, the majority concluded that “the door is still ajar subject to vigilant

³⁸³ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (“The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is ‘a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,’ . . . ‘But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[.]’”); for the Holmesian perspective, see Oliver Wendell Holmes, Jr., *The Common Law* 35–36 (1881)).

³⁸⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532–534 (1928) (Holmes, J., dissenting).

³⁸⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 742 *et seq.* (2004) (Scalia, J., concurring). For an extensive account of constitutional arguments against incorporation of international law as federal common law, see, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv. L. Rev. 869 (2007). For the contrary position, see, Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1560 *et seq.* (1984); more recently, Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997); William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 Harv. L. Rev. F. 19, 20 *et seq.* (2007).

doorkeeping, and thus open to a narrow class of international norms today.”³⁸⁶ Of course, in defining this narrow class of norms eligible for implementation, the majority cautioned against accepting norms with “less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.”³⁸⁷ Hence, both international consensus and the specificity of content would be necessary in order to qualify a norm of international law as actionable. Analyzing the plaintiff’s claim under this standard, the majority ultimately rejected application of the ATS for want of specificity. *Álvarez-Machain’s* detention may have been illegal, but it did not violate a “norm of customary international law so well defined as to support the creation of a federal remedy.”³⁸⁸

Evidently, *Sosa* did not provide for an unmistakable definition of what was necessary for a norm to qualify as universally acknowledged and sufficiently specific.³⁸⁹ But this was not the only problem, since transnationalization was understood to carry further implications. Justice Scalia’s critique made clear that the consolidation of international and national law bears the risk not only of national policies being usurped by private parties but of foreign states’ retaliation in general.³⁹⁰ In addition, economic and commercial distortion was identified as a major drawback of transnational human rights protection by the federal judiciary.

C Pandora’s Box: Politics and Economics

Like international antitrust, internalization under the ATS seems to implement and enforce globally acknowledged standards. There do not appear to be any drawbacks in such a brave new world of transnational law. Yet several aspects indicate that the osmosis of norms and policies

³⁸⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). As the court went on to explain, “[I]t would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism” (*id.* at 731).

³⁸⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). ³⁸⁸ *Id.* at 738.

³⁸⁹ Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 *Notre Dame L. Rev.* 1467, 1511 (2014).

³⁹⁰ The first part of his critique highlights an aspect mentioned earlier: the disempowerment of the state allows private parties to usurp domestic courtrooms. In Scalia’s critical voice: “The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign’s treatment of its own citizens within its own territory is a 20th-century invention of internationalist law professors and human rights advocates. . . . The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty . . . could be judicially nullified because of the disapproving views of foreigners.” (*Sosa v. Alvarez-Machain*, 542 U.S. 692, 749–750 (2004) (Scalia, J., concurring)).

may be less optimal than often portrayed. The first concern is that human rights adjudication in US courts may lead to political repercussions in both the short term and long term.³⁹¹ Judge Kleinfeld's dissenting opinion to the Ninth Circuit's 2011 *Sarei v. Rio Tinto, PLC* decision, echoing Justice Scalia's critique in *Sosa*, vividly highlighted this concern:

[O]nce we release the genie of universal jurisdiction from the bottle, we cannot control for whom the genie works its magic. Other countries with different values are likely to use universal jurisdiction against us. There could be a class action, perhaps in Papua New Guinea, brought by a Cherokee against descendants of those who obtained Cherokee land when President Jackson's administration forced their ancestors to leave their homes for the West. A foreign court could entertain a class action on behalf of African-Americans against American banks whose corporate ancestors profited from interest on loans for the purchase of American slaves. The law of nations provides no statute of limitations for universal offenses, so these class actions might well be cognizable in foreign courts. Why should descendants of those who have suffered great wrongs in America limit themselves to largely unavailable American remedies when foreign courts may be more advantageous?³⁹²

Even though there is scant empirical proof for the retaliation of foreign states,³⁹³ this idea seems to have also influenced the Supreme Court's *Kiobel* majority in 2013, which I will address in more detail in an instant. As the majority there argued, restricting the reach of ATS litigation through the presumption against extraterritoriality would contribute to leaving foreign policy decisions to the political branches and avoid "that other nations . . . could hale [US] citizens into their courts for alleged violations of the law of nations."³⁹⁴

The second aspect—more complex than the first—concerns potential economic repercussions of ATS litigation. Two facets must be distinguished: a direct drawback for international trade and direct investment and an indirect effect on competition in international commerce.

As Gary Hufbauer and Nicholas Mitrokostas contended with some grain of exaggeration in the pre-*Sosa* era, ATS litigation may ultimately

³⁹¹ For an early and extensive description of international political frictions, see the opinions in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 *et seq.* (Bork, J., concurring), and 823 *et seq.* (Robb, J., concurring) (D.C. Cir. 1984).

³⁹² *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 816–17 (9th Cir. 2011) (Kleinfeld, J., dissenting). For the costs of retaliation, see Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int'l L. 457, 461 *et seq.* (2001); see also Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 Minn. L. Rev. 815, 857 *et seq.* (2009).

³⁹³ See, e.g., William R. Casto, *The ATS Cause of Action Is Sui Generis*, 89 Notre Dame L. Rev. 1545, 1559 n. 89 (2014).

³⁹⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1669, 185 L.Ed.2d 671 (2013).

have the potential to “devastate global trade and investment.”³⁹⁵ International trade and investment, they claimed, could suffer from the risk of high damage awards against American or foreign-based multinational companies. In particular, foreign direct investment might decline.³⁹⁶ As the authors further predicted, these chilling effects, if left unchecked, might eventually offset the liberalization progress achieved under the recent World Trade Organization agenda.³⁹⁷ But their numbers game has never been bolstered empirically and has hence remained speculative, particularly in light of the comparatively small number of ATS lawsuits.³⁹⁸ Yet transnationalization undoubtedly has an economic underpinning. In this regard, a different aspect is less obvious, though far more convincing.

There is a more fundamental problem of enforcement inefficiency in the international arena. As Justice Breyer, referring to *Empagran*, explained in his concurring opinion in *Sosa*, it is important to “ensure that ‘the potentially conflicting laws of different nations’ will ‘work together in harmony,’ a matter of increasing importance in an ever more interdependent world.”³⁹⁹ He further elaborated:

Since different courts in different nations will not necessarily apply even similar substantive laws similarly, workable harmony, in practice, depends upon more than substantive uniformity among the laws of those nations. That is to say, substantive uniformity does not *automatically* mean that universal jurisdiction is appropriate.⁴⁰⁰

In other words, if normative uniformity is not accompanied by an internationally uniform level of enforcement, the transnationalization of

³⁹⁵ Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening the Monster: The Alien Tort Statute of 1789* 1–2 (2003); Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 St. Thomas L. Rev. 607, 607 (2004).

³⁹⁶ Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening the Monster: The Alien Tort Statute of 1789* 37 *et seq.* (2003); Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 St. Thomas L. Rev. 607, 607–608 (2004). For a more recent debate and concrete example, *see, e.g.*, Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 Geo. L.J. 2161, 2195–2196 (2012).

³⁹⁷ For a prediction of damages, *see* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening the Monster: The Alien Tort Statute of 1789* 37 *et seq.* (2003); Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 St. Thomas L. Rev. 607, 614 *et seq.* (2004).

³⁹⁸ For a biting critique of the authors’ “doomsday scenario of economic loss and devastation,” *see, e.g.*, Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. Int’l Econ. L. 263, 269 (2004).

³⁹⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring). For *Empagran*, *see supra* p. 453 *et seq.*

⁴⁰⁰ *Id.* at 761–762.

substantive norms and policies is problematic. This alludes to what I have already discussed in the context of international antitrust litigation.⁴⁰¹ In addition, a cost-based argument must be brought forward. The economics of comity starts with procedural law here: a court considers a dispute when it has authority over both the parties and the action. In US terminology, this is personal and subject-matter jurisdiction.⁴⁰² The first obstacle for the plaintiff to overcome, therefore, is the establishment of personal jurisdiction. Often, constitutional law requires that a defendant have a minimum level of contact with the forum. For corporate entities, this usually equals incorporation in, having the primary place of business in, or conducting commerce within the forum state. If a case is brought against a national or corporate entity of the forum state, establishing personal jurisdiction is usually no problem. Foreign defendants, however, often may not be subjected to the court's jurisdiction under these standards; in addition, service of process may be impossible or difficult.⁴⁰³ This means that unless the lawsuit specifically comprises subject matter in which domestic and foreign defendants are evenly or almost evenly subject to a certain forum's jurisdiction, it is generally easier to sue a domestic party than a foreigner. As we have seen, international antitrust is a field where this difference between domestic and foreign parties does not play out dramatically.⁴⁰⁴ Yet a number of other areas present a different scenario—one of them is international torts.

As Alan O. Sykes has explained, so-called discriminatory domestic law application can be a key economic factor in international torts, notably with respect to ATS litigation.⁴⁰⁵ If a party acts in more than one jurisdiction, including the forum state where she is domiciled or incorporated, she will always be—regardless of what happens abroad—subject to the forum courts' jurisdiction. If this forum's law provides for stricter

⁴⁰¹ See *supra* p. 456 *et seq.*

⁴⁰² See Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* ch. 1 and ch. 2 (5th edn., 2011).

⁴⁰³ *Id.* at ch. 10. For an instructive analysis of US (and other) rules on personal jurisdiction, see Axel Halfmeier, *Menschenrechte und Internationales Privatrecht im Kontext der Globalisierung*, 68 *RabelsZ* 653, 655 *et seq.* (2004).

⁴⁰⁴ For international antitrust litigation, see *supra* p. 457 *et seq.*

⁴⁰⁵ Alan O. Sykes, *Transnational Tort Litigation as a Trade and Investment Issue*, *John M. Olin Program in Law and Economics Stanford Law School, Working Paper No. 331* (January 2007), at 11 *et seq.*; Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 *Harv. L. Rev.* 1137, 1144 (2007); Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 *Geo. L.J.* 2161, 2194 (2012). For a quite similar argument, see Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *Yale L.J.* 1277, 1311 (1989).

standards of liability than the other jurisdictions' laws and if it extends to the party's conduct at issue, the domestic party will be at a disadvantage in competition. This becomes clear upon a comparison with actors that are not domiciled or incorporated in the forum and are hence far less at risk of being subjected to its courts' jurisdiction. First, according to Sykes, the discriminatory application of domestic tort law conflicts with a national-welfare perspective. This is a perspective that focuses on the welfare maximization of a state's own citizens only and disregards effects on the welfare of foreign states' citizens. To put it simply, a foreign plaintiff suing in the United States will ultimately ask for a transfer of wealth (usually monetary funds for, for example, damages and reparation) from domestic defendants.⁴⁰⁶ This suggests a detriment to the national economy. But the application of stricter standards of the forum's law is also undesirable under a global-welfare perspective. Even if it is superior in terms of economic efficiency, the expectation that applying forum law will always enhance global welfare is mistaken.⁴⁰⁷ If we distinguish between the short-term and long-term effects of discriminatory forum law application, we see that the effects on welfare differ over time. Let us presume that a particular sector of a foreign market's industry is in a competitive equilibrium. In this case, an increase in liability for one type of actor in the market⁴⁰⁸ may improve welfare in the short run. This is true, at least, if the forum's rules are economically superior to the rules that would otherwise apply under the foreign regime. One example where this effect might exist is the prescription of higher safety standards on hotel premises in foreign-based holiday locations. The increase in safety in hotels run by forum-based actors will (as we assume) benefit the consumer in the short term.⁴⁰⁹ But this changes over time if the stricter standards are not comprehensively enforced throughout the market—hence if not *all* actors are subject to the enhanced standards. In the long run, then, the discriminatory increase of liability will raise the overall costs for those actors subject to the forum courts' jurisdiction. Since, in sum, the industry's total output in the foreign market stays the same, however, the market participants ultimately left will be those *not* subject to stricter liability rules. The other type of actors will ultimately leave the market and will be

⁴⁰⁶ See Alan O. Sykes, *Transnational Tort Litigation as a Trade and Investment Issue*, John M. Olin Program in Law and Economics Stanford Law School, Working Paper No. 331 (January 2007), at 8.

⁴⁰⁷ *Id.* at 11; Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 Harv. L. Rev. 1137, 1146 (2007).

⁴⁰⁸ These actors are drawn from the category of defendants subject to forum courts' jurisdiction and, therefore, to stricter liability standards.

⁴⁰⁹ See, e.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (Posner, C.J.).

replaced by those that are isolated from the reach of the higher-standards jurisdiction.⁴¹⁰

Of course, it is questionable whether the ATS could ever become so wide-reaching in its discriminatory enforcement that it could exert a significant impact on international competition.⁴¹¹ Finding an answer to this question is not important here. Instead, what matters is the general conclusion that is seldom contested: the discriminatory submission of a certain class of defendants to higher standards of compliance is a problem for all private law and regulatory regimes when it comes to extraterritorial enforcement. Regardless of whether the substantive norms and policies at issue are universal, the divergence of procedural standards and efficiency can create anticompetitive distortions. The only way to avoid such distortions is a retraction of litigation and enforcement options in jurisdictions with more efficient systems—notably a cutting back of extraterritorial and universal application of substantive laws and policies. This aspect is important in trademark and unfair competition conflicts. Before I address this issue, however, I will conclude the overview on transnationalism with a final look at the US Supreme Court.

D *Kiobel v. Royal Dutch Petroleum Co.: The Swan Song of Transnationalization?*

In September 2002, the *Kiobel* petitioners, a group of Nigerian nationals who had formerly resided in Ogoniland, Nigeria, filed a suit that alleged a violation of the law of nations by the respondents. Two of the respondents were holding companies incorporated in the Netherlands and England. Another respondent company was incorporated in Nigeria, where it was engaged in oil exploration and production. As the complaint specified, the respondents had enlisted the Nigerian government in the 1990s to suppress demonstrations by Ogoniland residents against the environmental effects of the respondents' oil exploration and production activities. In the course of the suppression, the Nigerian military and police forces attacked residents of Ogoni villages—including the petitioners—and

⁴¹⁰ Alan O. Sykes, *Transnational Tort Litigation as a Trade and Investment Issue*, *John M. Olin Program in Law and Economics Stanford Law School, Working Paper No. 331* (January 2007), at 18–19; see also Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 Harv. L. Rev. 1137, 1146 (2007).

⁴¹¹ See, e.g., Chimène I. Keitner, *Response, Optimizing Liability for Extraterritorial Torts: A Response to Professor Sykes*, 100 Geo. L.J. 2211, 2215 *et seq.* (2012). Alan Sykes has cited concrete examples of economic and competitive distortion. See Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 Geo. L.J. 2161, 2195–2196 (2012). Overall, however, the situation does not seem too troubling. See Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. Int'l Econ. L. 263, 269–270 (2004).

committed a number of crimes and atrocities. According to the complaint, the respondents aided and abetted these atrocities by, inter alia, providing the Nigerian forces with food, transportation, and compensation.⁴¹² The petitioners filed suit alleging jurisdiction under the ATS in the Southern District of New York. While the district court was less decided on the petitioners' claims, the Second Circuit dismissed the entire complaint, explaining that the law of nations does not recognize corporate liability for human rights violations.⁴¹³

The Supreme Court majority, in an opinion delivered by Chief Justice John G. Roberts, phrased the issue quite differently. The question, Roberts explained, "is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign."⁴¹⁴ This brought the presumption against extraterritoriality into focus. The ATS may be a strictly jurisdictional rather than regulatory statute. Nonetheless, adjudication on conduct within the territory of other sovereign states still bears "the danger of unwarranted judicial interference in the conduct of foreign policy."⁴¹⁵ In light of these foreign policy implications, application of the ATS must be subject to the presumption against extraterritoriality. As the opinion further explained, the ATS lacks a clear textual indication of intended extraterritoriality, and the historical background suggests that the presumption cannot be overcome if the conduct at issue occurred in the territory of another sovereign.⁴¹⁶ And even if the claims "touch and concern the territory of the United States," as the majority concluded, "they must do so with sufficient force" in order to overcome the presumption.⁴¹⁷ Since conduct in the case had taken place outside the United States, the ATS could not be applied.⁴¹⁸

It may be an overinterpretation to conclude that the Supreme Court, with only its second decision on the ATS, has put an end to international

⁴¹² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1662–1663, 185 L.Ed.2d 671 (2013).

⁴¹³ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 124 (2nd Cir. 2010), *aff'd* on other grounds, 133 S.Ct. 1659 (2013).

⁴¹⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664, 185 L.Ed.2d 671 (2013).

⁴¹⁵ *Id.* ⁴¹⁶ *Id.* at 1665–1666. ⁴¹⁷ *Id.* at 1669.

⁴¹⁸ The majority opinion is accompanied by three concurring opinions, one of which substantially differs from the majority's reasoning and arguments. Unlike the majority, Justice Breyer did not apply the presumption against territoriality; rather, he used the principles and practices of foreign relations law (inter alia, the restatement) as a guideline for applying the ATS. The statute would then apply where the allegedly violative conduct occurs on US territory, where the defendant is an American national, or where the defendant's conduct "substantially and adversely affects an important American national interest," including an "interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *See id.* at 1670–1678 (Breyer, J., concurring).

human rights litigation. Of course, according to the majority in *Kiobel*, the presumption against extraterritoriality constrains the federal courts' power under the ATS. Prima facie, at least, this holding limits options to sue—particularly since the bulk of ATS litigation so far has concerned conduct outside the United States. Yet this need not necessarily be a full bar to litigation under the statute.⁴¹⁹ The majority's holding is actually narrow in the sense that the exclusion may not cover all instances of international human rights violations, especially not conduct that “touches and concerns” the territory of the United States. Scenarios that may still go forward might therefore cover claims against US citizens, including corporate entities, or against foreign citizens living in the United States.⁴²⁰ And, indeed, the continuing current of litigation in lower federal courts somewhat defies the prediction that ATS transnationalization at the federal level has come to a halt.⁴²¹ In addition, ATS litigation may continue in state courts.⁴²² Accordingly, it would be far-fetched to conclude that it is about to disappear soon the way it arrived—Lohengrin style.⁴²³

Overall, however, it comes as no surprise that the court would ultimately restrict the scope and degree of transnationalization—at least in its practical explosiveness and with respect to the looming detriments. Whether the majority “misunderstood” (and hence misapplied) the presumption against extraterritoriality—since *international* human rights are

⁴¹⁹ For the suggestion that the Supreme Court (perhaps) has “crafted a middle ground,” see Stephen Breyer, *The Court and the World—American Law and the New Global Realities* 160–161 (2015).

⁴²⁰ Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 Md. J. Int'l L. 208, 239 (2013); Ralph G. Steinhardt, *Determining Which Human Rights Claims “Touch and Concern” the United States: Justice Kennedy’s Filartiga*, 89 Notre Dame L. Rev. 1695, 1703 (2014).

⁴²¹ For examples see, e.g., Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 Notre Dame L. Rev. 1773, 1784 *et seq.* (2014).

⁴²² William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 Notre Dame L. Rev. 1577, 1607 (2014).

⁴²³ For the romantic figure of Lohengrin, the mystery of his name, and his forced return after revelation of the name, see Richard Wagner, *Lohengrin*, 3rd act, 2nd scene (Elsa): “Laß dein Geheimnis mich erschauen, daß, wer du bist, ich offen seh’! . . . Meiner Treue enthülle deines Adels Wert! Woher du kamst, sag ohne Reue—durch mich sei Schweigens Kraft bewährt! . . . Den Namen sag mir an! . . .” And in the final scene, with Lohengrin ultimately riding back on the swan, 3rd act, 3rd scene (Lohengrin): “Ihr hörtet alle, wie sie mir versprochen, daß nie sie wollt’ erfragen, wer ich bin? Nun hat sie ihren teuren Schwur gebrochen, treulosem Rat gab sie ihr Herz dahin! . . . So hehrer Art doch ist des Grales Segen, enthüllt—muß er des Laien Auge fliehn; des Ritters drum sollt Zweifel ihr nicht hegen, erkennt ihr ihn—dann muß er von euch ziehn. . . . Vom Gral ward ich zu euch daher gesandt: Mein Vater Parzival trägt seine Krone, sein Ritter ich—bin Lohengrin genannt. . . . Mein lieber Schwan! Ach, diese letzte, traur’ge Fahrt, wie gern hätt’ ich sie dir erspart!”

beyond the domain of *domestic* law and thus cannot raise an issue of extraterritoriality⁴²⁴—is not relevant for this inquiry. What is relevant is that the court laid, or at least attempted to lay, the foundation for a rule of self-restraint with respect to universal jurisdiction. Let us remember that transnationalist theory and practice seemed to agree that internalization is unproblematic as long as the norm or policy at issue is universal. In short, a globally uniform norm or policy is deemed to also be globally enforceable without the risk of invading another state's sovereignty.⁴²⁵ The majority opinion in *Sarei v. Rio Tinto, PLC*, illustrated this point with candor:

The norms being applied under the ATS are international, not domestic, ones, derived from international law. As a result, the primary considerations underlying the presumption against extraterritoriality—the foreign relations difficulties and intrusions into the sovereignty of other nations likely to arise if we claim the authority to require persons in other countries to obey our laws—do not come into play. This is because . . . we are not asserting an entitlement to “make law” for the “entire planet.” . . . Instead, and especially in light of *Sosa*, the ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place. It is no infringement on the sovereign authority of other nations, therefore, to adjudicate claims cognizable under the ATS, so long as the requirements for personal jurisdiction are met.⁴²⁶

This perspective, as we have seen throughout this chapter, illustrates a worrisome myopia with respect to the overall and long-term consequences of universal jurisdiction. One aspect is foreign policy friction. This was emphasized by the *Kiobel* majority.⁴²⁷ No less important is the

⁴²⁴ See, e.g., David L. Sloss, *Kiobel and Extraterritoriality: A Rule without a Rationale*, 28 Md. J. Int'l L. 241, 243 (2013); Anthony J. Colangelo, *Kiobel: Muddling the Distinction between Prescriptive and Adjudicative Jurisdiction*, 28 Md. J. Int'l L. 65 (2013).

⁴²⁵ For human rights in general, see, e.g., Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 Yale Hum. Rts. & Dev. L.J. 177, 177 (2008). For antitrust conflicts, this was expressed by Ralf Michaels, Hannah Buxbaum, and Horatia Muir Watt in their *Brief of Amici Curiae, F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 542780, at *20-21 (“When no conflict exists, a jurisdictional restraint analysis is unnecessary.” (with reference to *Steele v. Bulova Watch Co.*)). See also *Developments in the Law—Extraterritoriality, Comity and Extraterritoriality in Antitrust Enforcement*, 124 Harv. L. Rev. 1226, 1230 (2011) (“[I]nternational law’s powerful norm against extraterritoriality sometimes yields to consensual political objectives.”).

⁴²⁶ *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 746 (9th Cir. 2011). For similar formulations in scholarly commentary, see, e.g., Anthony J. Colangelo, *Kiobel: Muddling the Distinction between Prescriptive and Adjudicative Jurisdiction*, 28 Md. J. Int'l L. 65, 71-72 (2013); Roger P. Alford, *The Future of Human Rights Litigation after Kiobel*, 89 Notre Dame L. Rev. 1749, 1771 (2014). The argument has also been brought forward in, for instance, German doctrine. See, e.g., Andreas Spickhoff, *Der völkerrechtsbezogene ordre public*, 275, 280-281, in *Völkerrecht und IPR* (Stefan Leible & Matthias Ruffert eds., 2006) (with further references).

⁴²⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664, 185 L.Ed.2d 671 (2013).

international imbalance of enforcement structures and efficiency: even if a case at bar does not raise a question of conflicting policies, the long-term perspective may still demand jurisdictional self-restraint. The universality of rights and policies aside, there is no panacea to the inherent defect of the system of transnational litigation. As long as enforcement structures and efficiency diverge, transnational consensus is ineffective. No state can act as a decentralized enforcer without facing a risk of such global transaction costs.⁴²⁸

Coming back to the expectable consequences, the *Kiobel* decision in its entirety—including majority and concurrent opinions—indicates an at least rudimentary resurrection of the traditional doctrinal structures that got lost in the course of the late twentieth-century transnationalist movement. With respect to litigation in federal courts, the scope of the ATS is now subjected to yet another limiting element of scrutiny. Whether this is the presumption against extraterritoriality or—as Justice Breyer suggested—“further limiting principles such as exhaustion, *forum non conveniens*, and comity” that “would do the same”⁴²⁹ does not matter. Ultimately, the once seemingly unlimited reach of transnational norms has been cut back. And if it should prove to be true that ATS claims may increasingly be brought in state courts, the doctrine of international human rights litigation has actually come full circle. If international human rights violations are brought as transitory tort cases, states’ rules on choice of law will be key.⁴³⁰ Then, however, one way or the other, the system of comity-based conflicts rules—either technical as conceived of by Savigny or expressly political as suggested by Currie—has taken over again. The die may not be cast yet with respect to the ultimate status of ATS litigation *in toto*. But it is cast insofar as the Supreme Court—without slamming the door shut⁴³¹—has left it ajar for a much more limited number of cases. The comity of abstention, again, has pointed the way.

III Summary

The effects test dominates conflicts resolution in international economic law—namely, international antitrust. It evolved from a reflection of

⁴²⁸ For terminology of the “decentralized enforcer,” see Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 *Geo. J. Int’l L.* 1329, 1334 (2013).

⁴²⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1674, 185 L.Ed.2d 671 (2013) (Breyer, J., concurring).

⁴³⁰ Roger P. Alford, *The Future of Human Rights Litigation after Kiobel*, 89 *Notre Dame L. Rev.* 1749, 1761 *et seq.* (2014).

⁴³¹ Stephen Breyer, *The Court and the World—American Law and the New Global Realities* 161 (2015).

unbounded nation-state sovereignty under the Permanent Court of International Justice's *Lotus* enigma into a less unruly horse, domesticated by techniques of interest balancing and international comity. The meandering illustrates the crossroads at which theory and practice have arrived. While transnationalist theory contends that the global consensus on policies has shrunk, the need for a practical corrective—in other words, a doctrine of jurisdictional self-restraint—suggests otherwise. The question is whether the enforcement of universal policies will ultimately enhance global and national welfare. The answer is difficult to provide, particularly without empirical data. International regulatory litigation appears beneficial both nationally and globally if the policies enforced are “transnational”—and, notably, if the procedural setting provides for efficient handling. The counterposition advocates a consideration of the risks of a practical extension of litigation and the concurrent burdening of potential defendants' international commercial activities. Without globally uniform enforcement procedures, the internalization of universal policies will distort international competition and commerce. In this regard, no international level playing field exists, and the situation will likely not change in the near future.

Even though it concerns a field that appears unchallenged by economic considerations and is hence nonregulatory, international human rights protection reveals similar problems. The perception that transnational consensus on human rights had grown seemed to imply the disappearance of conflicts and a corresponding extension of jurisdictional capacities. As thorough analyses suggest, however, more caution is indicated. Liberating the courts from the traditional confines of jurisdiction will—as in international antitrust—ultimately risk surrendering the judiciary to the dynamics of private litigants' decision making. Without a controlling mechanism, a spontaneous order of public international law privatization may be in the making. And of course, at the end of this process, a true *ius cosmopolitanum* may ensue. Still, however, a reckless and unchecked expanding of jurisdictional capacities deactivates the instruments designed to “civilize” international transacting and commerce.

No matter how venerable the underlying policies and goals, the economic backlash of such “decivilization” can be significant. Of course, human rights protection and enforcement is a field where the cost-benefit ratio must not and cannot be determined by a focus on pecuniary arguments. In this regard, the field is exceptional. But this is not the case for areas of economic regulation, especially trademark and unfair competition law. If the focus is on commerce and competition, there is hardly a reason to risk distortion caused by an overextension of

regulatory policies to foreign markets. In any event, the issue of drawbacks resulting from extraterritoriality or universality is far more important. Accordingly, the doctrine of international trademark and unfair competition law must offer a limiting instrument to cut back the outgrowth of extraterritoriality or universality. In this regard, as I will now address, jurisdictional abstention can also be a question of self-interest instead of altruism—therefore, the doctrine of international comity is about to reveal one more facet of what is required for a civilizing of international transacting and commerce.

Section 3 The Shadowy Existence of Trademark and Unfair Competition Conflicts

Based on our findings in the preceding sections, we can now complete our analysis of international trademark and unfair competition law by taking a concluding look at the most fundamental defect in contemporary doctrine. International trademark and unfair competition law is one of the areas given short shrift when compared to the mass of analyses in other sectors. Reasons for the field's low attractiveness are numerous. As it seems, trademark and unfair competition conflicts present a far more mundane, and thus scholarly less attractive, field than do human rights. Trademark protection is no life-saver. Another reason is trademark and unfair competition law's focus on private rights and its apparent lack of domestic or global regulatory importance. In contrast to antitrust violations, trademark and unfair competition conflicts rarely constitute a "clash of giants"—the overall socioeconomic importance of the concrete dispute at bar appears small and negligible.⁴³² It is especially this latter perspective that invites fallacy. A party-centered angle may be typical for civil judges confronted with "private hucksters" fighting over trademark use and fairness in competition. But limiting the analysis to the concrete case at bar comes with a disregard for overall and long-term consequences.⁴³³ This ultimately distorts the analysis in current theory and practice on both sides of the Atlantic.

⁴³² See, e.g., William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & Econ. 265, 289 (1987) ("Since the allocative effects of individual trademark abuses are pretty much limited to raising consumer search costs, the potential misallocations are much smaller than in most antitrust cases.").

⁴³³ See Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 Yale L.J. 1165, 1167 (1948) ("One thing the examination will reveal is that what appear to be private disputes among hucksters almost invariably touch the public welfare.").

I The Mirage of Extraterritorial Enforcement Efficiency

A common perception still governing international trademark theory and practice is the idea that transnational enforcement of trademark rights is effective. Not surprisingly, the fear, rather, is that the extraterritorial overextension of domestic laws might be contrary to the limitations of national jurisdiction set by rules of public international law. Indeed, particularly in American economic law, some voices even adhere to the assumption that extending the reach of domestic law is preferred over international treaty making and strict territoriality.⁴³⁴ In international trademark and unfair competition conflicts, this understanding is founded on a particularly vicious fallacy: the extraterritoriality of domestic law is thought to ameliorate protection levels globally and, in doing so, enhance national and global welfare. Of course, in European unfair competition conflicts doctrine, the drawbacks of “extraterritoriality” have been debated ever since Nussbaum had suggested that the *lex domicilii communis* should apply to all domestic competitors’ activities in foreign markets. The argument that trade diversion might ensue from overextending domestic law was brought forward beginning in the 1930s.⁴³⁵ In US commentary as well, the anticompetitive effects of extraterritoriality have been alluded to.⁴³⁶ Nonetheless, dominant opinion still counsels in favor of domestic law extension. In particular, US theory regarding international economic law tends to approve extraterritorial regulation.⁴³⁷ The explanation seems plausible: since legal instruments of economic regulation are concerned with market-related interests and aim at establishing and maintaining an international level playing field, their extension reflects the fact that the object of regulation is an international market, not a political territory. As has been suggested, therefore, a reasonable way to enforce market statutes is to extend their reach to the entire relevant market—if necessary, across national borders. The tacit assumption is that enforcement capacities in the international arena are virtually unlimited. According to this approach, the extraterritoriality of domestic law may even serve as a placeholder in cases where an

⁴³⁴ See, e.g., Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 *Minn. L. Rev.* 815, 846 *et seq.* (2009).

⁴³⁵ See *supra* p. 64 *et seq.* Internationally, Wilhelm Wengler first alluded to similar detriments in the 1950s. See Wilhelm Wengler, *Laws Concerning Unfair Competition and the Conflict of Laws*, 4 *Am. J. Comp. L.* 167, 182 (1955).

⁴³⁶ Robert Alpert, *The Export of Trademarked Goods for the United States: The Extraterritorial Reach of the Lanham Act*, 81 *Trademark Rep.* 125, 145 (1991); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 *Law & Pol’y Int’l Bus.* 1, 90–91 (1992).

⁴³⁷ See *supra* p. 246 *et seq.*

international agreement on the unification of regulation has not been achieved.⁴³⁸ Lanham Act extraterritoriality in particular has thus also been criticized for putting foreign defendants at a disadvantage. Since foreign-based alleged infringers may have intentionally and legitimately chosen a foreign jurisdiction as their zone of activity owing to lower regulatory standards, the application of US law to exactly this activity seems to unfairly extend the Lanham Act's stricter rules.⁴³⁹

This assumption also dominates in practice. An early example is the Seventh Circuit's 1944 decision in *Branch v. Federal Trade Commission*,⁴⁴⁰ where the court found jurisdiction under the Federal Trade Commission Act to exist over a domestic correspondence school offering courses in Latin America. Looking at US competitors in the foreign market, the court found that jurisdiction existed on the basis that the Federal Trade Commission's injunction "aimed at compelling the petitioner to use fair methods in competing with his fellow countrymen."⁴⁴¹ Domestic law "does not assume to protect the petitioner's customers in Latin America. It seeks to protect the petitioner's competitors from his unfair practices."⁴⁴² The same philosophy, adopted in the *Nussbaum/Stahlexport* doctrine, has guided German practice and scholarship.⁴⁴³ The general assumption is that extraterritoriality is beneficial for domestic right owners and, accordingly, for national economic interests.⁴⁴⁴

In a more recent case, it was the First Circuit Court of Appeals in *McBee v. Delica Co., Ltd.*⁴⁴⁵ that made reference to a calculation of the overall piracy-related losses to American companies. Chapter 2 analyzed

⁴³⁸ See, e.g., Tonya L. Putnam, *Courts without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 *International Organization* 459, 469 *et seq.* and 485–486 (2009); see also Kal Raustiala, *Empire and Extraterritoriality in Twentieth Century America*, 40 *Sw. L. Rev.* 605, 614 (2011); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 *Notre Dame L. Rev.* 1673, 1707 (2012); for an elaborate analysis of international antitrust regulation, see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 *Harv. Int'l L.J.* 101, 152 *et seq.* (1998).

⁴³⁹ Anna R. Popov, *Watering Down Steele v. Bulova Watch Co. to Reach E-Commerce Overseas: Analyzing the Lanham Act's Extraterritorial Reach under International Law*, 77 *S. Cal. L. Rev.* 705, 727 (2004); Pamela E. Kraver & Robert E. Purcell, *Application of the Lanham Act to Extraterritorial Activities: Trend toward Universality or Imperialism?*, 77 *J. Pat. & Trademark Off. Soc'y* 115, 115 (1995).

⁴⁴⁰ *Branch v. Federal Trade Commission*, 141 F.2d 31 (7th Cir. 1944). ⁴⁴¹ *Id.* at 34.

⁴⁴² *Id.* ⁴⁴³ See *supra* p. 64 *et seq.*

⁴⁴⁴ See, e.g., Roger E. Schechter, *The Case for Limited Extraterritorial Reach of the Lanham Act*, 37 *Va. J. Int'l L.* 619, 634–635 (1997) ("[E]xtraterritoriality gives U.S. trademark owners an additional weapon in the fight against commercial piracy around the globe. . . . [I]f we can design an approach that minimizes conflict with foreign states while maximizing protection for U.S. companies against acts that poach on their goodwill, that approach would seem highly desirable.").

⁴⁴⁵ *McBee v. Delica Co., Ltd.*, 417 F.3d 107 (1st Cir. 2005).

the *McBee* test.⁴⁴⁶ The plaintiff, an American jazz musician, sued a Japanese clothing retailer that had adopted the trademark “Cecil McBee” (identical to the plaintiff’s name) for its adolescent female clothing line. The defendant company held a Japanese trademark; and although it did not market its products outside of Japan, it maintained a website where the trademark was extensively displayed. Even though the court ultimately denied subject-matter jurisdiction and application of the Lanham Act for lack of a “substantial effect on United States commerce,” the reasoning reveals a presumption that the extraterritorial extension of US law to infringements on foreign territory are beneficial for American commerce, particularly domestic trademark holders:

One can easily imagine a variety of harms to American commerce arising from wholly foreign activities by foreign defendants. There could be harm caused by false endorsements, passing off, or product disparagement, or confusion over sponsorship affecting American commerce and causing loss of American sales. Further, global piracy of American goods is a major problem for American companies: annual losses from unauthorized use of United States trademarks, according to one commentator, now amount to \$200 billion annually. . . . In both the antitrust and the Lanham Act areas, there is a risk that absent a certain degree of extraterritorial enforcement, violators will either take advantage of international coordination problems or hide in countries without efficacious antitrust or trademark laws, thereby avoiding legal authority.⁴⁴⁷

Judge Lynch’s argument that extraterritorial enforcement is necessary and efficient has been met with approval.⁴⁴⁸ Yet even though conventional wisdom still seems to suggest that extraterritorial rights protection is an ultimately welfare-maximizing approach, a closer look unveils the fallacy.

II *The Reality of International Trademark Rights Protection*

Enforcement efficiency is a key component of an economic perspective on international trademark and unfair competition law. In essence, this efficiency depends on the actors involved and on their interrelation. If parties to a dispute are members of a community—notably if they are all subject to the same state courts’ jurisdiction—enforcement is largely unproblematic. This is the case in many co-resident disputes, as well as

⁴⁴⁶ See *supra* p. 161–164.

⁴⁴⁷ *McBee v. Delica Co., Ltd.*, 417 F.3d 107, 119 (1st Cir. 2005).

⁴⁴⁸ See, e.g., Jason Webster, *Trademark Law—Extraterritorial Application of the Lanham Act—McBee v. Delica Co., Ltd.*, 417 F.3d 107 (1st Cir. 2005), 30 *Suffolk Transnat’l L. Rev.* 263, 269 (2006); Brendan J. Witherell, *The Extraterritorial Application of the Lanham Act in an Expanding Global Economy*, 97 *Trademark Rep.* 1090, 1105 *et seq.* (2007).

antitrust suits against transnational entities that are unable to evade the reach of extraterritorial regulatory systems, particularly the cross-border extension of national or supranational antitrust regimes.⁴⁴⁹ International trademark and unfair competition violations, however, provide for a more complex and complicated scenario.

A International Intellectual Property Rights Segmentation

A universal and comprehensive definition of the concept of “territoriality” in intellectual property law does not exist.⁴⁵⁰ But there is agreement on two key aspects. First, the scope of a national right is generally limited to the granting state’s territory; in other words, the right owner may exercise her right only within the state’s boundaries.⁴⁵¹ Second, it is uncontested that this geographical-political confinement results in an international segmentation of independent rights. Since each national right is geographically and politically limited, and since all rights are independent, no single solid “global right” exists. If a party has collected

⁴⁴⁹ See also *supra* p. 457 *et seq.*

⁴⁵⁰ See, e.g., Franz Kahn, *Die Lehre vom ordre public (Prohibitivgesetze)*, 161, 240, in *Abhandlungen zum internationalen Privatrecht, vol. I* (Otto Lenel & Hans Lewald eds., 1928). (“[A]lle möglichen und denkbaren Anknüpfungen verbergen sich ja in dem Proteus der ‚Territorialität‘, alle schillern sie gleichzeitig bunt nebeneinander; welche sollen wir ins Auge fassen, auf welche kommt es gerade an?”). For the modern landscape, see, e.g., Arnulf Weigel, *Gerichtsbarekeit, internationale Zuständigkeit und Territorialitäts-Prinzip im deutschen gewerblichen Rechtsschutz* 77–78 (1973); Christian von Bar, *Kollisionsrecht, Fremdenrecht und Sachrecht für internationale Sachverhalte im Internationalen Urheberrecht*, 108 UFITA 27, 48 (1988); Kurt Siehr, *Das urheberrechtliche Folgerecht inländischer Künstler nach Versteigerung ihrer Werke im Ausland*, 1992 IPRax 29, 31 (“Das Territorialitätsprinzip ist ein hoffnungslos mehrdeutiger Begriff, der nichts darüber aussagt, durch welches Anknüpfungsmerkmal örtlich angeknüpft wird.”); Christopher Wadlow, *Enforcement of Intellectual Property in European and International Law—The New Private International Law of Intellectual Property in the United Kingdom and the European Community* para. 1–22 (1998) (“Territoriality has such a wide range of meanings that it may fairly be criticised for being a term without a concept, and in some of its ramifications without much justification.”); Frank Peter Regelin, *Das Kollisionsrecht der Immaterialgüterrechte an der Schwelle zum 21. Jahrhundert* 46 (2000); Christian von Bar & Peter Mankowski, *Internationales Recht—vol. I: Allgemeine Lehren* § 4 para. 64 (2nd edn., 2003); Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 Wm. & Mary L. Rev. 711, 725 (2009) (“That principle is somewhat more chameleon-like than most scholars assume. Its protean nature serves only to obscure the real grounds for decisions in this area and to forestall the development of a genuine private international law reflecting the complexity demanded by contemporary exploitation of intellectual property.”).

⁴⁵¹ See, e.g., Erwin Deutsch, *Wettbewerbsstatbestände mit Auslandsbeziehung* 20 *et seq.* (1962); Arnulf Weigel, *Gerichtsbarekeit, internationale Zuständigkeit und Territorialitäts-Prinzip im deutschen gewerblichen Rechtsschutz* 99 (1973); Karl-Heinz Fezer, *Markenrecht*, Einl H MarkenG para. 7 (4th ed., 2009).

protection in different states, she holds a “bundle of rights.”⁴⁵² Thus, rather than being concerned with a uniform body of transnational goodwill, international trademark protection deals with a checkerboard of individual entitlements.⁴⁵³

This segmentation is commonly explained on a number of legal grounds. Most conventionally, intellectual property rights are still seen as state-granted licenses. Such an act of the state can extend only within its political boundaries.⁴⁵⁴ Another approach describes the territorial segmentation of rights as a consequence of national lawmakers’ voluntary self-restraint.⁴⁵⁵ Accordingly, it is the inherent limitation of the right that determines its restricted scope.⁴⁵⁶ But territoriality can also be seen in light of natural limitations to nation-state capacities. It must then be understood as a mirror image of actual state power.⁴⁵⁷ Under such a realist lens, territoriality is a factual rather than a legal concept.⁴⁵⁸

⁴⁵² *IHT Internationale Heiztechnik v. Ideal-Standard*, C-9/93, para. 24–25 (22 June 1994), [1994] E.C.R. I-2789; BGHZ vol. 41, 84, 91—*Maja* (22 January 1964); BGHZ vol. 22, 1, 13—*Flava Erdgold* (2 October 1956); Gerhard Kegel, in *Soergel: Kommentar zum Bürgerlichen Gesetzbuch, Einführungsgesetz, vol. X*, Anh. Art. 12 para. 16 (W. Siebert ed., 12th edn., 1996) (so-called Kegel’sche Bündeltheorie); Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 *Wm. & Mary L. Rev.* 711, 766 (2009); Michael Grünberger, in *Nomos-Kommentar-BGB, Rom-Verordnungen, vol. VI*, Art. 8 Rom II para. 3 (Rainer Hüßtege & Heinz-Peter Mansel eds., 2014).

⁴⁵³ The European Community’s trademark is a supranational right with the same segmented character as national rights, but extended within the geographical-political boundaries of the community. For the idea of a *Weltrecht* of trademarks under substantive law theories, see *supra* p. 258 *et seq.*

⁴⁵⁴ This is the so-called *Verwaltungsaktlehre*. See, e.g., RGZ vol. 118, 76 (20 September 1927); Arthur Nussbaum, *Deutsches internationales Privatrecht—Unter besonderer Berücksichtigung des österreichischen und schweizerischen Rechts* 337–338 (1932) (“Das Territorialitätsprinzip besagt mithin, daß das Immaterialgüterrecht nur innerhalb des ‚Verleihungsstaates‘ wirkt.”); Erwin Deutsch, *Wettbewerbsstatbestände mit Auslandsbeziehung* 21 *et seq.* (1962); Christian von Bar, *Territorialität des Warenzeichens und Erschöpfung des Verbreitungsrechts im Gemeinsamen Markt* 30 (1977).

⁴⁵⁵ See, e.g., RGZ vol. 149, 102, 105 (19 October 1935); Lienhard Schikora, *Der Begehungsort im gewerblichen Rechtsschutz und Urheberrecht* 55 (1968); Arnulf Weigel, *Gerichtsbarekeit, internationale Zuständigkeit und Territorialitäts-Prinzip im deutschen gewerblichen Rechtsschutz* 109 *et seq.* (1973).

⁴⁵⁶ Arthur Nussbaum, *Deutsches internationales Privatrecht—Unter besonderer Berücksichtigung des österreichischen und schweizerischen Rechts* 337–338 (1932); see also Dieter Pfaff, *Das Internationale Privatrecht des Ausstattungsschutzes*, 1109, 1123, in *Handbuch des Ausstattungsrechts—Der Schutz der nichteingetragenen Marke und Ausstattung im In- und Ausland, Festgabe für Friedrich-Karl Beier zum 60. Geburtstag* (Gerhard Schrickler & Dieter Stauder eds., 1986).

⁴⁵⁷ See, e.g., Jürgen Basedow, *Entwicklungslinien des internationalen Kartellrechts—Ausbau und Differenzierung des Auswirkungsprinzips*, 1989 *NJW* 627, 638; Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 *Sup. Ct. Rev.* 179, 207–208.

⁴⁵⁸ See Justice Holmes in *American Banana* (213 U.S. 347, 356–357 (1909)): “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,

Indeed, the public international law of intellectual property protection does not expressly provide for the principle of territoriality.⁴⁵⁹ Nor do national laws appear to have ever expressly implemented the idea of a nation-state's self-limitation.⁴⁶⁰ Segmentation in the international arena, therefore, primarily reflects the realities of limited capacities. The equation is simple: in the domestic arena, states are endowed with the power of enforcement; rights creation and protection is their exclusive and absolute domain. At the international level, however, the state's power to enforce is limited by definition.

B The International Vacuum of Nation-State Capacities

This last aspect of limited factual powers highlights the most relevant characteristic of international intellectual property protection. Since there is no world state to create property rights, protection in the international sphere is deficient. Indeed, a quasi-Hobbesian state of nature exists.⁴⁶¹ States have always been largely "powerless" vis-à-vis their sovereign counterparts and particularly vis-à-vis private individuals outside their borders. International agreements on judicial cooperation, recognition, and enforcement may have improved the situation. But the vacuum of capacities still exists. And this impotency is further intensified by the increasing detachment of conduct and effects. Globalization has accelerated and dephysicalized communication and transacting. Examining trademark and unfair competition law in this light illustrates the key differences between domestic and international conflicts. In the domestic sphere, efficient enforcement is—at least in principle—guaranteed by the territorial sovereign. At the international level, two scenarios must be distinguished. The extraterritorial enforcement of national rights and policies can be efficient. This is usually the case in international antitrust conflicts: as we have seen, both domestic and foreign-based violators are regularly equally subject to the regulating states' jurisdiction. If, however, right protection and policy enforcement are inefficient, anticompetitive distortion looms. As we have seen, this is the problem

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."

⁴⁵⁹ See *supra* p. 193 *et seq.*

⁴⁶⁰ My comparative-historical overview has presented many examples to the contrary. See *supra* chapters 1 and 2 *passim*.

⁴⁶¹ See Hans-Jörg Schmidt-Trenz & Dieter Schmidtchen, *Private International Trade in the Shadow of the Territoriality of Law: Why Does It Work?*, 58 *Southern Economic Journal* 329, 331 (1991); for terminology and the concept in general, see Anthony T. Kronman, *Contract Law and the State of Nature*, 1 *J. L., Econ. & Org.* 5, 6 (1985); for choice of law, see Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 *Am. J. Comp. L.* 297, 297 (1953).

underlying international human rights protection. Trademark and unfair competition conflicts is another example in this category.

C Trademark Extraterritoriality: Individual Propertization and Overall Taxation

Parallels between international tort law and trademark and unfair competition choice of law are manifest. As in international human rights litigation, notably personal jurisdiction rules can account for a nominal prevalence of domestic defendants in cross-border disputes. If forum law applies and provides for higher protection levels, this results in a discriminatory application of stricter standards and—ultimately—in anticompetitive distortions on foreign-based markets. Especially under US trademark doctrine, this phenomenon—which we might call an eye-of-the-needle effect—is further ratcheted by the first *Bulova* test factor.

The *Steele* progeny provides illustration:⁴⁶² by requiring “nationality” as one factor in the analysis of subject-matter jurisdiction, the *Bulova* test complicates suits against non-US nationals and entities. A cursory look at post-*Steele* case law on international trademark conflicts through 2014 reveals that defendants in 34 out of 140 opinions (24.29%) were American individuals or corporate entities. In 61 out of 140 opinions (43.57%), both national and foreign individuals and/or corporate entities were on the defendant side. Hence, overall, 95 out of 140 opinions featured at least one defendant party that was either an American individual or entity (67.86%). Courts have favored the application of domestic law in 26 out of 34 opinions where defendants were solely US nationals and entities (76.47%). In scenarios where the defendants consisted of both US and foreign nationals and/or entities, courts decided in favor of Lanham Act application in 35 out of 61 opinions (57.38%). If there were only foreign nationals or entities on the defendant side, the Lanham Act applied in only 9 out of 31 opinions (29.03%).⁴⁶³

Taking further into account that substantive law and procedural law in the United States are favorable to right owners, they will usually prefer to litigate foreign infringements in US federal courts, not in courts abroad. Since the extraterritorial application of domestic law will not be efficient enough to establish perfectly economized market information structures

⁴⁶² For a bird’s-eye view on the *Steele* progeny see p. 171 *et seq.* and appendix A.

⁴⁶³ For a comparison, the overall extraterritoriality rate (i.e., the Lanham Act application rate) across all opinions in the *Steele* progeny was 59.29%. It is important to note, however, that under a Chi-square test of independence, there is a statistically significant relationship between the defendant’s nationality and the Lanham Act application rate only for cases where the defendants were foreign nationals or entities only.

in a foreign territory,⁴⁶⁴ the primary effect that will ensue is the “taxation” of domestic actors.⁴⁶⁵

Under this perspective, the drawbacks of extraterritoriality can also be described as a specific facet of propertization. The extension of trademark rights’ substantive scope of application may somewhat increase domestic owners’ rights, but it creates transaction costs for all other market participants. As Mark Lemley explains in general terms, “The more we propertize, the more transaction costs we impose on everyone.”⁴⁶⁶ In the transnational sphere, domestic parties competing in foreign markets are the first to bear these costs. In the end, however, it is consumers in these foreign markets who suffer. While rights extension across national borders may lead to an immediate and short-term trademark propertization for the individual right owner, over time, it suffocates competition *in toto*.

III Summary

A general misperception exists in trademark and unfair competition conflicts doctrine. Often, courts and scholars assume that domestic actors can be efficiently protected both inside and outside national borders. Reality, however, is different. Unlike international antitrust violations, extraterritorial trademark infringements and unfair competition violations are usually hard to police comprehensively through forum courts. One consequence is that from among the group of

⁴⁶⁴ The fact that the domestic regime’s extension to other jurisdictions may be more efficient *per se* must not lead to the conclusion that competition in the foreign market would move toward an optimal stage. In the short run, the application of stricter (and presumably more efficient) standards of trademark and unfair competition law might enhance market information quality. The prosecution of unfair competitive conduct will then “clean” the market from incorrect information. The actual impact, however, is negligible. Even the agglomeration of numerous instances of extraterritorial regulation will not suffice to establish a comprehensively efficient market information climate in the foreign market. The bulk of foreign-based competitors (not subject to extraterritorial jurisdiction) are at a competitive advantage. This corresponds to the situation in international tort litigation (*see supra* p. 469 *et seq.*).

⁴⁶⁵ *See, e.g.,* Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 Harv. L. Rev. 1137, 1146 (2007). This result may seem paradoxical to the conventional theory of antiextraterritorialism, which contends that extraterritorial regulation is an undemocratic extension of domestic laws to foreigner-competitors as outsiders without a voice in or the ability to influence domestic politics. *See, e.g.,* Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. Pa. L. Rev. 1513, 1616 (2005) (“[I]t is violative of basic democratic principles for outsiders of the political community to dictate laws to the community. Such regulations may be thought of as extraterritorial in nature, and are just a step away from the ‘taxation without representation’ that so vexed our country’s forefathers.”).

⁴⁶⁶ Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1696 (1999).

competing actors in foreign markets, it is mostly domestic parties that are drawn as defendants into forum courts, resulting in a distortion of competition. Counterintuitively, therefore, we must conclude that extraterritoriality is detrimental for domestic parties and foreign consumers alike. Accordingly, jurisdictional self-restraint and abstention should be practiced not so much in the interest of other sovereign states but in the regulator's own interest in protecting its domestic constituencies.

Conclusions

The twentieth-century merger of private and public law as well as the concurrent fusion of public and private international law used to be seen as the starting point for a new era of transnational law uniformity. The dissolution of legal categories also seemed to deconstruct nation-state boundaries. Yet, more recent practical realities tell a different story. The fields of international antitrust and human rights litigation are exemplary for the disenchantment that has replaced the interim transnationalist euphoria. Today, in many sectors, it seems as if jurisdictional self-restraint is the order of the day. Indeed, it seems as if a doctrine of international comity as a principle of jurisdictional self-restraint and abstention has re-materialized. Regardless of whether one is willing to acknowledge international comity as a legal instrument, it is hardly contestable that the doctrine's subject matter of "civilizing" international private and regulatory law affairs is *the* requirement of a functioning order of transnational communication and socioeconomic transacting. As a closer look at trademark protection and unfair competition prevention in the international arena reveals, such a civilizing doctrine must be understood to have at least two different sides. First, it is conceived of in the traditional sense as a rule of co-sovereign respect. In this regard, it particularly demands self-restraint in international regulatory matters. By this means, the illegitimate invasion of foreign sovereigns' spheres of statal power is avoided in the interest of international harmony and concord. This aspect has always been acknowledged when the territoriality of rights was explained as a consequence of the international segmentation of regulatory state capacities. In addition however—and this is still widely overlooked—the doctrine can also be understood as a rule of genuinely self-interested abstention. In this sense, it is intended to prevent a regulator's extraterritorial overreach, resulting in a discriminatory application of the domestic (presumably stricter) regime of rights protection and economic regulation to its own constituencies. Like in international antitrust and human-rights litigation, in the long run, it may be particularly domestic parties that will be damaged. In order to guarantee

what Story termed the “mutual interest and utility” and what Savigny, quite similarly, explained as “the real advantage” of a civilized system of conflicts resolution, a dual limitation is indicated: both over- and under-extension of national laws must be avoided. This is the challenge when conflicts law and choice of law for international trademark protection and unfair competition prevention is at stake. In the next and final chapter, we will formulate concrete rules of application in order to implement this insight into legal practice.