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The Local Law of Global Antitrust

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THE LOCAL LAW OF GLOBAL ANTITRUST

EDWARD T. SWAINE*

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INTRODUCTION

Antitrust seems like a brief for the uselessness of international law. The imperative for international cooperation is obvious.¹ Lowered trade barriers increase the relative significance of private restraints on competition,² even as heightened international trade undermines the ability of individual nations to achieve antitrust objectives by themselves.³ Meanwhile, the phenomenal proliferation

1. For recent expressions, see *Report on the Internationalization of Competition Law Rules: Coordination and Convergence*, 1999 A.B.A. SEC. OF ANTITRUST L. & INT'L L. & PRAC. 60 [hereinafter *A.B.A. Report*], available at http://www.abanet.org/ftp/pub/antitrust/conv_rpt.doc; INT'L COMPETITION POLICY ADVISORY COMM., U.S. DEPT OF JUSTICE FINAL REPORT annex 1-C (2000) [hereinafter *ICPAC FINAL REPORT*], available at <http://www.usdoj.gov/atr/icpac/1c.pdf>; A. Douglas Melamed, *International Cooperation in Competition Law and Policy: What Can be Achieved at the Bilateral, Regional, and Multilateral Levels*, 2 J. INT'L ECON. L. 423, 423-24 (1999), available at http://www3.oup.co.uk/jielaw/hdb/Volume_02/Issue_03/pdf/020423.pdf; Robert Pitofsky, *Competition Policy in a Global Economy—Today and Tomorrow*, 2 J. INT'L ECON. L. 403, 403-04 (1999), available at http://www3.oup.co.uk/jielaw/hdb/Volume02/Issue_03/pdf/020403.pdf; Daniel K. Tarullo, *Competition Policy for Global Markets*, 2 J. INT'L ECON. L. 445, 447-50 (1999) [hereinafter *Tarullo, Competition Policy*], available at http://www3.oup.co.uk/jielaw/hdb/Volume_02/Issue_03/pdf/020445.pdf; Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000) [hereinafter *Tarullo, Norms and Institutions*].

2. Sir Leon Brittan, *The Need for a Multilateral Framework of Competition Rules*, Address Before the Organisation for Economic Cooperation and Development (OECD) Conference on Trade and Competition (June 29-30, 1999) (noting that "as government restrictions to trade are progressively reduced, there is increased concern that the benefits ... could be denied through anticompetitive business practices with market foreclosure effects"), available at http://www1.oecd.org/daf/clp/trade_competition/conference/sirBrittan.htm; Jonathan Faull, *Why Do We Need More Cooperation in the Field of Competition Policy?*, Address Before the Third European Union-Japan Competition Policy Seminar (Nov. 22, 1995) (same), available at http://europa.eu.int/comm/competition/speeches/text/sp1995_052_en.html; see also *ABA Report*, *supra* note 1, at 13; Joel Davidow, *Antitrust Issues Arising Out Of Actual Or Potential Enforcement Of Trade Laws*, 2 J. INT'L ECON. L. 681 (1999) (describing potential tensions between trade remedies and self-help and antitrust law), available at http://www3.oup.co.uk/jielaw/hdb/Volume_02/Issue_04/pdf/020681.pdf. Some argue that there is no proof that private restrictions have mushroomed. Joanna R. Shelton, *Competition Policy: What Chance for International Rules?*, OECD J. COMP. L. & POL'Y 37-54, 61 (1999); Organisation for Economic Cooperation and Development (OECD), *Aide-Memoire* 42 (June 29-30, 1999) (remarks of Diane Wood), available at http://www1.oecd.org/daf/clp/trade_competition/conference/aidleme-e.pdf. But even if new restrictions have not been encouraged, the relative significance of existing restrictions have increased due to the erosion of other barriers.

3. Tarullo, *Norms and Institutions*, *supra* note 1, at 479-80 (focusing on international cartels and possible emergence of global oligopolies or monopolies); see also Joel I. Klein, *The War Against International Cartels: Lessons from the Battlefield*, 1999 ANN. PROC. FORDHAM CORP. L. INST. CONF.: INT'L ANTITRUST L. & POL'Y 13, 18 (Barry E. Hawk ed., 1999) ("[T]he

of antitrust codes⁴ demonstrates not only the possibility of a new consensus on antitrust, but also the need for it, given the huge potential for regulatory overlap. Numerous antitrust regimes impose inconsistent requirements and substantial compliance costs, especially for the growing number of mergers requiring approval in multiple jurisdictions.⁵ Particularly given the highly active antitrust authorities in the United States and the European Union, some think that "anti-trust has been an accident waiting to happen in transatlantic relations."⁶ Tempers in fact were sorely tested in the Boeing/McDonnell Douglas merger⁷ and the attempted

conspirators are working globally, so antitrust enforcers must do so as well."), available at <http://www.usdoj.gov/atr/public/speeches/3747/htm>.

4. Klein, *supra* note 3, at 19 ("Over 80 countries now have antitrust laws -- most of them enacted during the past five or ten years -- and nearly 25 other countries are in the process of drafting such laws."); accord ICPAC FINAL REPORT, *supra* note 1, at 33. See generally Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105 (1998).

5. ICPAC FINAL REPORT, *supra* note 1, at 52-53 (describing potential for divergent analyses and results in multijurisdictional mergers); *id.* at 90-98 (describing unnecessary transaction costs imposed by multiple review processes); Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 ANTITRUST L.J. 219, 220 (2000) (same). Even mergers involving companies from the same country may pose international issues. Alan Cowell, *Seeking a Common Rule Book for International Mergers*, N.Y. TIMES, Jan. 28, 2001, at C4 (noting one transaction in which the merging parties sought approval from over forty jurisdictions, and another failed attempt requiring the services of thirty-five law firms, filing in sixteen jurisdictions and eight languages); William J. Kolasky, Jr. & William F. Adkinson, Jr., *Report Your Merger to FTC, DOJ, EC, Etc.*, LEGAL TIMES, Nov. 2, 1998, at 44 ("Most major mergers today, even those involving firms whose homes are in the same country, have a multinational dimension: MCI/WorldCom, Guinness/Grand Metropolitan, Price Waterhouse/Coopers & Lybrand, Daimler Benz/Chrysler, and British Petroleum/Amoco are just a few of the most prominent examples."). Professor Tarullo has expressed mild skepticism about the burdens of multiple reviews, citing a lack of business interest in an OECD proposal for a common premerger form, see Tarullo, *Norms and Institutions*, *supra* note 1, at 482, and the occasional reluctance of businesses to facilitate review by sharing confidential information, see Tarullo, *Competition Policy*, *supra* note 1, at 449-50. But it seems fairer to conclude that this reveals concerns about the alternatives, such as the feasibility of multinational merger processes or the competitive significance of confidential information.

6. John Van Oudenaren, *E Pluribus Confusio: Living With the EU's Structural Incoherence*, THE NATIONAL INTEREST, Oct. 1, 2001, available at 2001 WL 18477244.

7. Boeing's acquisition of another U.S. corporation, McDonnell Douglas, won easy clearance from the U.S. Federal Trade Commission (FTC). But the European Commission wound up challenging the transaction, requiring substantial concessions, notwithstanding attempts by U.S. politicians, including then-President Clinton, to intervene with their Commission counterparts. While many European observers supposed that the absence of any U.S. challenge reflected national biases, U.S. commentators were highly critical of the

GE/Honeywell merger.⁸ Small wonder, then, that the obsession with adapting American antitrust to contemporary economics has taken a backseat to rationalizing the more discrepant impulses of international antitrust—the focus, as evidenced in weekly headlines, being more on Brussels, Paris, or Geneva than Chicago.⁹

The question for many, in consequence, is why greater international cooperation has not transpired, or if it ever can;¹⁰ the

role Airbus, a European competitor of Boeing's, played in the Commission proceedings, and the mutual recriminations were sharp and rancorous. For discussion, see ICPAC FINAL REPORT, *supra* note 1, at 55-56; Thomas L. Boeder, *The Boeing-McDonnell Douglas Merger*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 139 (Simon J. Evenett et al. eds., 2000); Eleanor M. Fox, *Lessons From Boeing: A Modest Proposal to Keep Politics Out of Antitrust*, ANTITRUST REP., Nov. 1997, at 19; William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2001); Tarullo, *Norms and Institutions*, *supra* note 1, at 481.

8. This past summer, the European Commission announced that it would prohibit the proposed acquisition by General Electric of Honeywell International, marking the first time (as counsel for Honeywell put it) that "a transaction involving two U.S. companies has been blocked by the EC after receiving approval from antitrust authorities in the United States." Neal R. Stoll & Shepard Goldfein, *A Tale of Two Regulators*, N.Y. L.J., July 17, 2001, at 3. Whether or not the Commission set a real precedent—the transaction was blocked in part because the parties could not agree to concessions that might have permitted a highly conditioned approval, see Andrew Hill, *GE, Honeywell Fall Out Over Deal*, FIN. TIMES, June 30/July 1, 2001, at 1, and the decision has been appealed to the European Court of First Instance, Francesco Guerrera, *GE-Honeywell Decision Challenged*, FIN. TIMES, Sept. 13, 2001, at 17—it prompted President Bush to indicate that he was "concerned" about the merger's rejection, and the Commission decision was characterized by Secretary of the Treasury Paul O'Neill as "off the wall" and by Assistant Attorney General Charles James as "reflect[ing] a significant point of divergence" with "[c]lear and longstanding U.S. antitrust policy." Michael Elliott, *How Jack Fell Down*, TIME, July 16, 2001, at 40; Press Release, U.S. Dep't of Justice, Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition (No. 01-303) (July 3, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/8510.htm. For some of the many contemporary criticisms of the Commission's decision, see Gary S. Becker, *What U.S. Courts Could Teach Europe's Trustbusters*, BUS. WK., Aug. 6, 2001, at 20; Jeffrey E. Garton, *The GE-Honeywell Fiasco: Where to Go From Here*, BUS. WK., July 23, 2001, at 28; Lester C. Thurow, *Irreconcilable Differences*, BOSTON GLOBE, July 10, 2001, at D4.

9. *E.g.*, Charles James, *International Antitrust in the 21st Century: Cooperation and Convergence*, Address before the OECD Global Forum on Competition (Oct. 17, 2001) (discussing need to address international differences concerning portfolio or range effects analyses in bilateral relations with the European Community, in multilateral form such as the OECD, and the newly created Global Competition Network (as it was then named)), available at <http://www.usdoj.gov/atr/public/speeches/9330.htm>.

10. *E.g.*, Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U.L. REV. 1501 (1998); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 277 (1992).

predicate, in any case, is that international law has failed to provide any sort of solution. Justice Holmes once suggested that U.S. antitrust legislation was limited by international principles,¹¹ but the Permanent Court of International Justice subsequently professed ignorance as to what those principles were.¹² There has been little progress since. Attempts to establish a comprehensive international antitrust regime have repeatedly failed, and many believe they will continue to do so.¹³

Customary international law¹⁴ (or its kissing cousin, comity¹⁵) has been left to fill the breach, without much effect. For one, international law objections to U.S. extraterritoriality have faded as more and more nations assert like authority themselves, and cooperate with the United States either informally or through bilateral agreements.¹⁶ Meanwhile, attempts by U.S. courts to practice jurisdictional self-restraint—in the form of a multifactorized reasonableness test based substantially on custom¹⁷—fell off the wagon in *Hartford Fire Insurance Co. v. California*,¹⁸ in which the Supreme Court held that effects jurisdiction under the Sherman Act should be truncated only where foreign law compelled a defendant's

11. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909).

12. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A.) No. 20, at 35 (Sept. 7):

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; 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

... [A]ll 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.

13. See *infra* text accompanying notes 144-52.

14. For ease of reference, "custom."

15. As considered more fully below, understandings of what comity entails, and how it differs from international law, vary greatly, but it is often used to connote more of an ideal than an obligation. See *infra* text accompanying notes 244-49, 387-91, 428-29.

16. See *infra* text accompanying notes 60-66.

17. E.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) [hereinafter RESTATEMENT (THIRD)].

18. 509 U.S. 764 (1993).

antitrust violation.¹⁹ *Hartford Fire* relied on a patent misreading of the *Restatement (Third) of Foreign Relations*, but many contend that the Court's mistakes were venial: customary international law has not yet dictated, and perhaps may never properly dictate, any judicially enforceable restrictions on the exercise of antitrust jurisdiction.²⁰

The antitrust experience, indeed, has been cited as a compelling indictment of customary international law in general.²¹ The reasonableness test was bottomed substantially on judicial and academic fiat, rather than state practice, thus typifying a

19. *Id.* at 798-99.

20. *E.g.*, Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 506 (1998) ("Apart from laws enacted by governing members of the European Union, there is no international law of antitrust. No internationally agreed-upon rules of prescriptive jurisdiction have emerged in antitrust cases.").

21. *E.g.*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 481-82 (2000) (citing reasonableness limits on extraterritoriality as exemplary failing of customary international law); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 696-707 (1986) (same). Professors Bradley and Goldsmith, two leading critics of customary international law's standing in U.S. courts, also indirectly challenge extraterritoriality, which they appear to regard as a marginal type of traditional norm. Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 354 n.195 (1997) (noting "the purported CIL limits on the extraterritorial application of state law"). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2272-73 (1998) (approving the use of "CIL-related canons," including "that ambiguous statutes be construed not to violate international law, the presumption against extraterritoriality, and international comity"). Even defenders of customary international law, while critical of attempts to marginalize extraterritoriality and other traditional doctrines, offer only vague or half-hearted defenses of such limits on national authority. Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Reply to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 391-92 (1997) (noting inattention to "controversial and complicated example . . . of customary international law limits on the exercise of extraterritorial prescriptive jurisdiction," and assuming that in some cases "customary international law forbids [extraterritorial] application"); *see also* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1856 (1998) (arguing that "[i]nternational comity represents a principle with roots in both common law and international law, which now may be evolving into a rule of customary international law. Whether viewed as a rule of statutory construction or justiciability, or a principle of reasonableness, international comity clearly should be treated as a doctrine of federal law, capable of revision by Congress, the executive branch, or the federal courts, as circumstances demand."). For an important exception, see Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2287-88, 2311-12 (1991) (arguing that the rejection of reasonableness as a jurisdictional restriction questions a particular conception of international law, not its relevance).

methodology that custom's critics find particularly unsavory. To be sure, nations have tried to avoid conflict and coordinate their antitrust affairs, but such practices look like political or regulatory *alternatives* to custom,²² and offer little support for the distinctive balancing exercise they are supposed to have adopted. Reasonableness thus illustrates custom's familiar paradox: if the norm is genuinely patterned on what nations do, it verges on redundancy; if, on the other hand, it imposes a higher standard, it is not custom at all, and illegitimately interferes with ostensibly adequate political alternatives.²³

But such criticisms mistakenly accept the dominant discourse of custom on its own terms. As this Article explains, reasonableness may be unpersuasive, but that does not mean no custom exists—it just means that we have been looking for it in all the wrong places. Critics of antitrust custom, like its advocates, overlook the potential for what I describe as “local international law:” that is, international law that may be limited in the number of adherents, subject matter, and depth, but which is well adapted to application among certain nations and within their municipal legal environment. Local international law thus offers an intermediate alternative to claims for a universal international law, on the one hand,²⁴ and arguments that would require treaty making or domestic legislation in order to create international obligations, on the other.²⁵

22. E.g., Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991); cf. Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 465-70 (1989) (criticizing the draft and, to a lesser extent, final versions of *Restatement (Third)* section 403 on grounds that it exemplified attempts to present international law, detached from U.S. political authority, as an authoritative source of decisions in U.S. courts).

23. Cf. Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 641 (2000) (proposing rational choice analysis of customary international law that suggests it “has little if any effect on national behavior”); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (same).

24. E.g., Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993) (arguing that international legal norms may sometimes be promulgated outside of treaty-making process, notwithstanding state dissent).

25. E.g., Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 834-45 (1990) (review essay).

Local international law also affords a fresh opportunity to address the awkward relationship between custom and constitutional federalism. Global antitrust is federal in two important senses: first, as more commonly observed, in respecting the function of national differences within the international legal environment;²⁶ second, in the continuing relevance of the American states to antitrust enforcement even at the international level.²⁷ Local international law insists on examining the connection between these planes. To take a contemporary example, Microsoft's chief antagonist to date has been the U.S. Department of Justice,²⁸ but various state attorneys general have played a significant (and arguably disruptive) role at times,²⁹ and the

26. E.g., Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781 (2000); Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142 (2001).

27. 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, 252-53 (2001); Guzman, *supra* note 10, at 1541; Lionel Kestenbaum & James W. Olson, *Federal Amicus Intervention in Private Antitrust Litigation Raising Issues of Extraterritoriality: A Modest Proposal*, 16 INT'L L. 587 (1982); Diane P. Wood, *United States Antitrust Law in the Global Market*, 1 IND. J. GLOBAL LEGAL STUD. 409, 416 (1994).

28. In 1994, the Justice Department filed a complaint alleging that Microsoft had maintained an illegal monopoly in the operating-systems market through anticompetitive provisions in its licensing and software development agreements. The case was initially resolved with a consent decree, *United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995), which the Department later charged—ultimately unsuccessfully—Microsoft had breached, *United States v. Microsoft*, 147 F.3d 935 (D.C. Cir. 1998). Just prior to the resolution of that case, the Department initiated separate proceedings alleging multiple violations of sections 1 and 2 of the Sherman Act, and after a highly publicized trial, won a sweeping remedy including a court-ordered breakup of Microsoft. The D.C. Circuit later upheld most, but not all, of the district court findings, and ordered reconsideration of the remedial order. *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001).

While the matter was pending before the Supreme Court and the district court, the Department announced that it would no longer pursue its tying claim against Microsoft, and that it would seek conduct-related remedies only, in lieu of the breakup it had initially achieved. Press Release, U.S. Dep't of Justice, Justice Department Informs Microsoft of Plans for Further Proceedings in the District Court (Sept. 6, 2001) (No. 01-447), available at http://www.usdoj.gov/atr/public/press_releases/2001/8981.htm. Microsoft and the Justice Department later negotiated a proposed settlement, then revised its terms in order to secure the concurrence of nine state plaintiffs. See Stipulation and Revised Proposed Final Judgment, *United States v. Microsoft*, Nos. 98-1232 & 98-1233 (D.D.C. Nov. 6, 2001), available at <http://www.usdoj.gov/atr/cases/t9400/9495.htm>.

29. Nineteen U.S. states filed suit against Microsoft, in proceedings eventually consolidated with the suit filed by the Justice Department. Although the states have played a secondary role in the judicial proceedings, they were widely reported to have frustrated

European Commission's newly expanded interest in Microsoft's software integration practices may wind up influencing both the products it markets outside Europe and pending or future U.S. antitrust proceedings.³⁰ The solution to the potential conflict, I argue, lies less in quarreling over the administration of already

earlier efforts at a mediated settlement. Ken Auletta, *What Kept Microsoft from Settling its Case?*, THE NEW YORKER, Jan. 15, 2001, at 40 (describing participation in settlement process); Steven Levy & Jared Sandberg, *The Microsoft Mess*, NEWSWEEK, Apr. 10, 2000, at 30 (citing statement by Microsoft Chairman Bill Gates that consent decree discussions broke down because of "extreme" and "radical" demands by state attorneys general that were inconsistent with Justice Department positions). The states joined the Justice Department in waiving further proceedings concerning the tying claim and forswearing a breakup. See Joint Status Report, *United States v. Microsoft*, Nos. 98-1232 & 98-1233 (D.D.C. Sept. 20, 2001). But they were unable to agree to the settlement terms originally agreed to by Microsoft and the Justice Department, and after intensive negotiations attempted to secure their agreement, only nine of the states agreed to a revised settlement. See *supra* note 28. The remaining nine state plaintiffs (plus the District of Columbia) withheld their consent, and barring any progress in further negotiations, may pursue their case in further hearings to be held next year. Jonathan Krim & Ariana Eunjung Chu, *9 States, D.C. Reject Microsoft Settlement*, WASH. POST, Nov. 7, 2001, at E1.

30. Like the Justice Department, and with its cooperation, the European Commission investigated Microsoft's licensing practices in the mid-1990s and obtained the equivalent of a consent decree restricting Microsoft's conduct. Press Release, European Commission, *Following An Undertaking By Microsoft To Change Its Licensing Practices, The European Commission Suspends Its Action For Breach Of The Competition Rules*, IP/94/653 (July 17, 1994), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/94/653|0|AGED&lg=EN&display=. That did not end its interest. The Commission recently expanded its pending proceeding regarding the market for low-end server operating systems—a concern substantially distinct from any targeted in the U.S. litigation—by issuing a statement of objections alleging that Microsoft is illegally tying its Media Player product into the Windows operating system for personal computers. Press Release, European Commission, *Commission Initiates Additional Proceedings Against Microsoft*, IP/01/1232 (Aug. 30, 2001), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1232|0|RAPID&lg=EN&display=.

Conversely, in its recent proposed settlement with Microsoft, the Justice Department pressed (with minimal success) for terms that would protect the U.S. market for corporate servers, addressing some of the interoperability issues that had been the subject of the Commission's original investigation. John Wilke, *Negotiating All Night, Tenacious Microsoft Won Many Loopholes*, WALL ST. J., Nov. 9, 2001, at A1.

Both foreign and domestic private parties have also filed antitrust claims against Microsoft in U.S. courts, but those cases have run into serious standing difficulties. *In re Microsoft Antitrust Litigation*, 127 F. Supp. 2d 702 (D. Md. 2001); see Note, *A Most Private Remedy: Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122 (2001) (criticizing treatment accorded foreign antitrust claims). More than one hundred class actions remain, mainly on the basis of state law claims, but Microsoft has proposed to settle most of them. See Steve Lohr, *Microsoft Aims to Settle Suits by Equipping 12,500 Schools*, N.Y. TIMES, Nov. 21, 2001, at C1.

articulated custom in a federal system, and more in a nuanced understanding of what custom demands in the first place.

Part I of this Article orients the discussion by briefly describing the emergence of international antitrust, including the turn to regulatory comity among antitrust authorities as a means of resolving potential conflicts. As this Part explains, both existing bilateral agreements and the failure to date of multilateral efforts reflect certain recurring limits to cooperation, including a vestigial respect for sovereign authority over antitrust enforcement and the commonality of interests among a limited number of nations.

Part II then traces the rise and fall of the reasonableness standard, culminating in *Hartford Fire*, before examining whether that standard has ever corresponded with international law. The reasonableness standard not only lacks evidence that would satisfy conventional criteria for customary international law—a point I try not to belabor—but also unnecessarily invites criticism through three missteps that characterize much of customary law discourse. First, reasonableness states a theory of near-universal application, without regard to potential distinctions among subject matter or constituents. Second, it conflates evidence of norms with their realization, and fails to account for how the two might be mediated. Third, and finally, it attempts the undifferentiated application of the norm to all agents of antitrust, notwithstanding substantial evidence that the law is precisely to the contrary.

Part III builds on these criticisms by developing a general methodology for local international law. Localizing international law is an analytic process for evaluating proposed norms of custom, one beginning with the norm's potential application to particular members and subject matter within the international community, and its articulation, adaptation, and enforcement in domestic circumstances. Such law may be local in any of three senses: (1) it exists among a subset of the international community, with respect to a particular subject matter; (2) it is enforced as an interpretive canon with respect to national law, and defers to the national understanding of custom in marginal cases and with respect to emerging custom; or (3) its norms require careful distinction among the domestic parties potentially subject to its strictures.

Part IV applies this methodology to antitrust, in keeping with the methodology's emphasis on grounding international law theory in context. Against the great weight of contemporary analysis, I conclude that there *is* a local international law of antitrust, even after *Hartford Fire*. Antitrust comity consists of a set of procedural principles, potentially binding only members of the Organisation for Economic Cooperation and Development (OECD), that require national antitrust authorities to consider the legitimate interests of other adherents in enforcing municipal antitrust laws. This doctrine of comity is enforceable by American courts against U.S. antitrust authorities, albeit in highly limited circumstances.

Antitrust comity also pertains, however, to the activities of private and state attorneys general in international matters.³¹ Each type of action has a significant effect on the nation's ability to comply with its international obligations, and either may warrant legislative or judicial intervention. But the local law of antitrust comity requires distinguishing the two cases. While private litigants are at best penumbral participants in norms arising from intergovernmental relations, state attorneys general are constitutionally restricted in their ability to attend to international duties incumbent on the United States as a whole. The best solution, I contend, is to simulate antitrust comity on the local level by developing a cooperative federal-state protocol that respects domestic and global conceptions of sovereignty.

Several caveats are in order. For one, although this Article describes a new methodology for identifying customary international law, it substantially accepts the conventional view of custom's prerequisites.³² Similarly, it largely accepts the conventional (or

31. As explored more fully below, I construe "international" broadly for purposes of examining potential conflicts, thus including cases involving foreign conduct, mergers involving non-U.S. parties, discovery or remedies that reach abroad, or cases in which foreign regulators are actively or potentially involved.

32. There is no universally approved statement of the criteria for custom. RESTATEMENT (THIRD), *supra* note 17, §102, reporters' note 2; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3-11 (5th ed. 1998). But the present account tries to avoid the controversies attending, for example, arguments for dismissing the relevance of practice or *opinio juris et necessitas* or for placing higher demands on either factor. *E.g.*, Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L L. 177, 202-08 (1995) (concluding that *opinio juris* is unnecessary in the event of sufficient practice); *cf.* International Law Ass'n, Comm. on Formation of Customary (General)

"modern," depending on one's point of view) account of custom's place in American courts³³—though the mechanism for enforcement, the interpretation of federal statutes, is one with which even advocates of custom's "domestication" should agree.³⁴ In keeping with those principles, the theory of local international law should not be read to suggest that municipal behavior invariably conditions international law. Deciding whether conduct contributes to (or detracts from) the formation of custom, dissents from a developing norm in a way that exempts a particular nation, or simply violates a norm is difficult. But even dualist systems contemplate that the local legality of an actor's conduct—say, by virtue of unambiguous legislation—does not absolve the nation of its obligations under international law.³⁵

A final caveat concerns scope. Extraterritoriality issues arise in a variety of contexts, and one of this Article's messages is that they may be entirely differentiable. Accordingly, a theory of antitrust comity may not work in other contexts in which comity issues arise; even within antitrust, my primary focus is on legislative or prescriptive jurisdiction, rather than the discrete issues relating to the enforceability of U.S. discovery orders or judgments abroad.³⁶ As to these problems, the methodology of local international law, and its more universal alternatives, may suggest very different solutions, or no solutions at all.

International Law, Final Report: Statement and Principles Applicable to the Formation of General Customary International Law 32-38 (2000) (proposing idea that *opinio juris* is not invariably required for rules of customary international law), available at <http://www.ila-hq.org.pdf> (2000 Conference Report).

33. See *supra* text accompanying notes 21-23 (noting emerging controversy).

34. E.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 653 (2000) (adverting to the "domestication" approach); *id.* at 685-90 (describing the *Charming Betsy* canon applied in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). See generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (defending version of canon).

35. E.g., *Pigeon River Improvement, Slide & Broom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1933) (noting that later statute supersedes domestic effect of treaty, even in the event of conflict with international obligations).

36. See William S. Dodge, *Antitrust and the Draft Hague Convention*, 32 LAW & POL'Y INT'L BUS. 363 (2001) (discussing prospective international norms relating to personal jurisdiction and the enforcement of foreign antitrust judgments).

I. THE LOCAL LIMITS TO ANTITRUST AGREEMENTS

Although lawyers and politicians have tried repeatedly and with considerable ingenuity, there is very little international antitrust law to speak of. Aside from a few recent efforts at picking low-hanging fruit,³⁷ attempts to harmonize national antitrust laws have failed, leaving convergence largely in the independent discretion of national authorities—with the result that important policy differences persist, as evidenced most strikingly in the recent Boeing/McDonnell Douglas and GE/Honeywell cases.³⁸ This has placed a premium on coordinating national efforts, or at least avoiding disputes. After briefly explaining the prehistory of cooperation, this section suggests that existing bilateral agreements and ongoing efforts at securing multilateral agreement share an unarticulated vision of the potential reach of international cooperation which augurs poorly for the reasonableness norm, and should inform any successor.

37. It has been relatively easy to reach consensus on the illegality of practices like price fixing. OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (Apr. 27-28, 1998), available at <http://www1.oecd.org/daf/clp/Recommendations/Rec9com.htm>. Even here, the multilateral is overshadowed by the unilateral, and the formal by the informal. Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 712 (2001) (describing U.S. civil and criminal prosecution of cartels as the “leading edge” of an evolving “system of international competition law . . . [b]ased on implicit consensus and explicit, effective (and virtually unilateral) enforcement”).

38. After the smoke cleared, most serious commentary on Boeing/McDonnell Douglas concluded that the real differences between the FTC and the European Commission stemmed from substantive differences between U.S. and EC law. *E.g.*, Fox, *supra* note 7, at 19; Kovacic, *supra* note 7, at 852-63, 872-73. This same pattern is likely to emerge in the GE/Honeywell case. Brian M. Carney, *Blame the EU's Antitrust Rules-Not Monti*, WALL ST. J., July 6, 2001, at A8; William J. Kolasky & Leon B. Greenfield, *A View to a Kill: The Lost GE/Honeywell Deal Reveals a Trans-Atlantic Clash of Essentials*, LEGAL TIMES, July 30, 2001, at 28; Statement by Assistant Attorney General Charles A. James, *supra* note 8 (describing doctrinal disagreement as “a significant point of divergence”).

Mergers, unfortunately, may be an area of relative convergence. Compare James S. Venit & William J. Kolasky, *Substantive Convergence and Procedural Dissonance in Merger Review*, in ANTITRUST GOES GLOBAL, *supra* note 7, at 79 (concluding that substantive differences in merger policy are narrowing, but procedural differences remain), with Philip Marsden, *The Divide on Verticals*, in ANTITRUST GOES GLOBAL, *supra* note 7, at 117 (describing enduring differences in vertical restraint policies as threatening viability of cooperation).

A. *The Prehistory of Cooperation*

Global cooperation in antitrust enforcement developed in the wake of the aggressive pursuit by nations of their independent interests, with the United States in the vanguard.³⁹ The United States was not always so forward. Justice Holmes, no ardent admirer of the Sherman Act, thought it "surprising" to hear it argued in *American Banana* that the Act might apply extra-territorially.⁴⁰ In his view,

the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.⁴¹

American Banana involved a private suit, and the Supreme Court almost immediately began chipping away at it in a series of government enforcement actions that focused more acutely on the domestic effects of foreign acts.⁴² These decisions eventually freed Judge Learned Hand to assert in *Alcoa* that it was "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences

39. Some conclude, indeed, that unilateralism ought to be furthered in order to create the friction necessary to yield genuine cooperation. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 152-67 (1998); Thomas W. Dunfee & Aryeh S. Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883 (1984).

40. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355 (1909).

41. *Id.* at 356.

42. *Thomsen v. Cayser*, 243 U.S. 66 (1917); *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913)); PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* 140 (5th ed. 1997) (citing *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927)); 1 BARRY E. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 104-106.1 (2d ed. 1985 & Supp. 1996) (same).

within its borders which the state reprehends."⁴³ Even this "effects" test required both intent *and* effects, lest the Act apply to an unanticipated amount of foreign conduct; as Judge Hand explained, "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."⁴⁴ Courts gradually deemphasized intent,⁴⁵ but came to require that any effects be substantial and direct,⁴⁶ again partly to deflect criticisms that the effects test defied congressional intent by unnecessarily courting international conflict.⁴⁷ The executive branch⁴⁸ and Congress⁴⁹ supported effects tests too, and by the time

43. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (citing cases). The authority of *Alcoa* itself was enhanced—and its tension with *American Banana* ameliorated—because the Second Circuit was empowered to act as the court of last resort due to the lack of a quorum in the Supreme Court. *American Tobacco Co. v. United States*, 328 U.S. 781, 811-12 (1946).

44. *Aluminum Co. of Am.*, 148 F.2d at 443. Hand also assumed *arguendo* that the intent to affect American exports or imports would not be actionable absent tangible effects. *Id.* at 443-44.

45. HAWK, *supra* note 42, at 113-14; 1 SPENCER WEBBER WALLER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 6.6 (3d ed. 1997).

46. WILBUR L. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* § 2.12, at 53-58 (5th ed. 1996) (noting various statements of rule); *see also* HAWK, *supra* note 42, at 112-13 & n.231; 1 WALLER, *supra* note 45, § 6.7.

47. *Accord* 1955 ATT'Y GEN. NAT'L COMM. TO STUDY THE ANTITRUST LAWS 76; *see also* ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMM. ON ANTITRUST AND FOREIGN TRADE, Preliminary Rep. 15 (1957) (noting that "it is difficult to justify jurisdiction over these foreign activities where the effect on United States commerce, which is the basis for such jurisdiction, is only incidental"). Compare KINGMAN BREWSTER, JR., *ANTITRUST AND AMERICAN BUSINESS ABROAD* 298-301 (1958) (describing reservations with the potential reach of *Alcoa*), with FUGATE, *supra* note 46, § 2.12, at 54-55 ("[T]he question of the power of the United States over acts abroad affecting its commerce must now be taken to be settled, as is also the intent of Congress under the Sherman Act to exercise this jurisdiction. The only question remaining, apart from an actual conflict of foreign law, is how much effect is necessary. The answer appears to be any *substantial* effect.").

48. U.S. DEPT OF JUSTICE & FED. TRADE COMM., *Antitrust Enforcement Guidelines for International Operations*, 4 Trade Reg. Rep. (CCH) ¶ 13,107 (1995), 68 Antitrust & Trade Reg. Rep. (BNA) supp. 1 (1995) [hereinafter 1995 International Guidelines]; *see also* U.S. DEPT OF JUSTICE, April 3 *Statement of Enforcement Policy*, 62 Antitrust & Trade Reg. Rep. (BNA) 483 (Apr. 9, 1992); U.S. DEPT OF JUSTICE, *Antitrust Enforcement Guidelines for International Operations*, 4 Trade Reg. Rep. (CCH) ¶ 13,109.10 (1988) [hereinafter 1988 International Guidelines]; ANTITRUST DIV., U.S. DEPT OF JUSTICE, *Antitrust Guidelines for International Operations*, [Jan. - June] Antitrust & Trade Reg. Rep. (BNA) No. 799, at E-1, E-3 (Jan. 16, 1977) [hereinafter 1977 International Guidelines].

49. The Foreign Trade Antitrust Improvement Act of 1982 (FTAIA) exempted conduct relating to nonimport trade from Sherman Act coverage unless "such conduct has a direct,

the Supreme Court gave its official imprimatur in *Hartford Fire*,⁵⁰ the effects test had long been ensconced as a threshold for the exercise of American antitrust jurisdiction.

Application of the effects doctrine, if not necessarily the concept itself, was regarded with great hostility abroad.⁵¹ The federal government tempered itself on occasion, as when foreign policy considerations led Presidents Truman and Eisenhower to direct that the Justice Department pursue civil antitrust actions, rather than criminal, against oil cartels.⁵² Full-blooded conflicts, however, were

substantial, and reasonably foreseeable effect" on U.S. domestic commerce or on U.S. export trade. 15 U.S.C. § 6a(1) (2000); see also 15 U.S.C. § 45(a) (2000) (similarly amending Federal Trade Commission Act). Precisely what is encompassed within the FTAIA's term "trade or commerce (other than import trade or import commerce)" is not self-evident, but it appears to include both export trade and purely foreign conduct. H.R. REP. NO. 97-686, at 9-10 (1982), reprinted in *Antitrust & Trade Reg. Rep.* (BNA) No. 1076, at 308 (Aug. 5, 1982); see also FUGATE, *supra* note 46, § 2.14, at 60-61 (describing purposes of Act); HAWK, *supra* note 42, at 149. Congress was focused on relieving the burden of U.S. antitrust policies on U.S. exporters, rather than limiting its burden on foreign parties. H.R. REP. NO. 97-686, *supra*, at 7-8. As such, the Act "has no effect on the kind of activity by foreign firms that U.S. litigants are most likely to challenge and that is most likely to trigger international tensions," such as foreign cartel activities. Eleanor M. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is "Reasonableness" the Answer?*, N.Y.U. J. INT'L L. & POL. 565, 580 (1987); e.g., *In re Insurance Antitrust Litigation*, 723 F. Supp. 464 (N.D. Cal. 1989) (concluding that case involved "import trade"), *aff'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part and rev'd in part*, *Hartford Fire Ins. v. California*, 509 U.S. 764, 796 n.23 (1993) (assuming, without deciding, that FTAIA standard was met).

50. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993) (citing authorities); Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 752 (1995) (concluding that "*Hartford* is thus the first Supreme Court case actually to apply the Sherman Act to conduct outside the United States based solely on its intended effects here"); *id.* at 751-52 (discussing prior cases); see also RESTATEMENT (THIRD), *supra* note 17, § 415; 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 272c, at 351-52 (2d ed. 2000).

51. 1 HAWK, *supra* note 42, at 111; Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 791 (1984). Among commentators abroad, see R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 165 (1957) (describing *Alcoa* as a "startling projection of the objective test of territoriality"); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 102-06 (1964) (describing *Alcoa* as incompatible with international law); *id.* at 102 & n.206 (citing critics, and alluding to "numerous other writers whom it is impossible to enumerate").

52. David H. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283, 284 (1987) (citing 1 JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 2.24 (2d ed. 1981)).

frequent. Two years after *Alcoa*, U.S. attempts to gather Canadian evidence in price fixing proceedings against U.S. and Canadian paper firms led to the adoption in Ontario and Quebec of "blocking" statutes designed to frustrate discovery.⁵³ A steady stream of controversies followed,⁵⁴ even after U.S. courts began limiting the effects doctrine by taking international comity into account.⁵⁵ Important trading partners enacted other blocking statutes,⁵⁶ required their courts to refuse recognition to multiple damages awards,⁵⁷ and even adopted "clawback" statutes that permitted defendants sanctioned under U.S. law to recover that money at home.⁵⁸ As of 1981, one U.S. official claimed that "there have been

53. *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013 (S.D.N.Y. 1947); Griffin, *supra* note 20, at 505 n.3; Meessen, *supra* note 51, at 791.

54. For a sensitive discussion of these conflicts, beginning with the early American cases involving the bulb, nylon, petroleum, shipping conference, and Swiss watches, and progressing to conflicts derived from other nations' investigations, see Meessen, *supra* note 51, at 791-94; see also RESTATEMENT (THIRD), *supra* note 17, § 403 reporters' note 1.

55. *E.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979); *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976). But see, *e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980); *In re Ocean Shipping Antitrust Litigation*, 500 F. Supp. 1235 (S.D.N.Y. 1980).

56. Canada and other countries subsequently abreacted to attempts by Westinghouse to obtain documents relating to an alleged uranium cartel. Seung Wha Chang, *Extraterritorial Application Of U.S. Antitrust Laws To Other Pacific Countries: Proposed Bilateral Agreements For Resolving International Conflicts Within The Pacific Community*, 16 HASTINGS INT'L & COMP. L. REV. 295, 298 (1993); Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 LAW & CONTEMP. PROBS. 197, 204 (1987); cf. *Uranium Antitrust Litig.*, 617 F.2d at 1253-56 (rejecting submissions by Australia, Canada, South Africa and the United Kingdom, in upholding jurisdiction under effects doctrine). In 1980, the Philippines enacted a blocking statute in response to a suit involving U.S. coconut oil sales by American subsidiaries of Philippine parent companies. Chang, *supra* at 301; see also *id.* at 300-01 (further describing Australian blocking statute); Derek Devgun, *Crossborder Joint Ventures: A Survey of International Antitrust Considerations*, 21 WM. MITCHELL L. REV. 681, 702-03 (1996) (describing U.K. statute).

57. Chang, *supra* note 56, at 298-303 (describing nonenforcement schemes adopted by Canada, Australia, the Republic of the Philippines, Japan, and Korea); Devgun, *supra* note 56, at 704-05 (describing U.K. scheme); Griffin, *supra* note 20, at 505 n.5 (citing Canadian and Australian statutes).

58. Chang, *supra* note 56, at 298, 301 (describing Canadian and Australian clawback schemes); Devgun, *supra* note 56, at 704 (describing U.K. scheme); Joseph E. Neuhaus, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097 (1981) (same); *e.g.*, Protection of Trading Interests Act, 1980, c. 11, 5-6 (Eng.), as amended; Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, 8-9

five diplomatic protests of U.S. antitrust cases for every instance of express diplomatic support, and three blocking statutes for every cooperation agreement.⁵⁹

While foreign governments continued to protest particular invocations of U.S. jurisdiction, and noted qualms about the doctrine's full implications, they increasingly construed their own laws to permit jurisdiction over foreign conduct.⁶⁰ Canada, an inveterate opponent of U.S. extraterritoriality,⁶¹ began pursuing foreign mergers with vigor.⁶² In its *Wood Pulp* judgment, likewise, the European Court of Justice resisted the Commission's arguments in favor of U.S.-style effects jurisdiction,⁶³ but held that then-article 85 of the EC Treaty⁶⁴ permitted jurisdiction over foreign agreements if they were implemented through sales to EU purchasers.⁶⁵ By the end of the century it appeared as though the

(1984) (Can.), as amended; Foreign Proceedings (Excess of Jurisdiction) Act, 1984, No. 3, cl. 10 (Austl.), as amended.

59. Joel Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500, 502 (1981).

60. These positions were not necessarily conflicting. As Advocate General Darmon observed in the *Wood Pulp* proceedings, many of those favoring effects jurisdiction distinguished between the jurisdiction to prescribe, which entailed the power to lay down general or individual rules, and the jurisdiction to enforce, which involved the power to implement those rules in a particular instance. Accordingly, he reasoned, the fact that some twenty countries had adopted blocking statutes did not mean that they rejected the effects doctrine. Opinion of the Advocate General, Cases 89, 104, 114, 116, 117 & 125-29/85, A. Ahlstrom Osakeyhtiö v. Commission, 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901, 920-24 (1988), 4 Common Mkt. Rep. (CCH) ¶ 14,491 (1988) [hereinafter *Wood Pulp*] (concluding that the power to impose fines was inherent within the power to prescribe).

61. See *supra* text accompanying notes 53-59. In *Hartford Fire*, Canada's amicus brief contended that under customary international law, and consistent with the Sherman Act and judicial precedent construing it, "a state should not apply its economic law to regulate conduct by persons located in a foreign territory where doing so directly conflicts with and undermines the law of the foreign territorial sovereign"—and further opined that a foreign government's submission should be conclusive as to the presence of a jurisdictional conflict. Brief of the Government of Canada as Amicus Curiae in Support of Certain Petitioners at 5, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (Nos. 91-1111, 91-1128).

62. Meessen, *supra* note 51, at 792.

63. *In re Wood Pulp Cartel*, 1985 O.J. (L 85) 1, [1985] 3 C.M.L.R. 474 (1985); see also *Wood Pulp*, *supra* note 60 (reporting Commission arguments in favor of effects doctrine).

64. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 2, 298 U.N.T.S. 11, amended by TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]. Article 85, which has since been renumbered as article 91 without substantive change, is the European equivalent of section 1 of the Sherman Act.

65. *Wood Pulp*, *supra* note 60. There is considerable debate about whether there are

jurisdictional theory everywhere rejected had become nearly universal among active antitrust authorities.⁶⁶ This meant, of course, that U.S. firms—sometimes insulated from U.S. antitrust actions for their foreign activities⁶⁷—were increasingly subjected to foreign laws. Something had to be done.

B. Cooperative Bilateralism and its Limitations

While the gravitation toward the effects doctrine was reciprocal in the broadest sense, U.S. and foreign antitrust authorities also set about trying to forge more formal arrangements. Following the development of a cooperative scheme between U.S. and Canadian authorities, the OECD recommended in 1967 that its member countries consider limiting their enforcement actions in light of legitimate foreign interests⁶⁸—known as “traditional” or “negative”

differences between the U.S. and EU approaches. Compare 1995 International Guidelines, *supra* note 48, ¶ 3.1 n.51 (“[I]nternational recognition of the ‘effects doctrine’ of jurisdiction has become more widespread. In the context of import trade, the ‘implementation’ test adopted in the European Court of Justice usually produces the same outcome as the ‘effects’ test employed in the United States.”) (citing *Wood Pulp*), and Dodge, *supra* note 39, at 139 n.243 (arguing that *Wood Pulp* adopted effects test), with Griffin, *supra* note 20, at 512 n.40, 513 (citing authorities insisting on distinction and noting differences).

66. 1995 International Guidelines, *supra* note 48, ¶ 3.1 n.51 (ascribing jurisdictional approaches similar to effects doctrine to “[t]he merger laws of the European Union, Canada, Germany, France, Australia, and the Czech and Slovak Republics, among others”); RESTATEMENT (THIRD), *supra* note 17, § 403 reporters’ note 3 (arguing that Germany and “[m]ost other states of Western Europe, including Austria, Denmark, Finland, France, Greece, Norway, Portugal, Spain, Sweden, and Switzerland, as well as Canada and Japan (but not the United Kingdom or the Netherlands) have accepted the effects doctrine as applied to economic effects, either in their legislation or in political decisions, though with varying interpretations of the doctrine”). This is not to deny disagreement as to particular doctrinal questions. For example, there remains widespread dissatisfaction with the U.S. theory that it may assert jurisdiction over foreign conduct that affects its exporters, but not its consumers. OECD COMMITTEE ON COMPETITION LAW AND POLICY (CLP), MAKING INTERNATIONAL MARKETS MORE EFFICIENT THROUGH “POSITIVE COMITY” IN COMPETITION LAW ENFORCEMENT ¶ 11 (DAFFE/CLP(99)19) (June 1999) [hereinafter OECD REPORT ON POSITIVE COMITY].

67. Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (2000) (providing limited exception from the Sherman Act for associations engaged solely in export trade).

68. Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C(67)53/final (Oct. 5, 1967) [hereinafter 1967 Cooperation Recommendation], revised by OECD Doc. C(79)154/final (Sept. 25, 1979) [hereinafter 1979 Cooperation Recommendation], revised by OECD Doc. C(86)44/final (May 21, 1986), revised by OECD Doc. C(95)130/final (July 27-28, 1995), reprinted in 35 I.L.M. 1314 (1996) [hereinafter Revised OECD Recommendation]

comity. Since 1973 the OECD has harped on the need for "positive" comity, which involves a duty to consider pursuing enforcement action at another member's prompting.⁶⁹

Cooperation really began to hit its stride in the 1980s and 1990s, when the United States began forging agreements with many of the countries that had earlier retaliated against the invocation of U.S. jurisdiction.⁷⁰ By mid-2000, the United States had entered into agreements with Germany,⁷¹ Australia,⁷² Canada,⁷³ Brazil,⁷⁴ Israel,⁷⁵

(recommending notification, exchange of information, and coordination of enforcement actions among OECD members); see also OECD REPORT ON POSITIVE COMITY, *supra* note 66, at 8-9 (describing evolution of provisions); 1995 International Guidelines, *supra* note 48, § 2.9 (noting U.S. obligations under OECD recommendations). The OECD was not the only, or first, institution to encourage cooperation, merely the most effective. See *infra* note 147 (discussing early General Agreement on Tariffs and Trade [GATT] initiatives).

69. Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade, OECD Doc. C(73)99/final (July 3, 1973), revised by OECD Doc. C(79)154/final (Sept. 25, 1979), revised by Revised OECD Recommendation, *supra* note 68.

70. The sequence of these developments was sometimes odd, and frustrates attempts to draw a clear connection between unilateralism and subsequent efforts at cooperation. See *supra* note 39. For example, after Australia enacted the Foreign Proceedings (Prohibition of Certain Evidence) Act of 1976 and the Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979, it signed a mutual assistance agreement with the United States in 1982. Two years later, though, it enacted a far-reaching clawback provision. Chang, *supra* note 56, at 300-01.

71. Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956 [hereinafter U.S./F.R.G. Agreement], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,501 (2000), and available at <http://www.usdoj.gov/atr/public/international/docs/germany.us.txt>.

72. Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl. 34 U.S.T. 388, [hereinafter 1982 U.S./Australia Agreement], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,502 (1999), available at <http://www.usdoj.gov/atr/public/international/docs/austral.us.txt>; Agreement on Mutual Antitrust Enforcement Assistance, Apr. 27, 1999, U.S.-Austl., [hereinafter 1999 U.S./Australia Agreement], available at <http://www.usdoj.gov/atr/public/international/docs/usaust7.htm>.

73. Agreement Regarding the Application of Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.-Can., reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,503 (1997) [hereinafter 1995 U.S./Canada Agreement], and available at <http://www.usdoj.gov/atr/public/international/uscan721.pdf>.

74. Agreement Regarding Cooperation Between Competition Authorities in the Enforcement of Competition Laws, Oct. 26, 1999, U.S.-Braz. [hereinafter U.S./Brazil Agreement], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,508 (1999), and available at <http://www.usdoj.gov/atr/public/international/3376.pdf>.

75. Agreement Regarding the Application of Competition Laws, Mar. 15, 1999, U.S.-Isr. [hereinafter U.S./Israel Agreement], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,506 (1999), and available at <http://www.usdoj.gov/atr/public/international/2296.htm>.

Japan,⁷⁶ Mexico,⁷⁷ and the European Union.⁷⁸ Though less promiscuous than the United States, other countries and regional organizations—in particular, the European Union—negotiated agreements with third countries on substantially similar terms.⁷⁹ These agreements differ in some respects, reflecting the variety of parties and the divergent times at which they were negotiated.⁸⁰ At a high level of generality, however, they take similar approaches and suffer from similar limitations.⁸¹

76. Agreement Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan [hereinafter U.S./Japan Agreement], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,507 (1999), and available at <http://www.usdoj.gov/atr/public/international/docs/3740.pdf>.

77. Agreement Regarding the Application of Competition Laws [hereinafter U.S./Mexico Agreement], July 11, 2000, U.S.-Mex., available at <http://www.usdoj.gov/atr/icpac/5145.pdf>.

78. Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, Mar. 6-Apr. 6, 1998, E.C.-U.S., art. II, 37 I.L.M. 1070 [hereinafter 1998 U.S./E.C. Positive Comity Agreement], available at <http://www.usdoj.gov/atr/public/international/docs/1781.htm>; Agreement Regarding the Application of Competition Laws, Sept. 23, 1991, U.S.-E.C. [hereinafter 1991 U.S./E.C. Agreement], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,504 (1998), 1991 O.J. (L 95) 45 corrected at 1995 O.J. (L 131) 38, available at <http://www.usdoj.gov/atr/public/international/docs/ec.htm>.

79. The European Union is a party to bilateral agreements with a number of the same countries, including Australia and Canada, as well as with a number of countries aspiring to Community membership. See <http://europa.eu.int/comm/competition/international/bilateral/>. The European Union and Japan have also reach agreement in principle. Press Release, European Commission, EU and Japan Reach Mutual Understanding on Substantial Elements of an Envisaged Co-operation Agreement in the Competition Field, IP/00/739 (July 19, 2000). Within Europe, France and Germany have a longstanding agreement. Agreement Concerning Cooperation on Restrictive Business Practices, May 28, 1984, Fr.-F.R.G., 26 I.L.M. 531 (1987).

A number of other countries have followed the U.S. and European lead. Australia and New Zealand, for example, have harmonized their antitrust laws and pledged mutual enforcement assistance, see Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 355-56 (1997), as well as entering into cooperation agreements with Canada and Taiwan, United Nations Conference on Trade and Development (UNCTAD) Secretariat, *Experiences Gained So Far on International Cooperation on Competition Policy Issues and the Mechanisms Used*, at 5, U.N. Doc. TD/B/Com.2/CLP/21 (May 8, 2000) [hereinafter UNCTAD] (reviewing range of existing bilateral agreements), available at <http://www.unctad.org/en/docs/c2clp21.en.pdf>.

80. Thus, for example, the early U.S. agreement with Germany assumes substantially common interests and focuses on cooperation in enforcement, while the earlier U.S. agreements with Canada and Australia are more oriented toward dispute resolution. The recent agreement with Brazil contains a provision for technical cooperation in order to help a relatively fledgling antitrust authority. ICPAC FINAL REPORT, *supra* note 1, annex 1-C, at iv-vii.

81. *Agency Officials Relate Practical Application of International Agreements*, 77 Antitrust & Trade Reg. Rep. (BNA) 583 (Nov. 25, 1999) (quoting remark by Randolph W.

1. *The Nature of Bilateral Cooperation*

One of the biggest challenges to international enforcement of national antitrust continues to be the difficulty of obtaining evidence from foreign parties. Generic tools, like judicial orders and letters rogatory, have not proven terribly effective, other than in inspiring protective legislation.⁸² A principal objective of bilateral

Tritell, Assistant Director of the FTC's Bureau of Competition in charge of the International Antitrust Division, that "modern bilateral agreements are 'generally highly consistent with each other. Even differences that exist rarely affect how we approach individual jurisdictions.'" For helpful surveys of U.S. efforts by administration officials, see Melamed, *supra* note 1; John J. Parisi, *Enforcement Cooperation Among Antitrust Authorities*, 1999 EUR. COMP. L. REV. 133; Nina L. Hachigian, *International Antitrust Enforcement*, ANTITRUST, Fall 1997, at 22.

82. *Report on the Proposed International Antitrust Enforcement Assistance Act*, 1994 A.B.A. SEC. ANTITRUST L. & SEC. INT'L L. & PRAC. 3 (citing Anne K. Bingaman, Address Before the World Trade Center Chicago Seminar (May 16, 1994)) ("The traditional mechanisms for obtaining foreign-located antitrust evidence are not sufficient to meet the needs of modern antitrust enforcement. For example, an attempt to obtain information through a letter rogatory procedure could conceivably involve disclosure of sensitive facts to several layers of bureaucracy within the requested country, months of deliberation, and no results."); Anne K. Bingaman, *International Cooperation and the Future of U.S. Antitrust Enforcement*, Address before the American Law Institute (May 16, 1996) ("[N]o strong institutional relationship is created by the letters rogatory process, and that process, which is usually slow and quite unpredictable in result, is a very imperfect tool for cooperation."), available at <http://www.usdoj.gov/atr/public/speeches/96-05-16.ali>.

Mutual legal assistance treaties (MLATs) may be harnessed in criminal antitrust investigations, but only where antitrust falls within the scope of the treaty, and cooperation may be limited further by the requirement that both countries consider the relevant conduct to be criminal in nature. The MLAT between the United States and Canada is exceptional in this regard because it not only expressly includes criminal antitrust investigations, but also omits any dual criminality requirement. Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., Annex, 24 I.L.M. 1092, 1099 (1985); Melamed, *supra* note 1, at 427; Bingaman, *International Cooperation*, *supra* ("MLATs, while very useful, apply only to criminal matters, and only the Canadian MLAT specifically includes antitrust crimes."). Even the Canadian treaty, however, permits the parties to refuse assistance on grounds of national interest. Treaty on Mutual Legal Assistance in Criminal Matters, *supra*, art. V(1), 24 I.L.M. at 1094. See generally Lawson A. W. Hunter & Susan M. Hutton, *Where There Is a Will, There Is a Way: Cooperation in Canada-U.S. Antitrust Relations*, 20 CAN.-U.S. L.J. 101, 107-08 (1994); Waller, *supra* note 79, at 366-67; Laurie N. Freeman, Note, *U.S.-Canadian Information Sharing and the International Antitrust Enforcement Assistance Act of 1994*, 84 GEO. L.J. 339, 353-54 (1995).

Letters rogatory and MLATs have proven more successful in anticartel cases, where the alleged offenses are more universal and the claims to confidentiality weakest. Joel I. Klein, *The Internationalization of Antitrust: Bilateral and Multilateral Responses*, Address Before the European University Institute Conference on Competition (June 13, 1997), available at <http://www.usdoj.gov/atr/public/speeches/1580.htm>. But the failure of U.S. attempts to

agreements, accordingly, has been to promote the discovery and exchange of information between antitrust authorities.⁸³ Because such agreements do not purport to change domestic law, however, they exclude confidential information—that is, information compulsorily produced by companies that is regarded by those companies as confidential—thus substantially restricting their effectiveness.⁸⁴ In 1994, Congress enacted the International Antitrust Enforcement Assistance Act (IAEAA) in order to permit the negotiation of reciprocal arrangements to overcome this limitation,⁸⁵ but only Australia has taken the opportunity,⁸⁶ and other prospects are

enforce antitrust laws against the DeBeers diamond syndicate shows that the inability of U.S. prosecutors to obtain evidence from abroad may still prove fatal. *United States v. General Electric Co.*, 869 F. Supp. 1285, 1300 (S.D. Ohio 1994); see also Spencer W. Waller, *Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 573 (2000). But cf. Gary R. Spratling, *Criminal Antitrust Enforcement Against International Cartels*, Address at the Advanced Criminal Antitrust Workshop (Feb. 21, 1997) ("[W]e also are beginning to invoke other MLATs, as well as making increasingly successful use of the more traditional letters rogatory procedure in countries where we have no MLATs."), available at <http://www.usdoj.gov/atr/public/speeches/grs97221.htm>.

83. The types of information exchanged include public information, confidential agency information concerning internal agency proceedings (as opposed to confidential business information), and information for which a waiver of confidentiality has been provided. Parisi, *supra* note 81, at 137-38. This allows antitrust authorities to discuss issues of product and geographic market definition, competitive assessments, issues of foreign law, and remedies. E.g., Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws ¶ 4.2 (1998), reprinted in XXVIIITH REPORT ON COMPETITION POLICY 313 (1998) [hereinafter 1998 Commission Report], available at http://europa.eu.int/comm/competition/international/97346_en.html.

84. E.g., Shelton, *supra* note 2, at 68 ("All bilateral agreements, especially the most recent ones incorporating elements of positive comity, have come up against an important roadblock—namely difficulties agencies have in sharing confidential data.").

85. The IAEAA envisions agreements permitting either signatory's antitrust authority, upon the other's request, to share the confidential information it possesses or to employ compulsory processes to gather the information on the requesting authority's behalf. 15 U.S.C. § 6204 (2000); *id.* §§ 6201-6203, 6205-6212 (1994). The Attorney General and the FTC may provide investigatory assistance without regard to whether the investigated conduct would violate U.S. antitrust law, *id.* § 6202(c), but cooperation is not compulsory. *Id.* § 6207(a)(3) (limiting use of agreements to cases in which the U.S. Attorney General or the FTC, as appropriate, determine that "conducting such investigation, applying for such order, or providing the requested antitrust evidence, as the case may be, is consistent with the public interest of the United States"); *id.* § 6208(a) (providing that determinations under section 6207(a)(1) and (3) are not subject to judicial review).

86. Agreement on Mutual Antitrust Enforcement Assistance, April 27, 1999, U.S.-Austl., 39 I.L.M. 1501, available at <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>.

limited.⁸⁷ Even IAEAA agreements do not extend to information provided in connection with merger filings,⁸⁸ an area with the gravest need for international cooperation. In practice, confidential information shared among antitrust authorities is most commonly volunteered by parties eager to facilitate the onerous and time-consuming process of multinational review.⁸⁹

The more significant impact of cooperation agreements has been to improve the coordination of enforcement activities. Consistent with the OECD recommendations,⁹⁰ the standard U.S. bilateral agreement provides for the parties to notify one another when an enforcement activity of one might affect important interests of the other.⁹¹ The parties may then coordinate their

87. Potential partners have been reluctant to authorize the necessary derogations from their domestic laws. See Joel I. Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, Address Before the 24th Annual Conference on International Antitrust Law and Policy 7 (Oct. 16-17, 1997), available at <http://www.usdoj.gov/atr/public/speeches/1233.htm>; Waller, *supra* note 79, at 373-74 (noting change of heart by Canada). Potential partners may, moreover, have alternatives that require little or no reciprocity on their parts. *Id.* at 378 (noting availability of letters rogatory and letters of request and arguing that "[t]he only incentive for another nation to enter into an agreement under the IAEAA might be the incremental value of United States assistance through the grand jury or civil investigative demand process"). Under the IAEAA, in contrast, reciprocity is an intrinsic part of qualifying agreements. 15 U.S.C. § 6211(2) (2000).

88. 15 U.S.C. § 6204 (2000). U.S. investigations must also respect legally applicable rights and privileges, *id.* § 6202(d), and any agreement must contain assurances that the antitrust authority will respect and preserve confidentiality, *id.* § 6211(2)(B), (C) (2000).

89. Commission Report to the Council and the European Parliament on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws ¶ 2.2.3 (July 1, 1996 - Dec. 31, 1996), reprinted in XXVTH REPORT ON COMPETITION POLICY 312 (1996) [hereinafter 1996 Commission Report] (noting limited waiver in Commission and FTC review of Sandoz/Ciba-Geigy merger); *id.* ¶ 2.2.4 (noting waiver in U.S. and EU investigations of A.C. Nielsen Company); Thomas Lampert, *International Co-operation Among Competition Authorities*, 1999 EUR. COMP. L. REV. 214, 218 (noting waivers in, for example, the Kimberly Clark/Scott Paper, Boeing/McDonnell Douglas, and airline alliance matters). Waiver requests from the agencies are now routine, and administrative and time constraints, combined with a fear of adverse inferences, create substantial pressure to comply. 1998 Commission Report, *supra* note 83, ¶ 4.2. Disclosure to one authority, of course, will often spur another authority to request like treatment. See Parisi, *supra* note 81, at 138-40.

90. See *supra* text accompanying notes 68-69 (noting agreements).

91. See U.S./Mexico Agreement, *supra* note 77, art. II; U.S./Brazil Agreement, *supra* note 74, art. II; U.S./Japan Agreement, *supra* note 76, art. II; U.S./Israel Agreement, *supra* note 75, art. II; 1995 U.S./Canada Agreement, *supra* note 73, art. II; 1991 U.S./E.C. Agreement, *supra* note 78, art. II. In the 1991 U.S./E.C. Agreement, for example, these interests include matters that: (a) are relevant to enforcement activities of the other Party; (b) "[i]nvolve anticompetitive activities (other than a merger or acquisition) carried out in significant part

activities,⁹² but in any event are expected to take one another's important interests into account. Traditional comity contemplates that an antitrust authority consider the other party's interests in deciding whether to initiate an investigation or proceeding, determining its scope, and electing which remedies to pursue.⁹³ Beginning with the 1991 agreement between the United States and the European Community,⁹⁴ U.S. agreements also contain "positive"

in the other Party's territory"; (c) involve a merger or acquisition in which at least one of the transacting companies or its parents is within the other Party's territory; (d) "[i]nvolve conduct believed to have been required, encouraged or approved by the other Party"; or (e) "[i]nvolve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory." *Id.*; see also U.S./Brazil Agreement, *supra* note 74, art. II(2) (similarly defining "[e]nforcement activities to be notified"); U.S./Canada Agreement, *supra* note 73, art. II(2) (similarly defining "[e]nforcement activities that may affect important interests of the other Party"); U.S./Mexico Agreement, *supra* note 77, art. II(2) (same).

92. *E.g.*, U.S./Mexico Agreement, *supra* note 77, art. IV; U.S./Brazil Agreement, *supra* note 74, art. V; U.S./Japan Agreement, *supra* note 76, art. IV; U.S./Israel Agreement, *supra* note 75, art. IV; 1995 U.S./Canada Agreement, *supra* note 73, art. IV; 1991 U.S./E.C. Agreement, *supra* note 78, art. IV.

93. *E.g.*, 1991 U.S./E.C. Agreement, *supra* note 78, art. IV. Nearly identical terms are included in other agreements. U.S./Mexico Agreement, *supra* note 77, art. VI(1); U.S./Brazil Agreement, *supra* note 74, art. VI(1); U.S./Japan Agreement, *supra* note 76, art. VI(1); U.S./Israel Agreement, *supra* note 75, art. VI(1); 1995 U.S./Canada Agreement, *supra* note 73, art. VI(1). The older agreement with Australia contains a somewhat different consultation procedure, but with conflict-avoidance principles that are roughly consistent with the more recent agreements. 1982 U.S./Australia Agreement, *supra* note 72, art. II(4), (6). Typical factors include the relative weight of the anticompetitive conduct in each territory, the conduct's intended target, the relative significance of the anticompetitive activities to the authorities' respective interests, conflict or consistency with the respective authorities' laws, other reasonable expectations, and the relationship to other enforcement activities undertaken with respect to the same parties. *E.g.*, U.S./Mexico Agreement, *supra* note 77, art. VI(5); U.S./Japan Agreement, *supra* note 76, art. VI(3); U.S./Israel Agreement, *supra* note 75, art. VI(5); 1991 U.S./E.C. Agreement, *supra* note 78, art. VI(3). Substantially similar considerations are detailed in the 1995 U.S./Canada Agreement, *supra* note 73, art. VI(3). The older agreement with Australia is again more limited, see 1982 U.S./Australia Agreement, *supra* note 72, art. II(4), (6), and the agreement with Brazil omits any discussion of the relevant factors, see U.S./Brazil Agreement, *supra* note 74, art. VI.

94. The principle had been indirectly reflected in bilateral cooperation agreements since 1954, and in OECD policies since 1973, though in neither case to much apparent effect. See ICPAC FINAL REPORT, *supra* note 1, at 227-28; OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶¶ 4-5, 27-35.

As the OECD cautioned, the term positive comity has been used inconsistently. OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶¶ 19-21. For the most part, I follow its exhortation to use the term relatively rigidly: that is, distinguishing not only negative comity, but also investigatory assistance (as opposed to making enforcement decisions) and situations where one nation's enforcement action causes another nation to refrain from acting, but without the latter having requested the former's assistance. "Informal" positive

comity provisions, whereby one authority may request the other to investigate anticompetitive activities occurring within its territory that affect the requesting authority's important interests.⁹⁵ Many of the agreements are quite young, but the relative rarity to date of formal requests for either traditional⁹⁶ or positive comity⁹⁷ is still

comity, in this sense, simply refers to "informal processes for making and considering positive comity requests." *Id.*

95. *E.g.*, 1991 U.S./E.C. Agreement, *supra* note 78, art. V(2) ("If a Party believes that anti-competitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anti-competitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide."); *see also* U.S./Mexico Agreement, *supra* note 77, art. V; U.S./Brazil Agreement, *supra* note 74, art. IV; U.S./Japan Agreement, *supra* note 76, art. V; U.S./Israel Agreement, *supra* note 75, art. V; 1995 U.S./Canada Agreement, *supra* note 73, art. V.

The 1998 agreement with the European Community elaborates on this principle. First, the agreement makes clear that requests for assistance may be made regardless of whether the activities also violate the requesting authority's own competition laws. Agreement Regarding the Application of Competition Laws, Sept. 23, 1991, U.S.-E.C., art. III, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504A (1998). Accordingly, it is also irrelevant whether the requesting authority is even contemplating taking enforcement action on its own. Second, the 1998 agreement establishes a presumption, subject to certain exceptions, that the requesting authority will refrain from pursuing its own enforcement while it is being assisted—providing, in theory, a means of "handing off" enforcement to the authority to whom the request is made. *Id.* art. IV.

96. The Boeing/McDonnell Douglas merger is the only cited example. 1998 Commission Report, *supra* note 83, ¶ 2.1 (reporting as an instance of traditional comity the Commission's request, and the FTC's immediate agreement, that the FTC take into account Europe's interests).

97. As of mid-2000, the only example of a positive comity request was the April 1997 request by the Justice Department for the Commission's help in investigating allegations that U.S. companies had suffered discrimination in the operation of the Amadeus computerized reservation system operated by Lufthansa, Air France, and Iberia. This experience was not wholly satisfactory. The Commission issued its Statement of Objections over two years after the Justice Department made its formal request, and targeted only Air France. ICPAC FINAL REPORT, *supra* note 1, at 232-34; Lampert, *supra* note 89, at 216. The Commission later fined Lufthansa for violating its new Code of Conduct for Computer Reservation Systems through Amadeus-related conduct, and noted that its decision followed the investigation initiated at the behest of Sabre. *EU Fines Lufthansa for CRS Offenses*, 77 Antitrust & Trade Reg. Rep. (BNA) 122-23 (July 22, 1999). As the ICPAC reported, delays of this kind may in fact be a serious risk, absent refinement. ICPAC FINAL REPORT, *supra* note 1, at 238-39; *see also* OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶ 59 ("At this point, perhaps the most that can be said is that the voluntary use of positive comity in specific cases presents no apparent risks and has clear potential benefits in a limited number of situations.").

The Justice Department and the Commission also regard the latter's investigation of AC

quite striking, and seems to have caused some officials to backpedal from rosier assessments.⁹⁸

2. *The Local Limits to Bilateralism*

These limits on bilateral cooperation help define a distinctive, truncated style of international cooperation. For want of inspiration, I identify these features as "local": first, the recognition that antitrust represents a distinctive problem area, one that may be substantially addressed within a limited group of nations; second, the conscious decision to permit the adaptation of international cooperation to national legal orders; and third, the less deliberate failure to address distinctive aspects of the U.S. legal order. As will become clear in Parts III and IV, these local limits to cooperation help inspire an approach to identifying the international law of antitrust. For the moment, it suffices to explain how they establish evident limits to the bilateral approach.

a. *Local Consent*

Though the rapid propagation of bilateral agreements in recent years has been impressive, the drawbacks to proceeding pairwise

Nielsen, a U.S. firm, as an example of informal positive comity. 1996 Commission Report, *supra* note 89, ¶ 2.2.4; Klein, *supra* note 87, at 14-15; Press Release, U.S. Dep't of Justice, Justice Department Closes Investigation Into the Way AC Nielsen Co. Contracts Its Services for Tracking Retail Sales (Dec. 3, 1996), available at <http://www.usdoj.gov/opa/pr/1996/Dec96/576at.htm>; see also ICPAC FINAL REPORT, *supra* note 1, at 234. That characterization is open to dispute. Both authorities were interested in Nielsen's marketing practices, mostly in Europe, that may have had as one of their effects a diminution in market opportunity for U.S. exporters. Press Release 96-576, *supra*. The Justice Department apparently let the Commission take the lead, given the relative weight of European conduct and anti-competitive impact, and terminated its investigation when the Commission and Nielsen settled on terms satisfactory to the Justice Department. *Id.* The Justice Department's deferral to the Commission, and its wait-and-see approach to the matter of remedy, make the agencies' decisions seem essentially independent. As then-Acting Assistant Attorney General Klein characterized the episode, "[w]hen it became clear to us that the European Commission had a firm intention to act, we decided to let our colleagues at the Commission take the lead." *Id.*

98. The ICPAC Final Report contains a good reprise of official comments illustrating how expectations have gradually been lowered. ICPAC FINAL REPORT, *supra* note 1, at 235-36 (citing officials); see also Hachigian, *supra* note 81, at 24 (elaborating why "it is unlikely that [the 1991 U.S./E.C. Agreement] will be invoked frequently").

are equally apparent. Advocates of multilateral proceedings in the World Trade Organization (WTO), for example, point to the painfully incremental nature of proceeding through bilateral negotiation, as well as the difficulties of administering a potentially enormous number of relationships.⁹⁹ But the decision to address first the relationships among mature and like-minded antitrust regimes, including those with a proven propensity for conflict, hardly seems arbitrary.¹⁰⁰ If nothing else, having done so, participating authorities can rightly claim that some of the proven flash points have been addressed, arguably diminishing the need to proliferate these norms on a global basis.¹⁰¹

It is less remarked, but perhaps equally significant, that recent efforts at cooperation have been almost entirely antitrust-specific, in marked contrast to earlier, ineffectual efforts to develop antitrust cooperation under general Treaties of Friendship, Commerce, and Navigation.¹⁰² Dedicated agreements may have been warranted because of the newly detailed nature of that cooperation, or in order

99. See *infra* text accompanying note 159.

100. WTO Report (1999) of the Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/3 (Oct. 11, 1999) at 14 (observing that "this type of cooperation tended to take place among countries economically interdependent and sharing a similar level of experience in competition law enforcement, or countries that shared the same ideas in the field of competition policy"), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/3.DOC>. The U.S. agreements with Brazil, Mexico, and Israel do not fit this description; the motivation in these cases instead seems to have been to provide assistance and to facilitate influence with budding antitrust regimes.

101. Submission from the United States to the Working Group on the Interaction Between Trade and Competition Policy, WT/WGTCP/W/48 (Nov. 24, 1997) (describing success of agreements with Canada, Australia, and European Community in avoiding disputes), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/W48.WPF>. Former Assistant Attorney General Joel Klein routinely replied to promptings for a WTO antitrust program by declaring: "If it ain't broke, don't fix it." Ernst-Ulrich Petersmann, *Competition-Oriented Reforms of the WTO World Trade System—Proposals and Policy Options*, in TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION 43, 62 (Roger Zäch ed., 1999) (quoting, and criticizing, Klein's position).

102. Nina Hachigian, *Essential Mutual Assistance in International Antitrust Enforcement*, 29 INT'L LAWYER 117, 138 & n.135 (1995) (claiming that antitrust cooperation provisions of Friendship, Commerce and Navigation Treaties have never, or almost never, been invoked) (citing ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMPETITION LAW ENFORCEMENT: INTERNATIONAL COOPERATION IN THE COLLECTION OF INFORMATION 65 (1984)); accord UNCTAD *supra* note 79, at 16 ("There is no evidence that FCN treaties have been utilized as vehicles for cooperation.") (footnote omitted).

to begin anew. But the focused nature of the agreements, and the elaboration of relatively distinctive tools like positive comity, suggest an intent to forge a distinctive working order of antitrust. As elaborated below, that may caution against conflating the antitrust experience with putative legal principles of a more universal nature.

b. Local Law

Agreements negotiated outside the IAEAA take the form of executive agreements designed to create international obligations without displacing existing national law.¹⁰³ This limitation affects the potential for cooperation in a variety of ways.¹⁰⁴ Indeed, as U.S. officials admit, the agreements do not permit any greater cooperation than might be had in their absence,¹⁰⁵ or that private

103. Parisi, *supra* note 81, at 135 (describing agreements as "formal, binding international agreements, that contain commitments on the exercise of discretionary authority . . . [but] because they are not treaties . . . these agreements therefore do not override any provisions of U.S. law with which they may be inconsistent"). For sake of clarity, a number of U.S. agreements make it plain that they are intended to affect neither sovereign's laws. U.S./Brazil Agreement, *supra* note 74, art. X; 1995 U.S./Canada Agreement, *supra* note 73, art. XI; 1991 U.S./E.C. Agreement, *supra* note 78, art. IX; 1998 U.S./E.C. Positive Comity Agreement, *supra* note 78, art. VII; U.S./Japan Agreement, *supra* note 76, art. XI; U.S./Israel Agreement, *supra* note 75, art. X; U.S./Mexico Agreement, *supra* note 77, art. XI; *see also* 1998 Commission Report, *supra* note 83, ¶ 5.

104. Positive comity requests, for example, require that the conduct in question be illegal in the requested country (potentially excluding, for example, inquiries into foreign export cartels). OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶¶ 51, 61. The degree to which such requests depend on confidence in the requested authority's commitment and resources is also increased by confidentiality restrictions, which limit the requesting authority's ability to jump-start the other's investigation and its ability to examine the fruits of that authority's additional investigation in order to superintend its performance. *Id.* ¶¶ 52, 53.

105. Joel Klein, The War Against International Cartels: Lessons from the Battlefield, Address Before the 26th Annual Conference on International Antitrust Law and Policy 8 (Oct. 14, 1999) ("But you don't need a formal agreement to pick up the telephone and share public information about cases on a bilateral basis, to ensure that one agency's investigation does not unnecessarily get in another agency's way. You don't need a formal agreement to talk about the pros and cons of particular investigatory tools or the efficacy of particular penalties."), available at <http://www.usdoj.gov/atr/public/speeches/3747.htm>; *see also* Approaches to Promoting Cooperation and Communication Among Members Including in the Field of Technical Cooperation, Communication from the United States to the WTO Working Group on the Interaction Between Trade and Competition Policy, WT/WGTCP/W/116 (Apr. 15, 1999), at 2 (describing "informal bilateral contacts occurring outside the context of any formal agreement or legislation"), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/W116.doc>; accord UNCTAD, *supra* note 79, at 20. For example, the United

parties could broker by themselves.¹⁰⁶

The result, not incidentally, preserves sovereignty over every ultimate decision.¹⁰⁷ The duty to provide notice of enforcement activities typically turns on the notifying party's perception of the other's "important interests," encourages cooperation to the extent of the "common interest," and, subject to the "important interests" of each, and asks them only to "consider" (or, at most, "carefully consider") coordinating related matters and complying with requests for comity, subject in every case to the authority's discretion.¹⁰⁸ As the Commission noted in seeking Council approval of the 1998 U.S./E.C. Positive Comity Agreement, there is "no risk that a [requested country] would be obliged to investigate a case where it was not within its interests to do so."¹⁰⁹ There is likewise

States and the European Commission cooperated in their parallel investigations of Microsoft even though their agreement was suspended during the relevant period due to a flaw in the European authorization. Waller, *supra* note 79, at 370.

106. This is most obvious in merger actions, where the strict statutory deadlines that prevent much official coordination have encouraged many parties to take matters into their own hands—for example, by purposefully notifying U.S. authorities first, on the basis of a letter of intent, so as to get a head start before initiating the more rigid (and foreshortened) European procedure. Hachigian, *supra* note 81, at 24-25. The parties will not, of course, be able to effectuate by themselves the sharing of agency-confidential information.

107. Much the same may be said of comity under IAEAA agreements. Christine A. Varney, Cooperation Between Enforcement Agencies: Building Upon the Past, Remarks Before the APEC Committee on Trade and Investment Conference on Competition Policy and Law (July 25, 1995) ("[W]e are prepared to enter into IAEAA agreements even if there is only a relatively small number of situations in which a country would be likely to cooperate with us. . . . [This] mak[es] it easy to decline cooperation in particular cases."), available at <http://www.ftc.gov/speeches/varney/newz.htm>. Consequently, it may be argued that cooperation *increases* national power by expanding the potential reach of national law without requiring any corresponding sacrifices. Waller, *supra* note 79, at 378.

108. *E.g.*, U.S./Mexico Agreement, *supra* note 77, arts. II-VI. The strongest requirements, typically, concern notification, with some variation among the agreements. Compare, *e.g.*, U.S./Israel Agreement, *supra* note 75, art. II(2) (describing "[e]nforcement activities to be notified"), and U.S./Brazil Agreement, *supra* note 74, art. II(2) (same), and U.S./Japan Agreement, *supra* note 76, art. II(2) (describing "[e]nforcement activities that may affect the important interests of the other Party"), with 1991 U.S./E.C. Agreement, *supra* note 78, art. II(2) (describing "[e]nforcement activities as to which notification *ordinarily* will be appropriate") (emphasis added), and 1995 U.S./Canada Agreement, *supra* note 73, art. II(2) (describing "[e]nforcement activities that may affect the important interests of the other party and therefore *ordinarily* require notification") (emphasis added), and U.S./Mexico Agreement, *supra*, art. II(2) (same).

109. Communication from the Commission to the Council Concerning the Agreement Between the European Communities and the Government of the United States on the Application of Positive Comity Principles in the Enforcement of Their Competition

little risk that a country would be required to *refrain* from investigating if that were contrary to its interests, even in positive comity cases where forbearance may be a condition for assistance.¹¹⁰

This means that cooperation agreements will leave some important and contentious matters unresolved. The greatest payoff to positive comity lies with cases that the requested authority would not otherwise pursue,¹¹¹ and some of the most suitable candidates for referral—such as market access cases—are among

Laws 4, COM/97/0233 final (June 18, 1997) [hereinafter Commission Positive Comity Communication].

110. Then-Chairman Pitofsky was explicit about this:

The key point about positive comity that I think sometimes is missed is that the requesting nation . . . does not wash its hands with respect to a practice by seeking investigation by a foreign nation. Each country retains the right, if it is not satisfied with the speed or quality of investigation, to initiate or reinstitute its own enforcement activities. Indeed, I expect there will be instances where positive comity is only a preliminary—a practical and comity-conscious preliminary—to old-fashioned extraterritorial enforcement.

Pitofsky, *supra* note 1, at 409. Even the 1998 U.S./E.C. Agreement, which contains a relatively strong presumption that the requesting party should cease or defer any investigations on its own part, leaves the matter in the hands of the enforcing authority. See UNCTAD, *supra* note 79, at 6 (noting that “although the United States federal enforcement agencies are bound by this agreement, the courts are not”). But see OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶ 56 (disputing claims that the agreement lacks the means to ensure restraint, given its terms and the self-enforcing nature of the obligation).

111. As one commentator put it, “it is ‘a fact of life that countries tend not to take any action against any [anticompetitive] conduct that merely affects other countries.’” OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶ 55 (quoting Allan Fels, *Trade and Competition in the Asia Pacific Region*, Economic Society of Australia, 24th Conference of Economists, Adelaide at 6 (Sept. 28, 1995)); see also James R. Atwood, *Positive Comity—Is it a Positive Step?*, in 1992 ANN. PROC. FORDHAM CORP. L. INST. CONF.: INT’L ANTITRUST L. & POL’Y 79, 83 (Barry E. Hawk ed., 1992) (arguing that it is “not realistic to expect one government to prosecute its citizens solely for the benefit of another”); *id.* at 88 (arguing that positive comity cannot overcome the fundamental “proposition that laws are written and enforced to protect national interests”).

The OECD Report argues that such criticisms are inapposite given that the requested party’s law must have been broken, OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶ 55, but positive comity is of course relevant only in cases in which the law was broken and the authority was not otherwise disposed to prosecute. The report also quotes, by way of reply, the Commission’s assertion that “very often it will be in the Requested Party’s interest to bring an end to anticompetitive behaviour occurring on its territory and it may be extremely beneficial to have such behaviour brought to its attention.” Commission Positive Comity Communication, *supra* note 109, at 4, quoted in OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶ 55. If ignorance is the only difficulty, of course, positive comity amounts to nothing more than the exchange of information.

the least likely to appeal to the requested authority.¹¹² Where requests are accepted, it may be primarily as a means of wresting control,¹¹³ and authority will continue to be bifurcated in cases of substantial interest to both authorities.¹¹⁴ Traditional comity, for its part, will continue to be invoked (perhaps for the first time) at the remedies phase, when a case has been undertaken and proven, and the requested party's enforcement interests are presumably least open to compromise.¹¹⁵ In the event of genuine discord, a party may always withdraw from the agreements on relatively short notice.¹¹⁶

None of this means that existing agreements are irrelevant.¹¹⁷ Cooperation offers important opportunities for building confidence and developing relationships between antitrust authorities,¹¹⁸ and surely may improve enforcement—when, for example, two authorities are persuaded to impose consistent and complementary remedies, or when positive comity enables the timely and effective pursuit of evidence and prosecution of activities.¹¹⁹ Indeed, the occasional exaggeration by officials of comity's scope and implications may stem from their belief that the agreements will

112. OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶ 60.

113. As the Commission reported,

It is clearly preferable, from the European Community's point of view, that the United States avail of the principle of positive comity when considering anticompetitive behaviour taking place within the European Community rather than seeking to apply US competition laws. Through positive comity the Commission can retain control, where it so wishes, of enforcement procedures addressing such behaviour.

Commission Positive Comity Communication, *supra* note 109, at 3.

114. See *supra* text accompanying notes 90-98.

115. This is acknowledged in the agreements themselves. *E.g.*, U.S./Mexico Agreement, *supra* note 77, art. VI(4); U.S./Japan Agreement, *supra* note 76, art. VI(2); U.S./Israel Agreement, *supra* note 75, art. VI(4); 1995 U.S./Canada Agreement, *supra* note 73, art. VI(4); 1991 U.S./E.C. Agreement, *supra* note 73, art. VI(2).

116. The U.S. agreements typically provide for six months notice, though the IAEEA agreement with Australia is somewhat more complicated. 1999 U.S./Australia Agreement, *supra* note 72, art. XIII(C) (permitting immediate termination at a party's discretion, after consultation, in the event of unauthorized or illegal disclosure or use of confidential antitrust evidence confided to it); *id.*, art. XIII(E) (providing for termination upon 30 days' notice in other circumstances).

117. But see Guzman, *supra* note 10, at 1535 n.89 (noting the existence of agreements permitting the sharing of information).

118. *E.g.*, Melamed, *supra* note 1, at 426. The ICPAC Final Report seems to take promoting confidence in positive comity mechanisms as virtually an end in itself. ICPAC FINAL REPORT, *supra* note 1, at 238-39.

119. *E.g.*, ICPAC FINAL REPORT, *supra* note 1, at 237-38.

eventually spill over into mutual understandings that transcend any formal arrangement.¹²⁰

c. Local Actors

Beyond indicating that they are not intended to alter national or state laws,¹²¹ the agreements exhibit little appreciation of the multifaceted nature of U.S. antitrust. The Justice Department and the FTC are each subject to the agreements, but their nominal independence would not in any case threaten international cooperation,¹²² and they coordinate fairly effectively with other federal agencies having regulatory interests touching on

120. Klein, *supra* note 87, at 11.

121. See *supra* note 108 (citing relevant agreement provisions).

122. Each agency has the authority to enforce provisions of the Clayton Act. 15 U.S.C. §§ 12, 15, 18, 21, 26-27 (2000); *id.* §§ 13-14, 16-17, 19-20, 22-25 (2000). The FTC's authority under section 5 of the Federal Trade Commission Act, *id.* § 45, moreover, permits it to challenge conduct also actionable under the Sherman Act, which the Justice Department enforces through civil and criminal proceedings. *Id.* §§ 1, 2-4. To address this overlap, the agencies have agreed that the Justice Department will refer all civil Robinson-Patman Act matters to the FTC, and the FTC (which lacks the authority to commence criminal actions) will refer possible criminal matters to the Department. The agencies have also adopted a clearance procedure that dissolves most potential for conflict. Antitrust Div., U.S. Dep't of Just. & Bureau of Competition, Fed. Trade Comm'n, Clearance Procedures for Investigations (Dec. 2, 1993); U.S. Dep't of Just. & Fed. Trade Comm'n, Hart-Scott-Rodino Premerger Program Improvements (March 23, 1995); see also 1 A.B.A. SEC. OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 659-60 (4th ed. 1997) [hereinafter ANTITRUST LAW DEVELOPMENTS (FOURTH)]; ANTITRUST DIV., U.S. DEPT OF JUST., ANTITRUST DIVISION MANUAL ch. VII, at 1-6 (3d ed. 1998) [hereinafter ANTITRUST DIV. MANUAL], available at <http://www.usdoj.gov/atr/foia/divisionmanual/ch7.pdf>.

This is not to deny the idiosyncrasies, or excesses, of this redundancy. Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 ANTITRUST BULL. 695, 736-40 (1990) (suggesting that dual enforcement is costly and unnecessary, and proposing concentration of efforts in the Justice Department); William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505 (1996) (suggesting that dual enforcement may have little benefit in terms of inter-agency competition or diversification, and that its costs may outweigh its benefits). The decision by the Justice Department to undertake an investigation of Microsoft after the FTC closed its file illustrates the uncertainty this arrangement can pose for potential targets. See Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 CONN. J. INT'L L. 501, 502 (1994) (noting that the coordination process between agencies "does not prevent them from taking conflicting positions in adjudicatory proceedings, or seeking conflicting legal interpretations and results").

antitrust.¹²³ The lacuna in the agreements, rather, concerns the fact that nonfederal parties may enforce federal law against foreign parties and overseas activities.

Foreign governments were, of course, well aware of the private right of action under the Clayton Act,¹²⁴ having complained long and loudly about the *in terrorem* effect of treble damages,¹²⁵ which bedevil a growing number of international cases.¹²⁶ But private

123. The Justice Department is charged with advising a variety of federal agencies as part of its sectoral responsibility for antitrust matters concerning banking, telecommunications, and rail and air transportation. MILTON HANDLER ET AL., *TRADE REGULATION: CASES AND MATERIALS* 99 & n.2 (4th ed. 1997); see also 2 ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, ch. 14 (describing procedures); ANTITRUST DIV. MANUAL, *supra* note 122, at ch. VII, 33-38 (same). Most domestic and foreign observers conclude that this arrangement generally allows adequate attention to competition considerations. *The Relationship between Competition and Regulatory Authorities*, 1 OECD J. COMPETITION L. & POL'Y 169, 171, 175-76 (1999); Michael O. Wise, *Review of United States Competition Law and Policy*, 1 OECD J. COMPETITION L. & POL'Y 10, 37-54, 61 (1999). But cf. Eleanor M. Fox, *Lessons from Boeing*, *supra* note 7, at 19, 24 (arguing that antitrust should be kept distant from politics, and that "[p]olitical officials should leave antitrust to the experts").

124. 15 U.S.C. § 15 (2000). The Clayton Act as amended authorizes private actions to enforce the federal antitrust laws, including the Sherman Act, the Robinson-Patman Act, and the Clayton Act itself, *id.* § 12 (2000), and further permits injured persons to recover treble damages, *id.* § 15(a) (2000).

125. *E.g.*, MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* 66 (1999); Joseph P. Griffin, U.S. International Antitrust Enforcement: A Practical Guide to the Agencies' 1995 Guidelines, Corp. Practice Series, A-49, at A-55 (BNA Dec. 23, 1998) (citing foreign description of U.S. treble damages as a "rogue elephant") (quoting William M. Knighton, *Nationality and Extraterritorial Jurisdiction: U.S. Law Abroad, Remarks Before the American Law Institute of the Georgetown University Law Center* (Aug. 13, 1981)); Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 794 (1984) (claiming that "[i]n recent years, foreign protests [against American antitrust] have focused on treble damage cases").

Of course, private treble-damages actions are also controversial in U.S. circles. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 115-18 (1993) (describing controversy, but disputing premise); see also, *e.g.*, Wise, *supra* note 123, at 16 (noting possibility of disproportionate punishment through variety of penalties, and arguing that severity "encourage[s] claims for exemption, special treatment, or even regulation as a substitute for competition enforcement"); *id.* at 31 (querying whether, in light of class actions and criminal fines, it may be worth reconsidering whether awarding exemplary damages in antitrust cases is still a sound policy). The Reagan Administration cited similar concerns in its unsuccessful attempts to limit application of treble damages. Edward Corriea, *Congress and Antitrust Policy After the Reagan Administration, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY: ESSAYS ON LEGAL, ECONOMIC, AND POLITICAL POLICY* 451, 459-61 (Harry First et al. eds., 1991).

126. See, for example, the recent vitamins controversy, which Professor First has described as a formative episode in international antitrust. First, *supra* note 37, at 712-14, 718-19 (describing private class-action settlement for \$1.05 billion by six foreign vitamins

parties go almost unmentioned in the bilateral agreements.¹²⁷ The resulting gap in regulatory comity has been noted, however, in academic appraisals of *Hartford Fire*, and has resulted in calls for a legislative resolution¹²⁸ or government participation in private suits,¹²⁹ lest private parties establish an independent and relatively unconstrained international economic policy.¹³⁰

Less attention still has been paid to the state attorneys general, though they were pivotal participants in *Hartford Fire*.¹³¹ The bilateral agreements were not intended, it is clear, to amend state antitrust statutes—the majority of them resembling (if not in every respect) the federal antitrust statutes.¹³² But states are also able to enforce federal antitrust law. Just like any other “person,”¹³³ a state

manufacturers).

127. Cf. Russell J. Weintraub, *Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27, 30-31 (1999) (arguing that in light of existing agreements, while debate over comity is “moot” with respect to government enforcement actions, the role of comity in private actions is “less clear”). The exception is the 1982 agreement with Australia, which provides:

When it appears to the Government of Australia that private antitrust proceedings are pending in a United States court relating to conduct, or conduct pursuant to a policy of the Government of Australia, that has been the subject of notification and consultations under this Agreement, the Government of Australia may request the Government of the United States to participate in the litigation. The Government of the United States shall in the event of such request report to the court on the substance and the outcome of the consultations.

1982 U.S./Australia Agreement, *supra* note 72, art. 6.

128. Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 57 (1995) (suggesting that if U.S. officials “decide to extend their view of comity to private litigation, the appropriate procedure would be by treaty or congressional-executive agreement,” and that “[s]uch a process would assure that diplomatically sensitive lawmaking is rooted in the legislature where it belongs”).

129. Waller, *supra* note 79, at 568.

130. *E.g.*, Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 325 (“[W]here private actions are concerned, the government has no opportunity to make a decision [regarding comity] and indeed cannot even block the private action.”); *id.* at 327 (noting relative lack of safeguards for private actions in the absence of judicial comity).

131. See *infra* text accompanying notes 520-23.

132. 1 ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 742-44; WILLIAM T. LIFLAND, STATE ANTITRUST LAW § 1.02 (1999). Like state recourse under federal law, most state laws permit treble damages (and, in a minority of cases, *parens patriae* actions) and criminal penalties for certain classes of violation. 1 ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 742-44; LIFLAND, *supra*, § 1.04.

133. *E.g.*, *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447 (1945). So too are cities, counties, and other political divisions of states. *E.g.*, *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906). States are not, however, persons capable of

may seek injunctive relief (including divestiture of assets)¹³⁴ or treble damages¹³⁵ for threatened or actual antitrust injuries suffered as purchasers of goods or services. Unlike purely private parties, a state may also bring *parens patriae* actions on behalf of its natural residents, which again may entitle it to equitable relief¹³⁶ or treble damages.¹³⁷

The inattention to state antitrust is unlikely to persist. State antitrust enforcement has long been controversial domestically,¹³⁸ and states have no more forsworn intervention in international matters than they have in matters touching on interstate commerce.¹³⁹ States have been actively involved in a number of

violating the Sherman Act, *Parker v. Brown*, 317 U.S. 341, 351 (1943), though their political subdivisions often are. 2 ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 1085-91.

134. 15 U.S.C. § 26 (2000).

135. *Id.* § 15. In order to recover damages under federal law, the state, like any other plaintiff, must be a direct purchaser. *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989).

136. Such suits are authorized both as a matter of common law, as in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-64 (1972) and *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 445, 447-48 (1945), as well as by section 16 of the Clayton Act. *See* 15 U.S.C. § 26 (2000); *e.g.*, *California v. American Stores Co.*, 495 U.S. 271 (1990).

137. Unlike actions for injunctive relief, such relief does not derive from federal common law, *California v. Frito-Lay, Inc.*, 474 F.2d 774, 777-78 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973), but rather is authorized solely by statute, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394 (1976), codified as amended at 15 U.S.C. § 15g (2000); *id.* §§ 15 c-f, h (2000). Several limitations bear note: damages are limited to Sherman Act injuries, *id.* § 15c(a)(1); exclude injuries suffered by "unnatural" persons like corporations, *see id.*, or indirect purchasers, *cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and may be reduced to avoid double recovery (and, correspondingly, may bar damage claims by others who have not opted out of the state suit), 15 U.S.C. §§ 15c(a)(1)(A), (b) (2000).

138. David W. Barnes, *Federal and State Philosophies in the Antitrust Law of Mergers*, 56 GEO. WASH. L. REV. 263 (1988); Flexner & Racanelli, *supra* note 122; C. Douglas Floyd, *Control of Break-Away State Antitrust Litigation: An Issue of Federalism*, 35 HASTINGS L.J. 1 (1983) (discussing conflict between state-law antitrust actions and federal procedural rules governing removal); Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375 (1983) (discussing conflict between state antitrust law and federal antitrust scheme); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047 (1990).

139. Michael F. Brockmeyer, *State Antitrust Enforcement*, 57 ANTITRUST L.J. 169, 173 (1988) (rejecting notion that "states should leave the prosecution of national cases to federal authorities and should concentrate their efforts on local conspiracies"); *Roundtable Conference with Enforcement Officials*, 69 ANTITRUST L.J. 367, 381 (2001) [hereinafter 2001 *Roundtable*] (remarks of Thomas Greene, Senior Assistant Attorney General for Antitrust, State of California, and Chair, NAAG Multistate Antitrust Task Force); *Roundtable Conference with Enforcement Officials*, 67 ANTITRUST L.J. 453, 466-67 (1999) [hereinafter

recent mergers involving foreign parties or transnational dimensions, such as BP-Amoco/Arco, Exxon/Mobil, and MCI/Worldcom, sometimes at cross-purposes with one another or with the federal government.¹⁴⁰ States have also been involved in high-profile lawsuits potentially benefitting from international cooperation, such as the continuing Microsoft saga,¹⁴¹ and have proceeded directly against foreign defendants in matters involving parallel federal, state, private, and foreign proceedings, as in the vitamins price-fixing cases.¹⁴² The resulting potential for conflict is of no

1999 Roundtable] (remarks of Thomas Greene). Thus Robert Langer, then-head of the NAAG Task Force, responded to the question of whether states would be interested in international matters:

Obviously, we were very much involved in *Texaco/Getty*; other states were involved in *Socal/Gulf*. We look at companies involved in international operations where we feel there is sufficient local interest that we ought to have a part to play.

Now, the fact is, if you have EC approval or Canadian approval and FTC or DOJ involvement, and we believe we have something to say, if we are reasonably comforted by the level of scrutiny attached to the transaction by federal officials, it is unlikely that we are going to reinvent the wheel and start looking at international transactions with our limited resources. I don't discount the possibility on an ad hoc basis, but it is not going to be our primary focus.

60 Minutes with Robert M. Langer, Chair, National Association of Attorneys General Multistate Antitrust Task Force, 61 ANTITRUST L.J. 211, 222 (1992); *id.* ("I'm not going to speak for NAAG and say, 'Under no circumstances can I conceive of a circumstance where we would not have a role to play.' Although it was 'international,' we clearly thought we should have had a role to play in *Texaco/Getty*. But I don't see how one can have an absolutist position on the matter.").

140. See *infra* text accompanying notes 519, 524-25.

141. See *supra* text accompanying notes 28-30.

142. Following an investigation by the Justice Department (assisted by Rhone Poulenc, a French co-conspirator immunized for its cooperation), Roche Holding (a Swiss firm) and BASF (a German firm) pleaded guilty in May 2000 to price-fixing charges and paid \$725 million in fines. Additionally, some executives from each company were criminally sentenced to jail terms. Stephen D. Moore, *Vitamin Makers Still Face EU Objections*, WALL ST. J., Oct. 12, 2000, at B5. Canada's Justice Department later imposed fines of sixty-nine million Canadian dollars on the two companies. *Id.* Still later, Australia imposed record fines of twenty-six million Australian dollars on three firms after receiving assistance from U.S. authorities. *Three Australian Animal Vitamin Companies Face Anti-competition Fines*, AAP Newsfeed, Feb. 28, 2001, LEXIS, Nexis Library, WIRES File. The European Commission followed suit by imposing fines of 855 million Euros on eight companies. European Commission, Press Release, Commission Imposes Fines on Vitamin Cartels, IP/01/1625 (Nov. 21, 2001), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1625|0|RAPID&lg=EN&display=

In the meantime, civil actions led by private and state attorneys general flourished.

small relevance to foreign governments, but there has been as yet no attempt to moderate the states' role.¹⁴³

C. Multilateralism and its Limits

Conscious of the limits to bilateral arrangements, many argue that they nonetheless set the stage for deeper and broader international antitrust arrangements.¹⁴⁴ In the past, every attempt at international antitrust has failed, due largely to U.S. resistance—notwithstanding that the United States itself has the most robust history of national antitrust policy.¹⁴⁵ Decades of multilateral initiatives—from the League of Nations to the Havana Charter for an International Trade Organization, and from the United Nations Economic and Social Council and its Conference on Trade and Development (UNCTAD), to GATT—have left little legacy.¹⁴⁶ Antitrust norms have been incorporated to some degree in trade-related instruments, but such efforts have either been superficial

Private direct purchasers eventually settled class-action lawsuits filed in U.S. district courts for \$1.17 billion. Moore, *supra*, at B5. Six European and Japanese companies subsequently agreed to pay twenty-one states (plus the District of Columbia and Puerto Rico) \$225 million recoverable under state laws permitting states to recover for harm to indirect purchasers, and paid forty-seven states (again, plus the District of Columbia and Puerto Rico) \$30 million for direct purchases recoverable under federal law. *States Reach Settlement with Vitamin Makers in Massive Price-Fixing Case*, ASS'N OF ATTYS. GEN. ANTITRUST REP., Sept./Oct. 2000, at 1. California separately sought a settlement of \$80 million for its claims. Moore, *supra*, at B5.

143. See *infra* text accompanying notes 510-28.

144. E.g., Griffin, *supra* note 125, at A-49 (citing sources); Griffin, *supra* note 20, at 506 & nn.10-11 (same).

145. As Professor Waller has concluded,

Every attempt to establish transnational competition law, with the exception of that of the European Union, has ended either in complete failure or in dilution into aspirational measures with little content. The United States has played a curiously ambivalent role in these efforts, often initiating international efforts and then scuttling them when majoritarian voting at the international level has influenced the project in directions not to its liking.

Waller, *supra* note 79, at 344-45; accord Guzman, *supra* note 10, at 1535 ("[E]fforts to achieve international cooperation with respect to antitrust policy have achieved very little success.").

146. For surveys of these efforts, see Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 2-7 (1995); Guzman, *supra* note 10, at 1535-38; Waller, *supra* note 79, at 349-52; Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 597-601 (1994); Wood, *supra* note 10.

(as with GATT),¹⁴⁷ narrow (as with the TRIPS Agreement),¹⁴⁸ or vague (as with NAFTA).¹⁴⁹ Broader efforts at establishing antitrust within the WTO ran into implacable opposition by U.S. antitrust enforcers.¹⁵⁰ Although the United States appears newly willing to discuss the inclusion of core competition principles in the next WTO round,¹⁵¹ and has championed a new International

147. GATT's founders preferred to avoid the issue of competition policy. See Waller, *supra* note 79, at 351 & n.32 (citing JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 522-57 (1969)). A 1958 recommendation by a group of experts, followed closely by a subsequent decision, suggested consultation principles. Committee on Restrictive Business Practices, Report on the Problems Relating to the Control of Restrictive Business Practices Affecting International Trade, E.41450, at 3 (Jan. 12, 1965) ("[A] nation should accord sympathetic consideration to requested consultations . . . [and] if it agrees that such harmful effects are present, it should take such measures as it deems appropriate to eliminate these effects."); Decision on Arrangements for Consultations on Restrictive Business Practices, Nov. 18, 1960, GATT B.I.S.D. (9th Supp.) at 28 (1961) (recommending that "at the request of any contracting party, a contracting party should enter into consultations on Restrictive Business Practices on a bilateral or a multilateral basis as appropriate . . . and if it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects"). But that procedure was not invoked for thirty years—and then only tardily, in the midst of the Kodak/Fuji dispute. OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶ 30, at 8.

148. The TRIPS agreement charges members with responsibility for providing "full and sympathetic consideration to, and . . . adequate opportunity for, consultations" relating to positive comity requests on restrictive business practices, while according them complete "freedom [to make an] ultimate decision." Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, art. 40(3), 33 I.L.M. 1197, 1213 (1994).

149. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, art. 1501(2), 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301-3473 (1994 & Supp. V 1999)) (providing for cooperation "on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area").

150. In the early 1990s, for example, the International Antitrust Code Working Group, better known as the Munich Group, drafted an antitrust code for possible adoption as a WTO instrument, but U.S. skepticism almost immediately doomed the effort. Waller, *supra* note 79, at 347. The United States subsequently agreed to participate in a new Working Group on the Interaction Between Trade and Competition Policy, but continued to oppose promulgating international rules of any substance within the WTO or other multilateral organizations. E.g., A. Douglas Melamed, *Promoting Sound Antitrust Enforcement in the Global Economy*, 2000 ANN. PROC. FORDHAM CORP. L. INST. CONF.: INT'L ANTITRUST L. & POL'Y 1, 4-6 (Barry E. Hawk ed., 2000); see also Philip Marsden, "Antitrust" at the WTO, ANTITRUST, Fall 1998, at 28, 29-30 (describing U.S. positions); *infra* text accompanying note 157 (same).

151. The Bush Administration recently announced that it would reverse course and agree to discuss competition policy in the upcoming global trade negotiations, and that it saw merit

Competition Network,¹⁵² neither move is intended to yield the kind of binding antitrust code favored by many in the international community.

"in adherence to core competition principles of transparency, non-discrimination, and procedural fairness." Press Release, U.S. Trade Rep., USTR Zoellick Outlines U.S. Efforts to Promote Growth and Development by Launching New Trade Round (July 17, 2001) (statement of USTR Zoellick), *available at* <http://www.ustr.gov/releases/2001/07/01-54.htm>. But it stopped short of agreeing that even such basic principles ought be included in an international instrument, let alone a binding instrument, and noted uncertainty as to how obligations would be assessed or disputes resolved. The agreement to negotiate, moreover, means something less given the government's strategic decision to avoid further disputes over the round's agenda in favor of debating the merits of issues during actual negotiations. *Id.* The U.S. concession, in any case cleared the way for further negotiations. Paul Blustein, *142 Nations Reach Pact on Trade Negotiations*, WASH. POST, Nov. 15, 2001, at A1; cf. Jaret Seiberg, *Global Antitrust Debate Gets Stormier*, THE DAILY DEAL, July 27, 2001 (noting controversy over competition issues).

152. The idea for a Global Competition Initiative originated with the ICPAC Report, which proposed the need for a new venue in which interested governments, international organizations, nongovernmental organizations, private firms, and others could conduct a dialogue on competition issues. ICPAC FINAL REPORT, *supra* note 1, at 281-85. U.S. officials warmed to the idea. See Melamed, *supra* note 150, at 6-9 (sharing provisional thoughts as to terms and work program for initiative); Charles James, International Antitrust in the Bush Administration, Address before the Annual Fall Conference of the Canadian Bar Ass'n (Sept. 21, 2001) (describing initiative as "personal priority" and committing to attempt its launch no later than mid-2002), *available at* <http://www.usdoj.gov/atr/public/speeches/9100.htm>; Joel I. Klein, Time for a Global Competition Initiative?, Address at the EC Merger Control 10th Anniversary Conference (Sept. 14, 2000) (advocating a "move in the direction of a Global Competition Initiative, cautiously and on an exploratory basis"), *available at* <http://www.usdoj.gov/atr/public/speeches/6486.htm>.

The initiative, redubbed the International Competition Network (ICN), was finally launched in late October 2001, as this Article was being finalized for publication. The ICN's avowed purpose is to establish a forum "where senior antitrust officials from developed and developing countries"—initially, it would appear, including Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States, and Zambia—"will work to reach consensus on proposals for procedural and substantive convergence on antitrust enforcement." Press Release, U.S. Dep't of Justice, U.S. and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm. Its output, however, is to be in the form of nonbinding recommendations that governments are free either to adopt or reject, and it is to have "no rule making or decision making authority." *Id.*

Some explain these failures as a function of entrenched differences in substantive approach¹⁵³ or legal culture,¹⁵⁴ or common but divisive incentives to favor local economies.¹⁵⁵ Others find such assessments unduly fatalistic.¹⁵⁶ Resolving that debate is beyond the scope of this Article, but the argument against the WTO usefully illustrates an important perspective on the preferred terms for multilateral cooperation. U.S. antitrust officials, in particular, have stressed that WTO membership is too numerous, diverse, and inexperienced with antitrust to negotiate "sound" antitrust rules; that were they to do so, such principles would be of the lowest common denominator, which would only legitimize weak national regimes; and that any dispute settlement tools the WTO might bring to bear would either have little or no influence (in light of the low standards) or meddle with matters for sovereign consideration in a politically suspect fashion.¹⁵⁷

153. E.g., Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1, 3-4 (1997) (suggesting that differences among U.S., European, and Japanese approaches to antitrust standards and enforcement policy make international agreement difficult); see also *supra* note 38 (noting substantive differences between U.S. and European antitrust laws).

154. E.g., Marsden, *supra* note 38, at 117 (concluding that "fundamentally different philosophical approaches to economic freedom" in U.S. and EU vertical restraints policies mean that international cooperation or agreement are neither feasible nor desirable); Waller, *supra* note 79, at 347-48.

155. Guzman, *supra* note 10 (arguing that while national-level antitrust enforcement is suboptimal, the self-interest of individual countries will limit gains realizable through international antitrust cooperation); Guzman, *supra* note 26 (same); see also 2 ERIK NEREP, EXTRATERRITORIAL CONTROL OF COMPETITION UNDER INTERNATIONAL LAW 502 (1983) (describing self-interest of market regulators as the reason "international cooperation is slow to flourish"). While antitrust authorities frequently downplay any focus on self-interest, Congress has not been so demure. E.g., *International Antitrust Enforcement: How Well is it Working?: Hearings Before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary*, 105th Cong. (1998) (reviewing allegations that European Commission and Japanese Fair Trade Commission are reluctant to pursue anticompetitive practices by domestic outfits).

156. E.g., *Separate Statement of Advisory Committee Member Eleanor M. Fox*, in ICPAC FINAL REPORT, *supra* note 1, annex 1-A (arguing for greater substantive harmonization within the WTO).

157. E.g., James, *supra* note 152; Joel I. Klein, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Remarks to the Royal Institute of International Affairs (Nov. 18, 1996) [hereinafter Klein, A Note of Caution], available at <http://www.usdoj.gov/atr/public/speeches/jikspch.htm>; see also A. Douglas Melamed, *Antitrust Enforcement in a Global Economy*, 1998 ANN. PROC. FORDHAM CORP. L. INST. CONF.: INT'L ANTITRUST L. & POL'Y 1, 9 (Barry E. Hawk ed., 1998); Melamed, *supra* note 150, at 5-6; Conference Call with U.S. Trade Representative Charlene Barshefsky, Federal News Service, Dec. 17, 1999, LEXIS, Nexis

One premise for these objections is that there is presently a discrete community of antitrust enforcers, and that these nations are already cooperating formally and informally. Those espousing the WTO solution do not entirely disagree.¹⁵⁸ EU officials, for example, clearly acknowledge the relative strength of cooperation taking place among nations with similar philosophies and resources; at the same time, they and others express concern about the slow pace of proceeding bilaterally, and about the likelihood that many will simply be left behind.¹⁵⁹

A second premise is that antitrust issues are distinctive and not amenable to resolution by trade regimes. Again, advocates for WTO competition rules are not unsympathetic, and are at least inclined to exclude the application of certain familiar trade remedies.¹⁶⁰

Library, FEDNWS File ("[W]e know that full negotiations in these areas is [sic] not possible because there is no consensus, and there is no consensus because the view is they are not ripe. It's not clear what would be negotiated, what would be the end goal of the negotiation. In competition, half of WTO members don't even have competition laws, let alone a policy. What exactly would one negotiate?"); Joel I. Klein, *A Reality Check on Antitrust Rules In the World Trade Organization, and a Practical Way Forward on International Antitrust*, Address before the OECD Conference on Trade and Competition (June 29-30, 1999) [hereinafter Klein, *A Reality Check*], available at http://www.oecd.org/daf/clp/trade_competition/conference/klein_sp.htm.

158. This does not pretend to describe the views of all the relevant parties. Many, but not all, of the developed nations with established antitrust policies favor more substantial pursuit of a WTO agenda, though the developing countries, as well as various interest groups, are more skeptical. ICPAC FINAL REPORT, *supra* note 1, at 264-72.

159. Working Group on the Interaction between Trade and Competition Policy, WTO, *A Multilateral Framework Agreement on Competition Policy*, Communication from the European Community and its Member States, WT/WGTCP/W/152 (Sept. 25, 2000), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/W152.DOC>; Working Group on the Interaction between Trade and Competition Policy, WTO, *The Development Dimension of Competition Law and Policy*, Communication from the European Community and its Member States, WT/WGTCP/W/140 (June 8, 2000) (describing value of existing bilateral relationships, but noting exclusion of developing countries), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/W140.DOC>; Working Group on the Interaction Between Trade and Competition Policy, WTO, Report (1999), WT/WGTCP/3 (Oct. 11, 1999) (describing limited ambit of bilateral agreements, and observing that "it was not feasible to set up a bilateral agreement with every country, since in many cases very few business transactions were involved"), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/3.DOC>; Working Group on the Interaction between Trade and Competition Policy, WTO, *Approaches to Promoting Cooperation and Communication among WTO Members, Including in the Field of Technical Cooperation*, Communication from the European Community and its Member States, WT/WGTCP/W/129 (June 1, 1999) (same), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/W129.DOC>.

160. Communication From the European Community and its Member States to the

Third, and finally, there is general agreement that national laws on antitrust would not be displaced absent certain blatant flaws, such as discrimination on the basis of nationality,¹⁶¹ and that the discretion of national authorities over individual enforcement decisions would be preserved—including by recognizing that positive comity could not be compelled to any degree greater than at present.¹⁶² Assuming that the discretion to enforce antitrust laws is not simply inimical to international authority,¹⁶³ the general consensus is that it should not in fact be curbed.

Working Group on the Interaction Between Trade and Competition Policy, *The Contribution of Competition Policy to Achieving the Objectives of the WTO, Including the Promotion of International Trade*, WT/WGTCP/W/130 (July 12, 1999) ("It is clear, for instance, that the non-violation remedies of the WTO are not an appropriate means to address the interface between competition law and market access."), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/w130.doc>. The need to differentiate between antitrust and trade regimes was reemphasized in the recent announcement of the International Competition Network: the ICN, the Assistant Attorney General for Antitrust stressed, would not deal with trade or other non-antitrust issues, but would be "all antitrust, all the time." Press Release, *supra* note 152 (quoting Charles A. James). Professor Guzman, however, argues that substantive antitrust cooperation is most likely to be achieved if antitrust principles can be negotiated in tandem with unrelated issues, permitting horse trading; because the WTO addresses a variety of issue areas and features a ready-made dispute resolution system, he argues, it may be the ideal venue. Guzman, *supra* note 10, at 1545-46; Guzman, *supra* note 26, at 1156-63.

161. A Multilateral Framework Agreement on Competition Policy, *supra* note 159 (describing proposed framework as "fully compatible with respect to differences in national competition regimes"); *The Contribution of Competition Policy to Achieving the Objectives of the WTO*, *supra* note 160 (emphasizing the need to "fully recognize differences in domestic legal and institutional settings as well as levels of development").

162. Working Group on the Interaction between Trade and Competition Policy, WTO, A WTO Competition Agreement and Development, Communication from the European Community and its Member States, at 6, WT/WGTCP/W/175 (July 26, 2001), available at <http://docsonline.wto.org/DDRDocuments/t/WT/WGTCP/W175.DOC>; Brittan, *supra* note 2; see also A Multilateral Framework Agreement on Competition Policy, *supra* note 159 (distinguishing between de jure discrimination by national law and de facto discrimination, which "raises complex questions about the enforcement policies followed by competition authorities, including how competition law is being applied to individual cases"); *id.* (describing discretionary provisions for negative comity); *id.* (describing how, in response to positive comity request from developing country, the "enforcement responsibility lies with the country with primary jurisdiction over the anticompetitive practices in question and that enforcement assistance would remain voluntary in nature, ... compatible with the enforcement priorities, important interests and available resources of the requested country").

163. But see Ignacio De León, *The Dilemma of Regulating International Competition under the WTO System*, 3 EUR. COMP. L. REV. 162, 172 (1997) (arguing that "by its very nature, discretion associated to antitrust enforcement must always be excessive and arbitrary").

Each of these themes—the development of a separate antitrust community, the distinctiveness of antitrust, and the respect for national sovereignty over antitrust regulation—bear on a proper analysis of international antitrust. But they have been ignored by contemporary advocacy for a customary international law of antitrust.

II. THE LOCAL LIMITS TO ANTITRUST CUSTOM

A. *The Rise and Fall of Judicial Comity*

The diplomatic and regulatory practices encouraged by bilateral agreements continue a tradition with an important judicial pedigree. The kernel of both traditional and positive comity may be seen in *Hilton v. Guyot*,¹⁶⁴ in which the Supreme Court described the comity to be accorded foreign judgments as

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.¹⁶⁵

The highly subjective nature of these considerations, and the difficult compromise they suggest between international and domestic obligations, presaged the inconsistent course of comity in the antitrust context. Justice Holmes's opinion in *American Banana*, as previously noted, suggested that comity considerations required strict territorial limits to U.S. jurisdiction.¹⁶⁶ An almost deadlocked Permanent Court of International Justice indicated later in the *Lotus* case that *American Banana* might have been overly reticent in extending American authority,¹⁶⁷ a permissive approach that was incidentally reflected in Judge Hand's opinion in

164. 159 U.S. 113 (1895).

165. *Id.* at 164.

166. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

167. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser. A.) No. 9 (Sept. 7).

Alcoa.¹⁶⁸ Like the *Lotus* decision, though, *Alcoa* also acknowledged possible limits to that jurisdiction, and considered them relevant to construing the Sherman Act. As Judge Hand observed, courts "are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'"¹⁶⁹

The conflict of laws was not, however, a fixed beacon, and the effects doctrine remained vulnerable to criticisms that it neglected international considerations.¹⁷⁰ In 1958, Kingman Brewster elaborated what he termed a "jurisdictional rule of reason," a set of factors designed for prosecutorial and judicial consideration.¹⁷¹ The basis for and derivation of those factors was unclear,¹⁷² and their application in the courts uncertain: judges were to apply them to matters of liability and relief, rather than to strictly jurisdictional matters, within the unspecified "limits of their discretion."¹⁷³ Perhaps as a result, the jurisdictional rule of reason

168. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). The *Lotus* case was more directly influential in the European Court of Justice's deliberations over whether to recognize extraterritorial antitrust jurisdiction. The judgment was discussed at length by Advocate General Darmon, who concluded that the effects doctrine was not inconsistent with international law. Opinion of the Advocate General, Cases 89, 104, 114, 116, 117 & 125-29/85, *A. Ahlstrom Osakeyhtiö v. Commission*, 1998 E.C.R. 5193, [1988] C.M.L.R. 901, 921-23 (1988), 4 Common Mkt. Rep. (CCH) ¶ 14,491 (1988). The Court of Justice did not itself cite the judgment, nor did it go so far as the Advocate General in describing the potential reach of Community jurisdiction.

169. *Aluminum Co. of Am.*, 148 F.2d at 443 ("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.'").

170. *E.g.*, BREWSTER, *supra* note 47, at 258, 445-46.

171. *Id.* at 446.

172. Professor Brewster explained that "[s]ince there is no binding external authority to which the United States has submitted these questions, any limitation, in the last analysis, is self-imposed. In that sense, the decision to restrict jurisdiction is a matter of national policy, not sovereign power." *Id.* at 287; see also David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 203 & n.91 (1984) (observing that the jurisdictional rule of reason "was not based on normative international law"). The particular factors were not, in any case, traced to any particular international or domestic law, but instead were described as "essentially political" considerations.

173. BREWSTER, *supra* note 47, at 446. Brewster was keenly aware of the problem of limiting judicial discretion, and would have required that one or more additional factors be present before any case might be brought or liability imposed, including a relationship to

appears to have had little influence for nearly twenty years.¹⁷⁴ The initial *Restatement of Foreign Relations Law* more explicitly asserted international law limits on the reach of U.S. legislation,¹⁷⁵ but was equally slow to make an impression on courts. Although the United States sometimes dismissed or otherwise truncated actions based on foreign policy considerations,¹⁷⁶ according to one estimate, prior to 1973 "not one of the 248 foreign trade antitrust actions brought by the Justice Department was dismissed for lack of subject matter jurisdiction."¹⁷⁷

1. Rise: *Timberlane* and the Restatement

Eventually, spurred by consideration of foreign interests in analogous contexts¹⁷⁸ and the evident political conflicts in antitrust

U.S. conduct, domestic initiative or direction, foreign conduct by Americans, or foreign conduct by foreigners "explicitly aimed at and [with] the actual effect of restraining" American trade. *Id.* at 446-48.

174. Brewster's jurisdictional approach appears not to have been cited prior to *Timberlane*. 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, 400 (1979) ("[W]riting in the decade before the conflict of laws revolution in the United States, Brewster was unable to persuade the legal profession either in the United States or abroad that what he was talking about was real law, as contrasted with grace, diplomacy, good manners, prosecutorial discretion, or similar concepts."); accord Dodge, *supra* note 39, at 128-29; Gerber, *supra* note 172, at 203-04.

175. Section 40 of the first *Restatement of Foreign Relations Law of the United States*—denominated *Restatement (Second)*—provided that where two states possessed prescriptive jurisdiction, and their rules "require[d] inconsistent conduct upon the part of a person," each state was "required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction." That exercise was to be conducted in light of a nonexclusive list of factors: (a) each state's "vital national interests"; (b) 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 person's nationality; and (e) the likely efficacy of enforcement action in securing compliance. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) [hereinafter RESTATEMENT (SECOND)].

176. See Meessen, *supra* note 51, at 795 ("As a result of . . . negotiations [with foreign governments], the U.S. Government discontinued antitrust suits (*Petroleum, Uranium*), dropped plans for future actions (*Petroleum*), accepted limitations in orders on remedies (*Bulb, Nylon*) and agreed to a settlement incorporated in the final decree (*Petroleum, CRPL, Swiss Watch*)."); see also *supra* text accompanying note 52.

177. *Timberline Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 608 n.12 (9th Cir. 1976) (citing WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, app. B, at 498 (2d ed. 1973)).

178. *E.g.*, *Lauritzen v. Larsen*, 345 U.S. 571 (1953). For an excellent discussion of the

itself,¹⁷⁹ American courts became more inclined to limit the severity of extraterritorial antitrust.¹⁸⁰ The leading case was *Timberlane*,¹⁸¹ which involved allegations that American and Honduran defendants had conspired with Honduran officials to prevent an American company from milling Honduran lumber and exporting it to the United States.¹⁸² While the Ninth Circuit acknowledged that the bare requisites for effects jurisdiction had been established,¹⁸³ it noted Judge Hand's original suggestion that the Sherman Act should be read in light of custom,¹⁸⁴ and faulted intervening decisions for having "fail[ed] to consider other nations' interests."¹⁸⁵ To the court, conflicts principles embedded in (if not precisely defined by) customary international law¹⁸⁶ required weighing foreign and national interests affected by American jurisdiction.¹⁸⁷

relationship between antitrust comity analysis and the development of multilateralism in conflicts of law, see Dodge, *supra* note 39, at 123-34.

179. See *supra* text accompanying notes 51-67.

180. They were not entirely alone. *E.g.*, *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 105 (separate opinion of Judge Fitzmaurice).

181. *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976).

182. As the Ninth Circuit observed, the full "cast of characters" involved foreign and American plaintiffs and defendants. *Id.* at 603-04.

183. *Id.* at 615.

184. *Id.* at 609-10, 613 (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945)).

185. *Timberlane*, 549 F.2d at 611-12.

186. Compare *id.* at 609 (concluding that "it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction. What that point is or how it is determined is not defined by international law."), with *id.* at 610-13 (citing criticisms of the effects doctrine as inconsistent with international law and stating that a conflicts approach is required by international norms).

187. These interests included:

[T]he 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 Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Id. at 614-15 (footnotes omitted).

The court noted comparable multifactor tests developed in Kingman Brewster's treatise

Other courts followed suit,¹⁸⁸ and after an inauspiciously lengthy remand, the Ninth Circuit dismissed the *Timberlane* complaint largely due to a perceived conflict between U.S. law and conduct permitted, or at most encouraged, by Honduran law.¹⁸⁹

Amidst these decisions, the 1981 Tentative Draft No. 2 of the revised *Restatement of Foreign Relations Law*,¹⁹⁰ followed by the *Restatement (Third) of Foreign Relations Law* in 1986, significantly revised the American Law Institute's treatment of comity issues.¹⁹¹ Even where one of the principal bases for prescriptive (regulatory) jurisdiction otherwise existed,¹⁹² new section 403 required that its exercise be "reasonable"¹⁹³—not, the reporters' notes stressed, merely as a basis for moderating enforcement actions, "but as an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe."¹⁹⁴ Toward that end, section 403 articulated a list of factors not dissimilar to those detailed in *Timberlane*, including the territorial link to the activity, connections between the state and the persons engaged in the activity or protected by the state's regulation, the nature of the activity, any risk of unsettling expectations, the importance of the regulation to the state and the international community, and the interests of other nations in regulating the

and in the *Restatement (Second) of Foreign Relations Law. Id.* at 614 n.31.

188. *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884-85 (5th Cir. 1982), vacated by 460 U.S. 1007 (1983), cert. denied, 464 U.S. 961 (1983); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 868-69 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.* 595 F.2d 1287, 1297-98 (3d Cir. 1979). In *Mannington Mills*, the most noteworthy successor to *Timberlane*, the court detailed a slightly different set of considerations, and more clearly characterized comity as a matter of judicial discretion. *Mannington Mills*, 595 F.2d at 1296-98.

189. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378, 1384 (9th Cir. 1984) (*Timberlane II*), cert. denied, 472 U.S. 1032 (1985).

190. *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* § 403 (Tentative Draft No. 2, 1981).

191. *RESTATEMENT (THIRD)*, *supra* note 17, § 403 reporters' note 10.

192. *Id.* § 402.

193. *Id.*

194. *Id.* § 403 reporters' note 10. The note obscured the ambivalence of the *Restatement (Third)* toward equating reasonableness with comity, and comity with international law. Introductory commentary stressed the distinction between international law and comity, *id.* § 101 cmt. e, and the reasonableness standard in section 403 was intended to be distinct from comity, which the drafters thought was too easily conceived of as nonlegal in nature, *id.* § 403 cmt. a.

activity, including the likelihood of conflict with existing regulations.¹⁹⁵

Even while section 403 was being readied, the D.C. Circuit's *Laker Airways* decision sounded a prominent dissent.¹⁹⁶ Laker, a British airline, had initiated a Sherman Act action against U.S., British, and other foreign companies, but had been frustrated by an English court order (enforcing government blocking orders) that enjoined Laker to dismiss the British companies from the suit.¹⁹⁷ Laker then obtained an antisuit injunction to prevent U.S. and third-country airlines from availing themselves of similar relief.¹⁹⁸ In affirming, Judge Wilkey's majority opinion concluded that

195. Formally:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

Id. § 403.

As noted below, the Restatement also includes a provision specific to antitrust jurisdiction.

Id. § 415; see *infra* text accompanying notes 219, 279.

196. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). Other courts had earlier refused to decide whether to follow *Timberlane*. *E.g.*, *O.N.E. Shipping Ltd. v. Flota Mercante Grancolumbiana*, 830 F.2d 449, 452 (2d Cir. 1987) (declining to address *Timberlane*'s comity analysis, and resolving jurisdiction on other grounds); *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) (same); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255-56 (7th Cir. 1980) (holding that district court assertion of jurisdiction did not abuse its discretion, without determining whether *Timberlane* or *Mannington Mills* constituted circuit law).

197. *Laker Airways Ltd.*, 731 F.2d at 917-18.

198. *Id.* at 918-19.

congressionally conferred jurisdiction ought not be refused,¹⁹⁹ even if that meant that more than one nation might assert the authority to regulate the conduct in question.²⁰⁰ The opinion rejected interest balancing as inappropriate and indeterminate judicial second-guessing of political branch determinations, emphasizing the ongoing, confidential negotiations between the U.S. and British governments concerning the dispute²⁰¹—and the impropriety of substituting bilateral judicial negotiation of such issues.²⁰² Judge Wilkey noted, almost in passing, that there was no legal obligation for courts to muddy themselves with comity; absent “evidence that interest balancing represents a rule of international law,” comity was not mandatory, “since Congress cannot be said to have implicitly legislated subject to these international constraints.”²⁰³ Alluding to the critical commentary on *Timberlane*, *Mannington Mills*, and the *Restatement (Third)*,²⁰⁴ and confident that balancing’s difficulties were insuperable, Judge Wilkey predicted that the doctrine “has not gained more than a temporary foothold in domestic law.”²⁰⁵

199. *Id.* at 945-46, 949, 954 & n.175.

200. *Id.* at 951-52. As Professor Dodge recounts, Judge Wilkey’s demands that the possibility of concurrent jurisdiction be acknowledged were influential in the revision of *Restatement (Third)* section 403(3), though that in turn produced some tension with the balancing approach in section 403(2). Dodge, *supra* note 39, at 132-34.

201. *Laker Airways Ltd.*, 731 F.2d at 944-46.

202. *Id.* at 953 (“It is impossible in this case, with all the good will manifested by the English Justices and ourselves, to negotiate an extraordinarily long arms-length agreement on the respective impact of our countries’ policies regulating anti-competitive business practices.”).

203. *Id.* at 950.

204. *Id.* at 950 & nn.153-54. For contemporary criticisms, see, for example, Dunfee & Friedman, *supra* note 39; James M. Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT’L L. 395 (1983); Steven A. Kadish, *Comity and the International Application Of The Sherman Act: Encouraging the Courts to Enter the Political Arena*, 4 N.W. J. INT’L L. & BUS. 130 (1982); Harold G. Maier, *Extraterritorial Jurisdiction At A Crossroad: An Intersection Between Public And Private International Law*, 76 AM. J. INT’L L. 280 (1982); Harold G. Maier, *Interest Balancing And Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); Harold G. Maier, *Resolving Extraterritorial Jurisdiction, or “There And Back Again,”* 25 VA. J. INT’L L. 7 (1984); Meessen, *supra* note 51; James A. Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 N.W. J. INT’L L. & BUS. 336, 362-64 (1980). For discussion of the U.S. government appraisal, see *infra* text accompanying notes 268-70.

205. *Laker Airways Ltd.*, 731 F.2d at 950.

2. *Fall*: Hartford Fire

Less than a decade later, the Supreme Court appeared to vindicate Judge Wilkey. *Hartford Fire*²⁰⁶ involved a suit by private plaintiffs and nineteen states against domestic and foreign insurance and reinsurance companies that had allegedly conspired to restrict insurance coverage—including by dint of an agreement among London-based reinsurers to offer reinsurance to American companies only on jointly agreed terms.²⁰⁷ A five-member majority, in an opinion by Justice Souter, held that the conduct satisfied the effects doctrine,²⁰⁸ then made short work of the London reinsurers' argument that claims against them were barred by international comity: assuming "a court may decline to exercise Sherman Act jurisdiction over foreign conduct," any such argument failed because British insurance regulations did not compel the violation of U.S. antitrust law.²⁰⁹

For many, *Hartford Fire* both confirmed American effects jurisdiction and ended international comity.²¹⁰ If so, the *coup de grâce* was bizarrely indirect. None of Judge Wilkey's trenchant criticisms were even mentioned. Instead, the majority appeared to follow Justice Scalia's dissent in blithely equating the *Restatement (Third)* "reasonableness" test with any comity-based restrictions on U.S. jurisdiction,²¹¹ then proceeded to misapply that

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

207. *Id.* at 770-79.

208. *Id.* at 796.

209. *Id.* at 798-99.

210. *E.g.*, Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 214 (1993) (claiming that "the United States has followed the European Union in adopting an approach that fails to accord due respect to legitimate foreign sovereignty interests except in the (unusual) instance of a 'true conflict' between foreign and domestic laws"); Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity?*, 15 U. PA. J. INT'L BUS. L. 221, 222-23 (1994) (asserting that "[t]he notion of comity was swept away"); Waller, *supra* note 82, at 564-65 (describing *Hartford Fire* as "deal[ing] comity a near death blow"). *But see, e.g., infra* notes 466-69 (describing potential loopholes in *Hartford Fire*).

211. The majority assumed, without deciding, that international comity might somehow affect the existence or exercise of jurisdiction, and turned without explanation to the *Restatement (Third)*. *Hartford Fire*, 509 U.S. at 798-99. Justice Scalia was more direct, as befitting his conclusion that jurisdiction was lacking, but nevertheless appeared to endorse using the *Restatement (Third)* largely because it would be harmless. *Id.* at 818 (Scalia, J.,

test.²¹² By the majority's lights, the effects doctrine delimited subject matter and prescriptive jurisdiction, leaving only the question of whether the court should for some reason decline.²¹³ As Justice Scalia noted in dissent, this was a questionable understanding of jurisdictional doctrine,²¹⁴ and inconsistent with the traditional interpretive presumptions against extra-territoriality and against conflicts with international law,²¹⁵ it was also inconsistent with the *Restatement (Third)*'s framing of reasonableness as a decisive jurisdictional question,²¹⁶ and placed its application in the worst possible posture.²¹⁷

The majority's narrow understanding of the conflicts occasioning consideration of comity—that is, only those where a person is subject to two irreconcilable requirements²¹⁸—was even more

dissenting) ("I shall rely on the *Restatement (Third)* for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles (*Lauritzen*, *Romero*, and *McCulloch*) and in the decisions of other federal courts, especially *Timberlane*."). He then argued that whether the *Restatement* approach "precisely reflects international law in every detail matters little here," as any standard would bar prescriptive jurisdiction under the circumstances. *Id.*

212. That is not to say, however, that Justice Scalia's contrary conclusion, that section 403(2)'s factors clearly counseled against applying the Sherman Act, *id.* at 818-19 (Scalia, J., dissenting), was above reproach. See Dodge, *supra* note 39, at 141-42.

213. *Hartford Fire*, 509 U.S. at 795-97.

214. See Kramer, *supra* note 50, at 750 n.3 (suggesting that the majority and dissent applied different interpretations of "subject matter jurisdiction"). Compare *Hartford Fire*, 509 U.S. at 797 n.24 (stating that the effects doctrine precludes figuring comity concerns into a jurisdictional analysis), with *id.* at 817-18 & n.9 (Scalia, J., dissenting) (arguing that the majority had misinterpreted the type of comity at issue).

215. *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)); *id.* at 814-15 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); see also *id.* at 817-18 ("Considering comity in this way is just part of determining whether the Sherman Act prohibits the conduct at issue.").

216. *Id.* at 818-19 (Scalia, J., dissenting). The *Restatement (Third)* specifically avoids using the term "subject matter jurisdiction," RESTATEMENT (THIRD), *supra* note 17, § 401 cmt. c, but does tentatively distinguish between the jurisdiction to prescribe and the jurisdiction to adjudicate, *id.* § 401, and describes comity as relevant to the former, *id.* § 403. See also *id.* § 403 cmt. g (advocating construing U.S. statutes in conformity with sections 402 and 403, as well as international and foreign law).

217. See Dam, *supra* note 130, at 309-10. Indeed, the Court's view that prescriptive and subject-matter jurisdiction under the Sherman Act were co-extensive, *Hartford Fire*, 509 U.S. at 796 n.22, coupled with its views regarding its extraterritorial prescriptive reach, strongly imply that courts would be violating congressional intent in bowing to comity concerns.

218. *Hartford Fire*, 509 U.S. at 799 (holding that "[n]o conflict exists . . . 'where a person subject to regulation by two states can comply with the laws of both.'" (quoting

puzzling. As Justice Scalia argued, the majority "completely misinterpreted" the only support it cited,²¹⁹ a comment to section 403 that patently applied only to conflicts analyzed under subsection 403(3), and which left the multifactored "reasonableness" test of subsection 403(2) to govern cases like *Hartford Fire*.²²⁰ The upshot was that international comity offered little beyond the foreign compulsion defense, which the *Restatement (Third)* addressed elsewhere.²²¹ The interesting question, though, is not whether the majority was wrong in construing the *Restatement (Third)*—it plainly was—but whether that misreading mattered. One cause for doubt concerns the way the world had changed even since *Timberlane*. While the growth in antitrust codes and their application to foreign conduct increased the potential for disputes, the growing acceptance of extraterritorial jurisdiction tended to diminish any basis for principled objection.²²²

More significantly, antitrust enforcers were increasingly internalizing the reasonableness norm and supplanting the role of

RESTATEMENT (THIRD), *supra* note 17, § 403 cmt. e).

219. *E.g., id.* at 821 (Scalia, J., dissenting).

220. The majority's mistake was difficult to make. First, the relied-upon comment e, rendered in full, began by stating that "[i]t"—plainly, in context, subsection 403(3), governing instances in which more than one state could reasonably exercise jurisdiction—"does not apply where a person subject to regulation by two states can comply with the laws of both." RESTATEMENT (THIRD), *supra* note 17, § 403 cmt. e; see also 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, 49-50 (1995). Second, the very next sentence in comment e concludes that "[t]hose situations are governed by Subsection (2), but do not constitute conflict within Subsection (3)." RESTATEMENT (THIRD), *supra* note 17 § 403 cmt. e (emphasis added). Third, section 403(1) states comprehensively that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable," without hinting that matters falling within subsection (3) are exempt from analysis. *Id.* § 403(1). Fourth, subsection (3) expressly applies only "[w]hen it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity," which again adverts to subsection (2). *Id.* § 403(3). Fifth, the majority's path to subsection (3), and past subsection (2), stemmed from its reliance on comment j to section 415, see *Hartford Fire*, 509 U.S. at 799, but section 415's commentary makes clear that "[a]ny exercise of jurisdiction under this section is subject to the requirement of reasonableness" as articulated in section 403(2). RESTATEMENT (THIRD), *supra* note 17, § 415 cmt. a; see also *Hartford Fire*, 509 U.S. at 821 n.11 (Scalia, J., dissenting). Finally, as indicated in the text, the result of the Court's rule, which made international comity coterminous with the foreign compulsion defense, should have triggered doubts that it was correctly reading the Restatement.

221. RESTATEMENT (THIRD), *supra* note 17, § 403 cmt. e (citing §§ 441, 442).

222. *E.g., Waller, supra* note 82, at 575.

courts. In the United States, for example, the enforcement agencies' guidelines came to endorse comity considerations very much like those indicated by the *Restatement (Third)* and by *Timberlane*,²²³ including "full account of comity factors beyond whether there is a conflict with foreign law"—a test manifestly broader than that taken in *Hartford Fire*.²²⁴ The agencies stressed that this more deferential approach was purely a matter for their judgment,²²⁵ or

223. The 1995 Guidelines provided that those factors might include:

(1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.

1995 International Guidelines, *supra* note 48, § 3.2.

The U.S. brief in the *Hartford Fire* litigation recommended for judicial consideration not only the first six of the above factors, which were the entire roster of considerations contained in the 1988 Guidelines, but also those enumerated in *Timberlane*. See Brief for the United States as Amicus Curiae Supporting Respondents, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (Nos. 91-1111, 91-1128). It specifically cautioned against applying, however, the sixth factor of the *Mannington Mills* test, the "[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief," which it regarded as intruding into political branch prerogatives. Amicus Curiae Brief at 26 n.23, *Hartford Fire* (Nos. 91-1111, 91-1128) (quoting *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292, 1297). It differed for similar reasons, and on vagueness grounds, with two of the factors suggested by section 403(2)(e), "the importance of the regulation to the international political, legal or economic system," and section 403(2)(f), "the extent to which the regulation is consistent with the traditions of the international system." *Id.* (quoting RESTATEMENT (THIRD), *supra* note 17, § 403(2)).

224. 1995 International Guidelines, *supra* note 48, § 3.2 & n.72 (citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)); see also *infra* text accompanying notes 436-40.

225. 1995 International Guidelines, *supra* note 48, § 3.2 ("The Department does not believe that it is the role of the courts to 'second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.'" (quoting *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990)); see also Memorandum of Points and Authorities in Support of Plaintiff United States' Opposition to Defendants' Motion to Dismiss at 19, *United States v. LSL Biotechnologies, Inc.*, (D. Ariz. 2001) (No. CV-00-529-TUC-RCC) ("This litigation does not raise judicially cognizable issues of international comity, because it is an enforcement action brought by the United States. . . . [O]nce the Executive Branch has determined that the interests of U.S. law enforcement outweigh any detriment to our foreign relations, separation of powers principles dictate that the court should not second guess the Executive with its own international

at most subject to discussion with foreign authorities with reciprocal obligations.²²⁶ Not incidentally, positive comity provisions also increasingly offered an alternative to the assertion of U.S. jurisdiction, thereby obviating any need to apply judicialized notions of comity.²²⁷

In this light, criticisms of *Hartford Fire* as "swimming against a rising tide of cooperation in international antitrust enforcement,"²²⁸ or leaving the strictest nation's laws to govern global business activities,²²⁹ seem like exercises in misdirection: the rising tide of international cooperation should change the complexion of the cases reaching the courts, and negate the need for any heroic measures on their parts. In Professor Trimble's words:

The result is a triumph for governmental regulation of anti-competitive behavior. Extraterritorial application of competition

comity determination."); see also *infra* text accompanying notes 270-76.

The Guidelines are relatively agnostic as to the deference owed comity determinations by the FTC, which lies outside the executive branch. 1995 International Guidelines, *supra* note 48, § 3.2 & n.78 ("To date, no Commission cases have presented the issue of the degree of deference that courts should give to the Commission's comity decisions."); cf. *In re International Ass'n of Conference Interpreters*, No. 9270, 1995 FTC LEXIS 452, at *10 (Feb. 15, 1995) (order denying motion to certify interlocutory appeal) (noting that FTC "presumably" considered comity issues when it issued complaint, and that "[t]here is no basis in this record for the Commission to conclude on the basis of comity considerations that its recent decision to issue a complaint in this matter was mistaken"). The Guidelines are also agnostic as to comity considerations in private antitrust actions—though the latter are plainly addressed by *Hartford Fire*. 1995 International Guidelines, *supra* note 48, § 3.2 ("It is important also to note that in disputes between private parties, many courts are willing to undertake a comity analysis.") (citing *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976)); see also Memorandum of Points and Authorities in Support of Plaintiff United States' Opposition to Defendants' Motion to Dismiss at 19, *United States v. LSL Biotechnologies, Inc.*, (D. Ariz. 2001) (No. CV-00-529-TUC-RCC) (conceding that "it may at times be appropriate for courts to apply international comity analysis to litigation between private parties").

226. The Guidelines note that "in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected," and footnote the agencies' obligation to take into account the legitimate interests of foreign nations "in accordance with the recommendations of the OECD and various bilateral agreements." 1995 International Guidelines, *supra* note 48, § 3.2 & n.73.

227. Pitofsky, *supra* note 1, at 408.

228. Alford, *supra* note 210, at 230; see also Robert D. Shank, *The Justice Department's Recent Antitrust Enforcement Policy: Toward A "Positive Comity" Solution to International Competition Problems?*, 29 VAND. J. TRANSNAT'L L. 155, 185 (1986).

229. See Guzman, *supra* note 10, at 1532-33.

law has been legitimated. Domestic courts will not play the role of diplomats or international arbitrators. The unquestionable significant conflicts of policy must be worked out by legislators and diplomats, in the overall public interest.²³⁰

As we have seen, however, there are substantial reasons to doubt the sufficiency of regulatory comity. Bilateral cooperation directly addresses only a limited group of nations, and leaves national laws—including the assignment of enforcement authority to unregulated parties—apparently unaffected. The question remains whether *Hartford Fire*, in permitting such a state of affairs, really erred—since misconstruing the *Restatement (Third)* and permitting U.S. laws to be enforced are not self-evident legal errors. While some lower courts continued to adhere to the reasonableness approach notwithstanding *Hartford Fire*,²³¹ they never addressed whether that test really had a legal basis in the first place.

230. Trimble, *supra* note 128, at 57; accord Waller, *supra* note 82, at 566-68.

231. The Ninth Circuit more or less defiantly applied the traditional *Timberlane* factors in *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), notwithstanding the absence of a "true" conflict in *Hartford Fire* terms between Korean intellectual property rights and U.S. antitrust law. *Id.* at 846 & n.5 ("While *Hartford Fire Ins.* overruled our holding in *Timberlane II* that a foreign government's encouragement of conduct which the United States prohibits would amount to a conflict of law, it did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane I.*"). The court nonetheless wound up summarily rejecting the comity defense. *Id.* at 847; see also *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998) (noting, in reversing on other grounds, that the district court had applied a comity analysis without having found a "true conflict" within the meaning of *Hartford Fire*), *rev'g* 978 F. Supp. 464 (S.D.N.Y. 1997); *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997) (finding "actual and material conflict" between New Zealand Dairy Board regulations relating to cheese exports and U.S. antitrust law, and proceeding to decline jurisdiction after full analysis of *Timberlane* factors), *rev'g upon reconsideration* 942 F. Supp. 905, 913 (S.D.N.Y. 1996) (finding absence of sufficient conflict for purposes of *Hartford Fire*). For more straightforward applications, see *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), holding, in criminal prosecution of extraterritorial conduct, that "comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible." *Id.* at 8.

Other cases outside the antitrust context have continued to apply a broader understanding of comity, arguably on bases that might lend themselves to antitrust matters as well. *E.g.*, *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733 (2d Cir. 1994) (trademark); *Evergreen Marine Corp. v. Welgrow Int'l, Inc.*, 954 F. Supp. 101 (S.D.N.Y. 1997) (contract action); *In re Maxwell Communication Corp.*, 186 B.R. 807 (Bankr. S.D.N.Y. 1995).

B. Reasonableness and the Perils of Universalism

As discussed in Part IV, *Hartford Fire* presented the Supreme Court with the opportunity to focus on a very particular question of customary international law—namely, its application to antitrust actions maintained by private and state attorneys general. But the comity principle as framed by the Court was much broader, applying not only to all invocations of antitrust jurisdiction, but potentially to all exercises of judicial power.²³² This broader question continues to occupy critics and defenders of the Court's decision alike. The Court's critics insist that it misunderstood the provisions of the *Restatement (Third)* it professed to apply. *Hartford Fire*'s defenders rarely take direct issue,²³³ but instead argue that no harm was done, because the *Restatement (Third)* did not depict

232. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) ("The only substantial question in this litigation is whether 'there is in fact a true conflict between domestic and foreign law.'") (quoting *Société Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)). *Aerospatiale* was not an antitrust case, but involved a private personal injury suit, and comity was invoked as a ground for requiring that plaintiffs resort to the Hague Evidence Convention before exploring alternative means of obtaining discovery. *Aerospatiale*, 482 U.S. at 525, 528. In demurring, the Supreme Court stressed the need for subtle, particularized applications of comity, *id.* at 543-44, and cited an altogether different section of the *Restatement (Third)* as describing the relevant factors in the discovery context, *id.* at 544 n.28. The *Hartford Fire* majority relied solely on Justice Blackmun's concurrence. *Hartford Fire*, 509 U.S. at 768.

233. *But see, e.g.*, 1 HAWK, *supra* note 42, at 148.2 (asserting that "[t]he Supreme Court certainly reached the appropriate result"). Professor Trimble goes further, claiming that "[t]he Souter majority did not refuse to apply international law. It simply declined to apply section 403." Trimble, *supra* note 128, at 56. But this seems backwards: the majority did not "decline[] to apply section 403"—it tried to apply the section, but failed to do so properly.

customary international law²³⁴ or even its understanding by U.S. courts.²³⁵

The criticism is an important one and persuasive in many respects. As I explain in the following subsection, the reasonableness standard is indeed difficult to defend in terms of the conventional criteria for customary international law. In the second subsection, though, I argue that the standard's real flaws lie more in its unnecessary election of a universal method for making claims about custom. This approach is itself customary, but examining its deficiencies helps us appreciate the benefits of approaching the question of international antitrust in an entirely different way.

1. Reasonableness as Customary International Law

The criteria for customary international law are notoriously unsettled,²³⁶ but most would require "a general practice accepted as law,"²³⁷ or in *Restatement (Third)* terms, "a general and consistent

234. Compare *RESTATEMENT (THIRD)*, *supra* note 17, § 403 cmt. a ("This section states the principle of reasonableness as a rule of international law."), with Dodge, *supra* note 39, at 137 (arguing that, in light of nonobligatory nature of section 403, "whether Justice Souter or Justice Scalia has the better reading of the Restatement (Third) is largely beside the point"), and *id.* at 139-42 (elaborating on the *Restatement (Third)*'s departure from international law and commenting on Justice Scalia's *Hartford Fire* opinion), and Stephen B. Burbank et al., *Case Two: Extraterritorial Application of United States Law Against United States and Alien Defendants (Sherman Act)*, 29 NEW ENG. L. REV. 577, 591 (1995) (arguing, in judicial guise, that "few people other than those who drafted the relevant sections of the Restatement (Third) . . . believe that section 403 states rules of customary international law"), and Trimble, *supra* note 128, at 53 ("The Court correctly applied the customary international law of prescriptive jurisdiction."), and *id.* at 55 ("[T]here is no such general practice and hence no customary international law like that advanced in section 403."), and David B. Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419, 428-37 (1997) (arguing that section 403 did not reflect customary international law). As explained elsewhere, this perception has dogged section 403 from its inception. See, e.g., *supra* text accompanying notes 204, 230; *infra* text accompanying note 256.

235. Compare *RESTATEMENT (THIRD)*, *supra* note 17, § 403 cmt. a ("Some United States courts have applied the principle of reasonableness as a requirement of comity, that term being understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states."), with Massey, *supra* note 234, at 434-37 (arguing that U.S. courts predominately considered comity a matter of judicial discretion, rather than customary international law).

236. See generally BROWNLEE, *supra* note 32, at 3-11.

237. Statute of the International Court of Justice, art. 38(b), in DOCUMENTS ON THE

practice of states followed by them from a sense of legal obligation."²³⁸ By its own standard, can the *Restatement (Third)* depiction of reasonableness as a limit on prescriptive jurisdiction—or its variants in *Timberlane* and kindred cases—be regarded as international law? This was oddly free of controversy in *Hartford Fire*. As noted above, Justice Scalia assumed the *Restatement (Third)* test was substantially authoritative on the content of international law, and Justice Souter's opinion for the majority seemed to concede the point.²³⁹

The *Restatement (Third)* was not plowing new ground in supposing that customary international law imposed some limit on the effects doctrine.²⁴⁰ The closely contested *Lotus* decision was neither unequivocal nor the last word on extraterritoriality,²⁴¹ and

INTERNATIONAL COURT OF JUSTICE 61, 79 (Shabatai Rosenne ed., 1979). Literally, article 38 describes "international custom, as evidence of a general practice accepted as law," *id.*, but it might better be said that general practice is the evidence of custom, G.M. DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 76 (1993).

238. *RESTATEMENT (THIRD)*, *supra* note 17, § 102(2). Common to both approaches is some emphasis on state motivation, or *opinio juris et necessitatis*. The function of *opinio juris* is often disputed, but most agree that some showing of perceived obligation is necessary. See BROWNLIE, *supra* note 32, at 7-9; O.A. ELIAS & C.L. LIM, *THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW* 22 (1998). But see *supra* note 32 (citing examples of contrary views).

239. See *supra* note 211 (citing majority and dissenting opinions). In *Aerospatiale*, in contrast, the Court noted uncertainty on the then-new *Restatement's* authority on comity's application to discovery matters. *Société Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 544 n.28 (1987) (noting "that § 437 of the *Restatement* may not represent a consensus of international views on the scope of the district court's power to order foreign discovery in the face of objections by foreign states," but finding its factors probative).

240. E.g., BROWNLIE, *supra* note 32, at 312 ("The American courts, the United States government, and foreign governments in reacting to American measures assume that there are certain limits to enforcement jurisdiction but there is no consensus on what those limits are."); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 250 (1991) ("There is no dissent from the general proposition that public international law sets limits on the authority of States to legislate, adjudicate and enforce its [sic] domestic law."); Carlyn Maw, *United States Antitrust Law Abroad—The Enduring Problem of Extraterritoriality*, 40 *ANTITRUST L.J.* 796, 799 (1970-71) ("It is generally agreed . . . that there are limits under international law beyond which states may not go in prescribing rules for conduct within the territorial boundaries of other states. Agreement is lacking, however, as to where the line should be drawn.").

241. Cf. F.A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 186 *RECUEIL DES COURS* 9, 33 (1984) (arguing that "[e]ven the discredited majority opinion in the *Lotus* case recognized some limits of a State's legislative jurisdiction," and that "[s]ince then more than 50 years have expired," during which time "international law has not stood still").

the pivotal American decisions establishing the effects doctrine (not to mention *American Banana*) also indicated that international law might be reflected in the congressional assignment of antitrust jurisdiction to the courts.²⁴²

But these authorities conspicuously refrained from saying where the line should be drawn,²⁴³ a task the *Restatement (Third)*—like *Timberlane* before it—then assumed. The *Restatement (Third)* began by distancing its approach from comity. As the commentary indirectly acknowledged,²⁴⁴ comity sometimes meant something other than law; the Supreme Court had described comity as “neither a matter of absolute obligation . . . nor of mere courtesy and good will,”²⁴⁵ and contemporary discussion usually treated comity as closer to the courtesy end of the spectrum.²⁴⁶ The possible

242. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945).

243. In his separate opinion in *Barcelona Traction*, Judge Fitzmaurice confessed that there generally were no “hard and fast rules” restricting national jurisdiction, and that states had “wide discretion”; while international law did “postulate the existence of limits,” it might be “in any given case . . . for the tribunal to indicate what these are for the purposes of that case.” *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 105 (separate opinion of Judge Fitzmaurice).

244. RESTATEMENT (THIRD), *supra* note 17, § 403 cmt. a (“Some United States courts have applied the principle of reasonableness as a requirement of comity, that term being understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states. This section states the principle of reasonableness as a rule of international law.”).

245. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); see also *Société Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 543 n.27 (1987) (describing comity as “the spirit of cooperation”) (citing *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370 n.1 (1797) (referring to “the courtesy of nations”)).

246. *E.g.*, RESTATEMENT (THIRD), *supra* note 17, § 101 cmt. e (noting various approaches to comity, but purporting to distinguish it from international law); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 33 (1974-75) (explaining that “*opinio juris* is . . . needed in order to distinguish legal obligations from non-legal obligations, such as obligations derived from considerations of morality, courtesy or comity”); Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT’L L. 145, 214-16 (1972-73) (claiming that ordinary, but not exclusive, usage is inconsistent with regarding comity as a matter of legal obligation); Peter MacAlister-Smith, *Comity*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 671 (Rudolph Bernhardt ed., 1992) (“By definition, the rules of comity lack a legal nature.”); *id.* at 672 (claiming that “[s]ince a rule of comity does not involve a legal obligation, its non-observance produces no legal consequences”); *id.* at 672 (citing “misleading[]” use of comity “as a synonym for international law,” but giving “[n]o further consideration . . . to any of these variants”); Gerber, *supra* note 172, at 205 (“Although the concept of comity has had a variety of meanings, it is now generally considered to be little more than an exhortation to ‘neighborliness,’ with no specific content and no binding effect.”); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between*

reasons bear closely on the *Restatement (Third)*'s enterprise. For one, nations frequently speak and behave as though comity is not obligatory. Even if we are not strict about requiring that nations describe their behavior as legally compelled,²⁴⁷ and avoid attributing too much significance to signs of disobedience,²⁴⁸ there is abundant evidence that comity is sometimes used to mean something other than law.²⁴⁹

A second problem is that comity's terms, if assumed in principle to be mandatory, employ a nondeterminative means for answering determinative jurisdictional questions. In any given dispute, each side will likely be able to invoke comity on its behalf; any principle capable of providing succor so generously, it may be argued, lacks legality.²⁵⁰ Justice Scalia's attempt in his *Hartford Fire* dissent to

Public and Private International Law, 76 AM. J. INT'L L. 280, 283 (1982) (explaining that a political notion of comity "represents modern American judicial and scholarly usage and is reflected in many of the more recent transnational regulation cases"); Paul, *supra* note 22 *passim* (arguing at length that comity, as employed in the *Restatement (Third)*, misconceives discretionary limits as legal); Don Wallace, Jr., *Extraterritorial Jurisdiction*, 15 L. & POL'Y INT'L BUS. 1099, 1106 (1983) ("[C]ourts, too, are asked to limit U.S. jurisdiction by employing the doctrine of 'comity,' a soft doctrine if ever there was one. Indeed, it is neither a doctrine nor a policy, but merely an emanation of the awareness that nation-states must co-exist."). But see *infra* text accompanying notes 388-91 (citing contrary views).

247. See Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 245-46 (2000) (noting lack of clarity and precision in typical state expressions of international obligations); cf. Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 148 & n.14 (1987) (citing authorities indicating that widespread, consistent state practice may obviate the need for direct evidence of *opinio juris*).

248. The recurring question is how to assess when disobedience is simply a breach and when it undermines the process of customary international law. See BYERS, *supra* note 125, at 135-36.

249. For a valuable recitation of the range of views expressed by OECD members see, for example, OECD, MINIMIZING CONFLICTING REQUIREMENTS: APPROACHES OF "MODERATION AND RESTRAINT" 9-11 (1987) ("Most [d]elegations recognize a distinction between international comity and rules of international law in that application of comity is not considered to be a legally binding obligation."). Of those distinguishing comity, however, a number found firmer evidence of international obligations. *Id.*

250. Professors Neale and Stephens state this with particular clarity:

Thus state A will believe that out of "comity" state B could very well enable state A's regulation to take effect; but state B will probably reply that state A might well have refrained out of "comity" from pressing the matter. This feature of being all things to all men led Brownlie to equate comity to "neighbourliness" and "mutual respect." When states differ about the strictness with which each other's sovereign rights should be respected, "comity" will not resolve the problem, for they will differ correspondingly about what comity requires.

link comity to familiar choice-of-law principles was of little assistance.²⁵¹ Choice-of-law principles are not the best role model,²⁵² and even if comity requires states to heed their national conflicts principles (whatever they may be) in addressing international matters, such "enlightened self-interest" does not sound like the rigorous legal principle that may be desired.²⁵³

The *Restatement (Third)* made little headway by repackaging comity as "reasonableness."²⁵⁴ Elaborating factors for balancing may improve transparency, but not predictability. Individual factors will

A.D. NEALE & M.L. STEPHENS, *INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION* 14-15 (1988); see also Macalister-Smith, *supra* note 246, at 672-73; cf. BROWNLIE, *supra* note 32, at 8 (discussing the *North Sea Continental Shelf Cases*).

Vagueness may also be desirable to the extent it gives political decision makers flexibility and, hence, makes customary international law tolerable to them. This appears to be what Myres McDougal was driving at when he claimed, in another context, that reasonableness was a norm "formulated at the highest level of abstraction" and thus "ambiguous in highest degree." MYRES S. MCDOUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* 776 (1987). But see Anthony A. D'Amato, *Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law*, 10 VA. J. INT'L L. 1, 23 (1969) (suggesting that reasonableness is in the eye of the beholder, and might be claimed for positions with which McDougal would disagree).

251. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 816-18 (1993) (Scalia, J., dissenting).

252. Those principles are far from stable, e.g., Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 81 (1992) (noting nostrum that in conflict of laws, everything has been tried, because nothing works), and are certainly not universal. Karl M. Meessen, *Conflicts of Jurisdiction under the New Restatement*, 50 LAW & CONTEMP. PROBS. 47, 54-60 (1987).

253. Meessen, *supra* note 51, at 798-801; Meessen, *supra* note 252, at 57-60; see *infra* text accompanying note 263 (describing international law principles undergirding Meessen's approach). Professor Meessen's discussion is couched as an attempt to come up with an international law basis for the *Restatement's* approach, and it is not wholly clear whether he subscribes to the result. E.g., Meessen, *supra* note 252, at 59 ("The *renvoi* of reasonableness is to the enlightened self-interest of the state about to exercise its jurisdiction. An international law rule reflecting that interpretation of reasonableness could well be assumed to exist."). He does appear, however, to recognize its deficiencies. *Id.* at 59-60 ("To be sure, an international law *renvoi* to enlightened self-interest adds no substance to the obligations already contained in the respective rules of national conflicts law. The value of such a rule of international law is exhortatory, but it also opens access to the remedies of the international law of state responsibility if the domestic law standard of reasonableness is not observed.").

254. *RESTATEMENT (THIRD)*, *supra* note 17, § 403 cmt. a ("Some United States courts have applied the principle of reasonableness as a requirement of comity, that term being understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states. This section states the principle of reasonableness as a rule of international law."); see also Lowenfeld, *supra* note 220.

often point in different directions, placing a premium on the decision maker's judgment, and opposing parties will still be able to claim credibly that the test supports each of their positions.²⁵⁵ More fundamentally, to the extent that the reasonableness standard improves comity's apparent precision, it undermines any claim to accord with actual state practice. No one, not even the American Law Institute, contended that section 403's list of relevant factors or its conclusive nature was based on evidence of how states actually proceeded.²⁵⁶ The question, it bears emphasis, is not merely whether nations are obliged to be reasonable, but whether the *Restatement (Third)* describes the standard by which they have agreed to be assessed.

One might argue, of course, that the *Restatement (Third)* in fact *became* customary international law—particularly since gravitating toward reasonableness seems so, well, reasonable.²⁵⁷

255. MILTON HANDLER ET AL., *TRADE REGULATION* 1195 (4th ed. 1997) ("[V]irtually any result can be justified under the balancing test, no matter what facts are in the record, unless the case has such an obvious outcome that the test wasn't needed to begin with."); SCHACHTER, *supra* note 240, at 259; *see also* Meessen, *supra* note 51, at 802 (describing *Timberlane* as "too open a rule to be operable on the level of international law"); Meessen, *supra* note 252, at 55 (describing *Restatement (Third)* factors as nonexhaustive, more detailed even than *Timberlane*, and yet "as open-ended as ever").

256. Dodge, *supra* note 39, at 139-40 n.241 (citing authorities); *see, e.g.*, Karl M. Meessen, *supra* note 252, at 59 ("No way exists to accept the *Restatement's* claim for qualifying reasonableness as a rule of international law if the standard of reasonableness is interpreted by reference to an independent international law standard based on the common denominator of a widely diverging state practice."); Cecil J. Olmstead, *Jurisdiction*, 14 *YALE J. INT'L L.* 468, 472 (1989) ("[I]t seems implausible that Section 403 rises to the level of . . . 'a principle of international law.'") (quoting *RESTATEMENT (THIRD)*, *supra* note 17 § 403 cmt. a); *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved*, 81 *AM. SOC'Y INT'L L. PROC.* 180, 188 (1987) (remarks of Cecil Olmstead) (noting, in assessing "reasonableness" limit to jurisdiction as a principle of U.S. and international law, that "[w]hile surely this is a highly desirable rule and principle, its roots in international law appear somewhat less than deep. Its establishment in U.S. law is also based on only a few cases. . . . I think that the concept is highly desirable; I agree with its thrust. I just question the depth of its roots."); *id.* at 192 (remarks of Monroe Leigh) (asserting, in appraising section 403, cmt. a, regarding "reasonableness" jurisdictional limit as a principle of U.S. and international law, that "[n]o international tribunal has so ruled as of this date, and I doubt that such a ruling is to be expected any time soon").

257. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 246 (1996) ("Something like the principle of reasonableness is inescapable. . . . I believe that the principle of reasonableness to adjust the traditional bases of jurisdiction to prescribe has arrived, and by some name, in some guise or guises, will be recognized."); Macalister-Smith, *supra* note 246, at 673 ("The characteristic lack of the *opinio juris* which separates comity from the realm of customary international law may be reversed when a particular rule or practice of

and its alternatives no more appealing.²⁵⁸ Judicial decisions like those anticipating or applying the *Restatement (Third)* are potentially important indicia of custom,²⁵⁹ as are the views of respected scholars like those active in the American Law Institute.²⁶⁰ But courts and scholars were hardly of one mind even after the *Restatement (Third)* was finalized,²⁶¹ and those favoring international law limits on jurisdiction frequently chose divergent tests like minimum contacts²⁶² or balancing state interests only.²⁶³

comity maintained over a sufficient period of time develops into customary law by its acceptance as law.”); P.M. Roth, *Reasonable Extraterritoriality: Correcting the “Balance of Interests,”* 41 INT’L & COMP. L.Q. 245, 285 (1993) (concluding that “[t]he extent of continuing criticism and the inconsistency of State practice means that ‘interest-balancing’ cannot be asserted as an independent principle of international law”); *id.* at 286 (“If the requirement of reasonableness is not yet *lex lata*, then it is a necessary development.”); *cf.* Kirgis, *supra* note 247, at 149 (suggesting that “[a] reasonable rule is always more likely to be found reflective of state practice and/or the *opinio juris* than is an unreasonable (for example, a highly restrictive or inflexible) rule.”). This argument is fully elaborated in Massey, *supra* note 234, at 437-44. *But see* Meessen, *supra* note 252, at 53, 59 (arguing that while “today’s *lex ferenda* might be tomorrow’s *lex lata* if only due to the impact of the *Restatement* itself,” the range of factors identified for determining reasonableness, among other factors, means that “no chance exists” that the balancing test will become customary international law).

258. The limitations of these alternatives undoubtedly led some back to the reasonableness approach. *E.g.*, Born, *supra* note 252, at 83-84 (claiming that “there is probably a rough consensus among academic commentators in the United State surrounding Section 403’s approach, if only for want of more attractive alternatives”).

259. Statute of the International Court of Justice, art. 38(1)(d), *supra* note 237, at 79 (identifying “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”); RESTATEMENT (THIRD), *supra* note 17, § 103(2)(b) (according “substantial weight” to “judgments and opinions of national judicial tribunals”).

260. Statute of the International Court of Justice, art. 38(1)(d), *supra* note 237. Academics, of course, are often quick to defend their influence, *see* RESTATEMENT (THIRD), *supra* note 17 § 103(2)(c) (according “substantial weight” to “the writings of scholars”), sometimes to an extreme. Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT’L & COMP. L. 399, 401 (1996) (asserting, with approval, that “international law is made, not by states, but by ‘silly’ professors writing books, and by knowing where there is a good book on the subject”); *id.* at 399 (“I submit that states really never make international law on the subject of human rights. It is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals.”).

261. The best survey of the state of thought prior to the promulgation of the *Restatement (Third)* is provided in 2 NEREP, *supra* note 155, chs. 14-15; *see also supra* note 204 (citing criticisms of the reasonableness approach).

262. *E.g.*, Mann, *supra* note 241, at 28.

263. Meessen, *supra* note 51, at 802-08; Meessen, *supra* note 252, at 63. Under Professor Meessen’s approach, if each state’s enlightened self-interest, as measured by its domestic conflicts principles, is truly incompatible, then international law intercedes. *Id.* at 67. Such an approach may be more in keeping with the traditional focus of custom, *see* Meessen, *supra*

Even those decisions giving rise to the reasonableness principle did little to give it teeth, prompting criticism that reasonableness was largely a veil for U.S. national interests.²⁶⁴ The final blow to any

note 51, at 802-03, but to that extent accentuates the difficulty of distinguishing between decisions based on "mere" interest and those derived from a sense of obligation. Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 23, at 1117-18 (describing observational problems attending principle of *opinio juris*); *id.* at 1122-23, 1131-32 (identifying, and distinguishing, coincidence of interests from traditional requisites for customary international law). This is apparent even in Meessen's citation of the early 1980s pipeline controversy, in which he essentially assumes that U.S. capitulation to its allies may have resulted from its desire to heed customary international law. Meessen, *supra* note 252, at 67-68. Other contemporary episodes suggest an erosion of any focus on international law. See Roth, *supra* note 257, at 273 (contrasting the 1964 British blocking statute, which expressly provided for resisting foreign measures only where they infringed on U.K. jurisdiction under international law, with the 1980 Protection of Trading Interests Act, which abandoned reference to international law in favor of considering "the trading interests of the United Kingdom" and "prejudice to UK sovereignty or to its foreign relations").

More generally, Professor Meessen's theory suffers from some of the same drawbacks as the *Restatement (Third)*. One of the examples he cites of salient practice, the German *Bayer/Firestone* case, surrendered jurisdiction over the merger of French subsidiaries that had faint German effects in the first place. Meessen, *supra* note 51, at 792 & n.50 (citing Kammergericht [KG, Berlin Ct. App.], Decisions I and II, Nov. 26, 1980, *Wirtschaft und Wettbewerb/Entscheidungssammlung* [WuW/E] OLG 2411 (1980) (*Bayer/Firestone v. Bundeskartellamt* [Federal Cartel Office, FCO])); see also Meessen, *supra* note 252, at 68. The *Bayer/Firestone* case also better illustrates the sway of legal theory in continental legal systems than the realities of state practice; the FCO ignored the putative existence of international law constraints, and the court based its supposition of those constraints solely on Professor Meessen's work. David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756, 774-75 (1983). Another example is the later decision in *Philip Morris-Rothmans*, which also invoked as limits to the effects doctrine the international principles of nonintervention and the principle against abuse of discretion. THE INTERNATIONAL CHAMBER OF COMMERCE, THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 10 (Dieter Lange & Gary Born eds., 1987) (citing BKartA, Feb. 24, 1982, WuW/E Bkart A 1943 (*Morris/Rothmans*), at 1953-54)); Gerber, *supra*, at 777-78; Meessen, *supra* note 252, at 67. But there are numerous counterexamples, e.g., Roth, *supra* note 257, at 282; and German doctrine is perhaps unique in taking the view it does of international law, Gerber, *supra*, at 779 (describing examples as "novel usages of international law principles, and, although they require further refinement, they expand the potential role of international law in this context"). The problems of balancing, of course, remain. 1 HAWK, *supra* note 42, at 94 (contending that "[a]lthough Meessen's balancing of state interests test is narrower than the reasonableness test of Section 403, it is also subject to the significant criticism that balancing of United States and foreign interests is beyond judicial competence").

264. In *Laker Airways Ltd. v. Sabena*, Judge Wilkey observed:

When push comes to shove, the domestic forum is rarely unseated. . . . [C]ourts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests. This partially explains why there have been few times when courts have found foreign interests to prevail.

claim that reasonableness prevailed is *Hartford Fire's* suggestion that the effects doctrine described custom's limits,²⁶⁵ a position also attracting considerable support among academics.²⁶⁶

In any event, even if scholars and judges came to accept the reasonableness approach, the target audience should be the governments involved.²⁶⁷ Some U.S. objections were satisfied when

731 F.2d 909, 951 (D.C. Cir. 1984) (Wilkey, J., dissenting). Judge Wilkey's view was echoed several years later by Professor Trimble:

There is a major problem with [the *Restatement's*] position: most courts seem to have rejected it. Furthermore, even those courts that have rhetorically adopted *Timberlane* have found, for the most part, that the balance favored United States interests. Hence, there is no support in the actual holdings of these cases for the proposition that a rule of customary law can be applied to frustrate policies endorsed by the political branch.

Trimble, *supra* note 21, at 702; accord SCHACHTER, *supra* note 240, at 260-61; Mann, *supra* note 241, at 45, 52, & 83 (citing "chauvinism" of American applications of balancing).

265. As explained above, the *Hartford Fire* majority apparently perceived that the Sherman Act eclipsed comity, or that the effects doctrine (as modified by the Court's gloss), wholly incorporates it. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); see also *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255-56 (7th Cir. 1980) (arguing that *Timberlane* factors are consistent with determining jurisdiction under *Alcoa*). Read differently, *Hartford Fire* simply denies that comity is customary international law. Compare, e.g., Lowenfeld, *supra* note 220, at 47 (arguing that, after *Hartford Fire*, "it is now clear beyond doubt that the Supreme Court—majority and minority—understands that the reach of a nation's law is a subject of international law—public customary international law"), with Andreas F. Lowenfeld, *Jurisdictional Issues Before National Courts: The Insurance Antitrust Case*, in EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 1, 13 (Karl M. Meessen ed., 1996) (remarks of Gary Born) (disagreeing that "you can fairly rely on [*Hartford Fire*] for the proposition that international law and international comity are part of the US law and automatically get incorporated into some statute," and noting that "Justice Souter went out of his way to say almost exactly the opposite"). Professor Lowenfeld later seemed to modify his claim. See ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* 27 (1996) ("The Court [in *Hartford Fire*] says that only comity might counsel against exercising jurisdiction, whereas the *Restatement* purports to set out a rule of law.").

266. See *supra* text accompanying notes 204, 230, 234, 256.

267. Judicial decisions are usually regarded as evidence of customary international law, rather than sources of it. Statute of the International Court of Justice, art. 38(1)(d), *supra* note 259 (identifying "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"); RESTATEMENT (THIRD), *supra* note 17, §§ 102, 103. This places them in an inferior position relative to the executive branch as regards the formation of custom. See also RESTATEMENT (THIRD), *supra* note 17, § 111 reporters' note 4 (observing that "[i]n determining international law, judges are less free in their 'sources' and are subject to international constraints"); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 137 (2d ed. 1996) (arguing that, relative to common law, "judges have been substantially less free to follow their own bent in determining customary international law, in view of the authority of the Executive

the American Law Institute redrafted section 403 to drop its pretense to definitively allocate jurisdiction when each of two states had reasonable claims,²⁶⁸ and the United States seemed to favor applying the standard in private cases, so long as it could be so confined.²⁶⁹ But the government also continued to insist that reasonableness in any public action should be entrusted to political, rather than judicial, discretion.²⁷⁰ Critics maintained that this

branch in the matter and the need to attend to the practices and opinions of many nation-states over many years"). *But cf.* Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 929 (1986) (arguing that the President is not the sole means by which the United States participates in international law, because "[t]he courts, Congress and the Executive all partake in the process of customary law formation and transformation; a norm of customary international law reflects the acts of all three branches"); Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 388 (1987) (same). Indeed, it is sometimes argued that the absence of court cases suggests the existence of an international rule. *E.g.*, *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 4 (Sept. 7, 1927), 1927-32 WORLD COURT REPORTS 20, 42, discussed in BROWNIE, *supra* note 32, at 7-8.

268. Small, *supra* note 52, at 291-93 (citing, in addition, modifications in the bases for jurisdiction); *see also* Davis R. Robinson, *Conflicts of Jurisdiction and the Draft Restatement*, 15 LAW & POL'Y INT'L BUS. 1147, 1152-53, 1155 (1983) (explaining U.S. view that draft *Restatement (Third)* "does not accurately reflect the state of international law," and indicating a preference for the prior standard of *Restatement (Second)* section 40); *accord* Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 269 (1982).

269. Kenneth Dam, then-Deputy Secretary of State, declared that:

We in the Department of State are not altogether satisfied with making a balancing test the prerequisite to the *existence* of jurisdiction. As a practical matter, however, a careful weighing of the states concerned is obviously a useful procedure and a deterrent to unwarranted conflicts. We welcome the Federal courts' use of a general balancing analysis in private cases like *Timberlane*, *Mannington Mills*, and *Mitsui*. Balancing can certainly help to ensure that decisions affecting significant foreign concerns are not taken lightly.

Kenneth W. Dam, Address Before the American Society of International Law (Apr. 15, 1983), in 2 CUMULATIVE DIGEST OF U.S. PRACTICE IN INT'L LAW 1981-88, at 1323, 1325 (1993) [hereinafter CUMULATIVE DIGEST] (internal cross-reference omitted); *accord* Cira, *supra* note 268, at 266-69 (assessment by Assistant Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice, that "[t]he Justice Department welcomed *Timberlane*, since it reinforced the principles which the Department has applied in investigation and prosecution of foreign commerce cases in recent years") (citing authorities); *see also infra* text accompanying notes 434-40 (discussing terms of the U.S. agencies' international guidelines). The Legal Advisor, though, warned that the prospect that a court might establish binding precedent as to the "reasonable" scope of the Sherman Act, and so constrain federal enforcement, could force the executive branch to intervene in private litigation. Robinson, *supra* note 268, at 1153.

270. Thus the executive branch claims to evaluate comity independently in the exercise of prosecutorial discretion. *See supra* text accompanying notes 225-26.

"treated an issue of law as if it were an issue of politics,"²⁷¹ but the point is that it contributed to defining what the law *was*.²⁷² That position, moreover, found support not only among U.S. courts,²⁷³ but also from abroad.²⁷⁴ Some foreign governments exhibited concern about the propriety of entrusting *any* balancing exercises to the judiciary,²⁷⁵ even though they appeared to benefit from any leniency

271. Lowenfeld, *supra* note 220, at 53; see also 1988 A.B.A. REP. SEC. OF ANTITRUST L. AND SEC. OF INT'L TRADE AND PRACTICE TO THE HOUSE OF DELEGATES ON DRAFT ANTITRUST GUIDELINES FOR INT'L OPERATIONS, in 57 ANTITRUST L.J. 651, 663 (1988). The reception given the 1995 Guidelines was no kinder. WALLER, *supra* note 45, § 6:22, at 6-70 (describing differentiation of executive branch application as the "Government's assault on comity"); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 189-92 (1999); accord Waller, *supra* note 82, at 567-68. As noted below, their appreciation of comity was considerably different. See *infra* text accompanying notes 437-40.

272. Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1254 (1988) ("In essence, every time a state takes a position with respect to a particular question in international relations, the state is not only acting to deal with that particular question, but also providing an example of state practice that can affect the content of customary international law. In that sense, every state action in the international arena has a double quality. Each state action is simultaneously a response to a given concrete problem and, in effect, a legislative act.").

273. *United States v. Time Warner, Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,702 (D.D.C. 1997); *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990).

274. The European Commission, for example, appears to regard its internal evaluation of comity as both necessary and sufficient. LEON BRITTON, *COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET* 16 (1991) (stating that whether or not comity is a principle of international law, "the Commission does consider itself obliged to have regard to comity when exercising its jurisdiction in competition cases with a foreign element"); *id.* at 16-17 ("[T]he Commission as a collegiate body does not have to consult another department or branch of government to ascertain the likely impact of a proposed course of action on the Community's external relations. A Commission decision on competition policy reflects the totality of the Commission's views and policies."); see also Atwood, *supra* note 111, at 83; Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 FORDHAM INT'L L.J. 353, 358 (1994) ("It appears that the Commission believes that international comity is a matter of prosecutorial discretion, including consultation within the College of Commissioners, and not a legal prerequisite to the exercise of jurisdiction."). But see Walter Van Gerven, *EC Jurisdiction in Antitrust Matters: The Wood Pulp Judgment*, in 1989 ANN. PROC. FORDHAM CORP. L. INST. CONF.: INT'L ANTITRUST L. & POL'Y 451, 480 (Barry E. Hawk ed., 1989) (arguing that international comity, as rule of law, must be applicable in European courts "regardless of whether the issue has or has not first been addressed" by the Commission).

275. Civil law jurisdictions, in particular, typically regard balancing as more of a regulatory function than a judicial one. See Gerber, *supra* note 172, at 208; Harold G. Maier, *Jurisdictional Rules in Customary International Law*, in EXTRATERRITORIAL JURISDICTION, *supra* note 265, at 64, 85 (remarks of Andrea Bianchi); Mann, *supra* note 241, at 45, 52, 83, 89-91; Meessen, *supra* note 252, at 57-58; Brian Pearce, Note, *The Comity Doctrine as a*

in the exercise of U.S. jurisdiction, however ill-conceived.²⁷⁶

The distinction between types of antitrust enforcement is also a fundamental challenge to the standard's inductive premises. The reasonableness approach claimed to derive a judicial rule at least in part from state practice, and with limited exceptions, the *Restatement (Third)* treated regulatory and judicial comity as identical.²⁷⁷ If so, the fact that national governments prefer to insulate their decisions from judicial review, and to maintain unalloyed discretion over their evaluations of comity, would undermine the impression that reasonableness was *ever* judicially enforceable.²⁷⁸ If, on the other hand, states differentiate between

Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison, 30 STAN. J. INT'L L. 525, 563 (1994) ("[S]uch balancing in civil-law countries appears to be endogenous to the law; that is, the civil-law judge is expected to apply jurisdictional rules which are the result of the legislature's diplomatic balancing of the permissible public and private interests. Interest balancing in civil-law jurisdictions is thus exhausted upon formulation and permits little discretion in application."); *id.* at 550.

Common law jurisdictions also shared these concerns. 2 JAMES R. ATWOOD & KINGMAN BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 21-26 (2d ed. 1981); *see also, e.g.*, Peter Durack, *Extraterritorial Application of United States Law*, Address to the American Bar Association (Aug. 12, 1981), in A.V. LOWE, *EXTRATERRITORIAL JURISDICTION* 91, 94 (1983) (arguing that, although international law places limits or should limit the extraterritorial application of law, "it is not feasible for a Court of Law applying judicial techniques to balance the disparate interests of two States which they claim to be of national importance"); *The Uranium Antitrust Litigation-Extracts from Canadian Amicus Curiae Briefs of 21 May 1979 and 1 July 1980*, reprinted in LOWE, *supra*, at 109 (arguing that balancing approach adopted by U.S. courts improperly reviews decision making by the Canadian government, where international comity requires that official pronouncements by foreign government concerning its own activities must be decisive). Within the United States, the objection was best articulated by Judge Wilkey's dissent in *Laker Airways*, which argued that balancing was better conducted by the U.S. political branches that were assigned diplomatic functions under the Constitution—and which were engaged in ongoing negotiations with the British government in the case at hand. *See supra* text accompanying notes 196-205; *see also In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979), *aff'd*, 617 F.2d 1248, 1255-56 (7th Cir. 1980). These perceptions undoubtedly contributed to the perception of comity as more of a political than a legal enterprise. *E.g.*, MINIMIZING CONFLICTING REQUIREMENTS, *supra* note 249, at 12-13 (noting emphases by U.S., U.K., Australian, Canadian, French, and German delegations on the role of political branches in implementing principles of "moderation and restraint") (citing authorities).

276. This suggests the limitations of attempts to assess comity strictly in terms of obvious national interests. *But see* Guzman, *supra* note 10, at 1532-33.

277. *E.g.*, RESTATEMENT (THIRD), *supra* note 17, § 403 cmts. a, g (describing practices of legislatures, administrative agencies, and courts, and urging that U.S. law be interpreted by courts, executive branch officials, and regulatory bodies so as to avoid conflict with reasonableness principles).

278. At a minimum, a moratorium on judicial review of government decisions means that

public and private actions, and resist the judicial review of public actions, it raises a quandary as to how the latter's distinctive limits might be derived.

2. Reasonableness as Universalism

All this suggests that the factor-rich reasonableness norm is unpersuasive: there is simply insufficient evidence, under generally accepted criteria, that it is customary international law. But the flaws in the existing doctrine are both more profound and more easily addressed than this suggests, and certainly less marginal to the overall enterprise of international law. Three missteps deserve particular emphasis.

The first involves the attempt to elaborate a theory of near-universal application, without regard to potential distinctions among subject matter or constituents. Section 403 of the *Restatement (Third)* states a norm to apply across all regulatory contexts. Although several areas are singled out for additional discussion, they depend upon the same reasonableness principle,²⁷⁹ and the antitrust provisions are typical in referring back to section 403 for the standard of reasonableness.²⁸⁰ Professor Meessen's

state practices lose transparency, making it difficult to determine whether those decisions have been made for reasons of expediency or in order to ensure compliance with the law. *Cf.* Meessen, *supra* note 252, at 68 (noting that "the impact of international law can be more clearly established in disputes determined by the courts").

279. *RESTATEMENT (THIRD)*, *supra* note 17, § 403 cmt. h.

280. Section 415 provides:

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

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

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

argument for balancing state interests begins, refreshingly enough, with antitrust,²⁸¹ but he also suggests that an identical norm of balancing governs other exercises of jurisdiction,²⁸² and the generality of his argument seems to require that result absent obvious state dissent.²⁸³

A similarly expansive approach is taken to the type of disputes to which reasonableness applies. The *Hartford Fire* majority's "true conflicts" test, which it sought to found on section 403 of the *Restatement (Third)*, owed as much to comity precedent decided in a wholly different context.²⁸⁴ The *Restatement (Third)* itself did little better, asserting a universal requirement for the exercise of jurisdiction—reasonableness—and placing no limitations on the occasions for that inquiry.²⁸⁵ In consequence, a clash between U.S.

Id. § 415.

This adds little to section 403, particularly as to the question of international law; the antitrust-specific analysis of section 415 simply incorporates the reasonableness approach of section 403, and does not attempt separately to describe international legal norms for antitrust jurisdiction. *Id.* pt. IV, ch. 1, subch. C ("These sections focus on exercise of jurisdiction by the United States, but other states (and the European Community) can apply, and to some extent have applied, the same principles in regulating similar activities."). What is more, section 415 arguably expands antitrust jurisdiction on the basis of situs and principal purpose to a degree unsustainable under domestic law. 1 Hawk, *supra* note 42, at 154-57 (concluding that "if section 415 is intended to be a restatement of antitrust jurisdiction, it is inconsistent with both statutory and case law," and "[i]f section 415 is intended to be an antitrust-specific standard of reasonableness, it is unnecessary, unpersuasive and would be unconstitutionally employed if used as a basis to exercise antitrust jurisdiction").

281. 2 NEREP, *supra* note 155, at 492-94 (describing Meessen's attempts to differentiate international antitrust).

282. Meessen, *supra* note 125, at 804 (describing international law of antitrust); Meessen, *supra* note 252, at 62 (suggesting that "[i]n the form of a hypothesis, it may be extended to cover every field of law"). But cf. Meessen, *supra* note 252, at 52, 54 (criticizing *Restatement (Third)* for indiscriminately addressing divergent fields).

283. The American Law Institute and Professor Meessen are merely illustrative. See also BYERS, *supra* note 125, at ch. 4; THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS, *supra* note 263, at 46-48 (arguing generally for "jurisdictional rule of reason"); Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 25-26 (1995) (criticizing majority decision in *Hartford Fire* for ignoring "an international law of prescriptive jurisdiction"). Some studies focus on antitrust only because of its centrality to jurisdictional disputes, or ally it with another area of similar controversy. E.g., 1 NEREP, *supra* note 155, at XXII (explaining limitation of study to extraterritorial antitrust and securities regulation largely for purposes of manageability).

284. See *supra* text accompanying note 239 (describing invocation of *Aerospatiale*).

285. The exception, previously described, was for "true" conflicts in which the exercise by each of two states would "not be unreasonable." RESTATEMENT (THIRD), *supra* note 17, §

antitrust laws and a safe harbor established by foreign insurance laws was supposed to be evaluated by the same calculus as the discrepant application of essentially compatible U.S. and foreign antitrust laws.

Considering reasonableness at this level of abstraction is hardly arbitrary, given the norm's derivation from metaprinciples such as sovereign equality, nonintervention, and territorial integrity,²⁸⁶ and more immediately from jurisdictional principles forged for international criminal law and related areas.²⁸⁷ Critics of reasonableness tend to follow the same course, often denying the existence of the norm *en toto*.²⁸⁸ But nothing about this kind of generalization is inevitable. Customary international law affords its observers discretion in determining the appropriate level at which to generalize rules,²⁸⁹ and doing so clearly involves value judgments. Broad renderings of a principle may be attractive where they efficiently resolve a broader range of perceived problems, or allow greater analytic clarity. But they also risk overlooking nuances in the evidence, and tend to be easier to contraindicate at the margins, in ways that do not necessarily reflect on the presence or absence

403(3) reporters' note e. Justice Scalia, likewise, would have used a traditional (though not the *only* traditional) conflicts analysis. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 821 (1993) (Scalia, J., dissenting) (proposing that conflicts should be deemed to exist "[w]here applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute").

286. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (1970), reprinted in 65 AM. J. INT'L L. 243 (1971); BROWNIE, *supra* note 32, ch. XIV; D.W. Bowett, *Jurisdiction: Changing Patterns of Authority Over Activities and Resources*, 53 BRIT. Y.B. INT'L L. 1, 14-18 (1982); Mann, *supra* note 241, at 20-21; Meessen, *supra* note 252, at 63 (describing each state's duty to ensure that another state has "an equal chance to take effective legal action to implement its policies").

287. See 2 NEREP, *supra* note 155, at 482.

288. See, e.g., Kelly, *supra* note 21, at 482 ("[T]he reasonableness limitation, like much of asserted CIL principles, has no basis in general state practice nor is there any evidence that states accept it as mandatory. There is virtually no evidence that states, including the United States, accept such a principle as legally obligatory."); Trimble, *supra* note 21, at 701-07 (dismissing balancing approach of *Restatement (Third)* in its entirety); cf. Paul, *supra* note 22 *passim* (critically scrutinizing comity, broadly construed).

289. E.g., Stephan, *supra* note 247, at 245-46 (describing need to have scholars construe vague signals about "what states believe their obligations to be"); see also *supra* note 260 (citing authority for weighing academic views); cf. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION ch. 3 (1991) (stressing significance of judicial values in determining level of generality at which constitutional rights should be construed).

of a narrower principle.²⁹⁰ Given the difficulties in sustaining a workable theory for all exercises of prescriptive jurisdiction, it may be fruitful to consider whether they might be avoided by any antitrust-specific alternatives.

There is an independent warrant for a more cautious approach. Custom's critics increasingly stress its antidemocratic elements: not only is the law elaborated by unelected judges and scholars,²⁹¹ but it is characteristically imposed by a few countries upon many that are given little opportunity to participate.²⁹² American complaints about extraterritorial constraints ring somewhat hollow, given the global reach of U.S. laws and the tremendous influence of American norms on international law,²⁹³ and tend to omit custom's

290. For example, the reporters' notes for *Restatement (Third)* section 403 cite an OECD statement calling upon members to have regard to "revant principles of international law," cooperate "as an alternative to unilateral action," and "take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries." *RESTATEMENT (THIRD)*, *supra* note 17, § 403 reporters' note 1 (quoting Committee on International Investment and Multinational Enterprises, OECD, *THE 1984 REVIEW OF 1976 OECD DECLARATION AND DECISIONS ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES* 28 (1984) [hereinafter 1984 REVIEW]; see also *Conflicting Requirements Imposed on Multinational Enterprises, in MINIMIZING CONFLICTING REQUIREMENTS*, *supra* note 249, annex I, at 41, 42 n.1 (noting, additionally, that "[a]pplying the principles of comity, as it is understood in some Member countries, includes following an approach of this nature in exercising one's jurisdiction"); OECD, *Declaration and Decisions on International Investment and Multinational Enterprises*, annex 2, OECD Doc. DAF/IME(2000)20 (as amended June 27, 2000), available at <http://www1.oecd.org/daf/investment/guidelines/conflict.htm>. But the 1984 statement pointedly defers to provisions already in place with respect to restrictive business practices. 1984 REVIEW, *supra*, at 27 ("These procedures do not apply to those aspects of restrictive business practices or other matters which are the subject of existing OECD arrangements."). Thus, while the annex may support the general position of the *Restatement (Third)*, it is more ambiguous as to whether the same principle applies in the particular context of antitrust.

291. Kelly, *supra* note 21, at 518 & n.290; Stephan, *supra* note 247, at 245-48; Trimble, *supra* note 21, at 717-23. Foreign judges and scholars, presumably, are still further removed from local democratic influence. Kelly, *supra* note 21, at 526-30.

292. Charney, *supra* note 24, at 537 (1993) (claiming that "when authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent, or most interested among them"); Hiram E. Chodos, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 *TEX. INT'L L.J.* 87, 102 (1991) (arguing that "[t]he number of states required to meet the generality requirement [of customary international law] is often no more than a mere handful"); David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 *GER. Y.B. INT'L L.* 198, 203-04, 209 (1996); Kelly, *supra* note 21, at 519-23; see also *id.* at 523-30 (describing related problems created by new states and ICJ lawmaking).

293. Cf. W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 *CAL. W.*

countervailing democratic virtues, particularly in protecting unrepresented foreigners from the extraterritorial application of U.S. law.²⁹⁴ But it remains the case that unnecessarily broad assertions of customary international law shift authority from representative institutions to the courts.

A second misstep has been to conflate evidence of norms with their realization. Custom is afflicted by observational problems. Practices and opinions giving rise to custom are usually less than uniform,²⁹⁵ and may be even more disparate when the norms in question are envisioned as granting the states latitude;²⁹⁶ departures from a putative norm, too, may be interpreted as either detracting or contributing to that norm's formation,²⁹⁷ or perhaps as

INT'L L.J. 133, 135 (1987) (depicting "custom" as an attempt to shift international decision making "from the floors of the world legislatures to back rooms").

294. Professor Brilmayer has forcefully argued to this effect. Much of international law, she notes, is not inconsistent with the expressed views of the political branches. Brilmayer, *supra* note 21, at 2310. Additionally, democratic values counsel in favor of restricting the ability of the U.S. government to act extraterritorially against foreign citizens who lack input into that government's policies. *Id.* at 2311; see also Alan O. Sykes, *Externalities in Open Economy Antitrust and Their Implications for International Competition Policy*, 23 HARV. J.L. & PUB. POL'Y 89, 92 (1999) (observing that "it is exceptionally unlikely that the welfare of foreign citizens will be weighted equally with the welfare of domestic citizens in the domestic political process").

295. Even individual practices deemed sufficiently uniform for doctrinal purposes will differ somewhat from one another. Judge Hudson's classic definition of the elements required for custom, for example, demanded a "concordant practice by a number of States with reference to a type of situation falling within the domain of international relations." [1950] 2 Y.B. INT'L L. COMM'n 26, UN Doc. A/CN.4/SER.A/1950/Add.1; see also BROWNIE, *supra* note 32, at 5 (indicating that in order to establish customary international law, "[c]omplete uniformity is not required, but substantial uniformity is"). It might be the case, for example, that the U.S. balancing test exemplifies and contributes to a custom of reasonableness, but that does not mean that balancing is synonymous with reasonableness, nor that U.S. deviation from balancing (let alone a foreign state's failure to embrace that approach) amounts to a violation of international law.

296. See *infra* text accompanying notes 382-84 (discussing existence of, and preference for, such rules).

297. In the *Nicaragua* case, the International Court of Justice noted that for a rule to be established as customary, the corresponding practice [need not] be in absolutely rigorous conformity with the rule. . . . [It is] sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm

something else entirely.²⁹⁸ But one of the most basic problems concerns distinguishing between near custom and new custom,²⁹⁹ including how to treat what is often called "emerging" custom.³⁰⁰ We proceed on the premise that customary norms are legally distinctive; even if there is some basis for accommodating near custom,³⁰¹ its violation ought not have the same consequences as violations of actual custom. At the same time, a nascent custom ought in principle to be regarded as seriously as its older brethren.³⁰²

rather than to weaken the rule.

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 98, ¶ 186 (June 27).

298. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 19 (1994) (noting that "[o]ne of the special characteristics of international law is that violations of law can lead to the formation of new law"). For some, such as Professors D'Amato and Wolfke, only state acts violating custom are capable of changing it. BYERS, *supra* note 125, at 134 (reviewing position and its critics).

299. V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 185 (1997) ("[I]t is almost impossible to ascertain the precise moment at which a settled practice crystallizes into a new legal rule."); HENKIN, *supra* note 257, at 34 (noting, even of more "traditional" customary law, that "it is rarely clear when a norm mature[s]"); Maier, *supra* note 22, at 470 (commenting that "[i]t is exceedingly difficult to determine the precise moment in time when a rule of customary international law changes or initially emerges").

300. To add confusion, sometimes emerging custom is contrasted to less developed (or "emerged") norms, *see, e.g.*, North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 38, ¶ 62 (Feb. 20) ("[T]he principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law.") (emphasis added), but at other times the intention seems to be to stress that the norm has not yet arrived. *See id.* at 55 (separate opinion of Judge Zafrulla Kahn) (arguing that "the emerging customary law, now become more defined . . . crystallized in the adoption of the Continental Shelf Convention by the Conference") (emphasis added).

301. *E.g.*, Oscar Schachter, *Towards a Theory of International Obligation*, in THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 14 (1971) (arguing that notwithstanding "uncertainty as to the legal authority of emerging principles" in international economic matters, they "exhibit some measure of practical efficacy and give rise to widespread expectations as to their future application"); Kara H. Ching, Note, *Indigenous Self-Determination In An Age Of Genetic Patenting: Recognizing An Emerging Human Rights Norm*, 66 FORDHAM L. REV. 687, 719 (1997) ("Although not binding on states, evidence of emerging norms anticipates what may develop into positive law or become recognized as customary international law. Thus, such emerging norms may eventually be binding on states. If a norm is identified as emerging, or established, the norm should positively affect state behavior.").

302. *E.g.*, Fisheries Jurisdiction Case (U.K. & N. Ir. v. Ice.), 1974 I.C.J. 23-24 (July 25) (observing that "the Court, as a court of law, cannot render judgment *sub species legis ferendae*, or anticipate the law before the legislator has laid it down"); *see also* DANILENKO,

This problem is inherent to custom, and institutional considerations may be cited in favor of greater or lesser generosity in construing custom on the cusp.³⁰³ But the *Restatement (Third)* made relatively little attempt to explain how reasonableness evolved from discretionary "United States law" to "emerge[] as a principle of international law as well"³⁰⁴—except by citing widely disparate claims in the reporters' notes, none of which resembled the reasonableness approach in their particulars.³⁰⁵ The result, given the influence of the *Restatement (Third)* at home and abroad, is that a dubious assessment of emerging law became further evidence of its emergence, seemingly illustrating the dangers of treating marginal cases as custom.³⁰⁶

Such bootstrapping is made more troubling by the strong position the *Restatement (Third)* takes toward the enforcement of custom. According to the *Restatement*, custom should influence the interpretation of federal statutes, perhaps even at the expense of conflicting federal statutory law that antedates emerging custom—such as, for example, the Sherman Act.³⁰⁷ Applying these rules

supra note 237, at 22 & n.22 (citing additional examples). Thus, for example, in the leading case of *Filartiga*, in which the district court properly declined to enforce what it (mis)perceived to be an "emerging" principle of customary international law, the court of appeals properly enforced what it took instead to be an established norm. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880, 884 (2d Cir. 1980). *But see* Laura Dalton, Note, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of An Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161 (1990) (arguing that Supreme Court decisions upholding the death penalty for juveniles do not violate U.S. obligations under emerging international human rights law).

303. See *infra* text accompanying notes 344-70 (discussing institutional considerations relating to treatment of nascent custom under *Charming Betsy* canon).

304. RESTATEMENT (THIRD), *supra* note 17, § 403 cmt. a (distinguishing treatment of reasonableness as comity by U.S. courts).

305. *Id.* § 403 reporters' notes 1-9. In explaining the evolution from the prior *Restatement*, the reporters' notes allude to "developments in the practice of other states," *id.* § 403 reporters' note 10, but it is difficult to discern what were those developments.

306. This problem, which plagues the enterprise of customary international law, means that the "internalizing" function that Professor Koh and others attribute to courts and other domestic actors invariably involves "externalizing" as well. Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996); see also Harold H. Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 626-27 (1998) (describing interpretive function of courts).

307. RESTATEMENT (THIRD), *supra* note 17, § 403 cmt. g (describing principle that U.S. law should be interpreted to avoid both unreasonableness and conflict with international law); see also *id.* § 114 cmt. a ("[C]ourts are obliged to give effect to a federal statute even if it is inconsistent with a pre-existing rule of international law or with a provision of an

appears to involve the definitive rendering of customary international law that will afterward become enforceable as federal law in all U.S. courts.³⁰⁸ Such implications place a special premium on distinguishing near law and new law, an interpretive burden the *Restatement (Third)* fails to discharge.

A third, and final, misstep concerns a different form of universalism: the undifferentiated application to all agents of antitrust. Reasonableness purportedly states a decisive limitation that courts may apply to terminate any suit, by any party, seeking to enforce U.S. antitrust laws. This is not how it has worked in practice. Prior to *Timberlane*, as previously noted, no court had invalidated any attempt by the U.S. government to enforce antitrust law extraterritorially; as of the time the *Restatement (Third)* came into being, the only two cases in which a court had found an insufficient U.S. interest in extraterritorial regulation both involved private actions.³⁰⁹ One might conclude from this record, even prior to *Hartford Fire*, that reasonableness was not in fact a rule of international law,³¹⁰

international agreement of the United States.") (emphasis added); *id.* § 115 cmt. d ("It has also not been authoritatively determined whether a rule of customary international law that developed after, and is inconsistent with, an earlier statute or agreement of the United States should be given effect as the law of the United States."). Statutes are also supposed to be interpreted so as to avoid conflict with the laws of states that, according to the criteria of the reasonableness test, have a greater interest in the matter at hand, but it is not clear what this adds to the *Restatement's* view of what international law requires. *Id.* § 403 cmt. g.

308. *Id.* § 111(1) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States"); *id.* § 111 cmt. d ("As law of the United States, international law is also the law of every State, is a basis for the exercise of judicial authority by State courts, and is cognizable in cases in State courts, in the same way as other United States law.").

309. *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Assoc.*, 749 F.2d 1378 (9th Cir. 1984); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

310. Professor Trimble summarized the record as of 1986:

Since *Timberlane*, there have been at least nineteen cases involving the application of United States antitrust, securities, intellectual property, and commodity trading regulation extraterritorially. Only two cases applied a balancing test and found insufficient United States interests. Neither of those involved an attempt by the government (as opposed to a private party) to enforce a regulatory scheme, so even these cases did not involve a direct restraint of the political branches. Eleven cases rejected the balancing approach; the Second and D.C. Circuits seem squarely opposed to it. Three more cases accepted a balancing approach, but found the United States interest prevalent. Three cases were remanded or continued for development of the

and even more readily infer a particular reluctance by the judiciary to challenge the political branches.

Such reticence is hardly senseless. Although international law generally constrains national governments, and in the U.S. legal system may be interpreted and enforced by the courts, the ordinary difficulties in identifying and applying sometimes elusive customary norms, and of attempting to constrain coordinate institutions, are redoubled when courts seek to apply custom against the very institutions charged with its making.³¹¹ The advantages of judicial enforcement may seem particularly marginal in light of the federal government's active administration of comity in its relations with other antitrust authorities. Yet the *Restatement (Third)* standard,

record for purposes of carrying out the prescribed interest analysis. On the basis of this limited experience, I infer a different rule of customary international law—that states are free to regulate economic activity that has minimum contacts with its territory or nationals whenever its interests so dictate, subject only to limitation by treaty (as in the tax field). The court decisions do not support a more restrictive view.

Trimble, *supra* note 21, at 702-04.

311. Thus, Professor Henkin acknowledges that

the courts ought to follow the Executive at least when it has taken an international position on an issue of international law, not only for the obvious practical reasons, but because the practices and policies of executives, including our own, are major ingredients of customary international law, and Executive statements on international law make foreign policy and are legislative in some measure.

HENKIN, *supra* note 267, at 511 n.21; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432-33 (1964) ("When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns. In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided."); RESTATEMENT (THIRD), *supra* note 17, § 112 cmt. c.

To be sure, arguments for exempting executive branch activities from review for their conformity with international law are problematic, and often subject to qualification. *E.g.*, RESTATEMENT (THIRD), *supra* note 17, § 112 cmt. c ("Courts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters.") (emphasis added). One might wish, for example, to distinguish formal acts of the President, in furtherance of his constitutional foreign affairs powers, from less concerted violations of international obligations, and further distinguish violations by lesser agents like the Attorney General and the Federal Trade Commission. HENKIN, *supra* note 267, at 243-45; Jonathan I. Charney, *The Power of the Executive Branch of the United States to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 919-22 (1986); Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 936-37 (1986).

like those of *Timberlane* and *Mannington Mills* before it, drew no clear distinction between suits brought by the federal government and those brought by others,³¹² making the Justice Department's attempted self-exemption appear ad hoc.³¹³ Foreign governments, too, repeatedly objected to the pretense of American courts balancing interests confined to their own or, at best, inter-governmental assessment.³¹⁴ Invoking custom against national governments—hoisting them with their own petards—is a conundrum inherent to international law, but applying determinative standards against all parties, without regard to their differences, seems to invite objection unnecessarily.

Due to these errors, one of the *Restatement (Third)*'s most important insights was essentially squandered. The low threshold for engaging in reasonableness analysis (that a law "respect[ed] ... a person or activity having connections with another state"),³¹⁵ and the broad-ranging inquiry into every nearly conceivable interest, suggest—correctly, in my view—that extraterritoriality per se is of diminishing import in antitrust. The appropriate focus, instead, concerns the variety of circumstances in which states may have conflicting interests. But the ubiquity of the problem, as I have argued, may not direct an equally broad solution.

III. LOCALIZING INTERNATIONAL LAW: A METHODOLOGY

The universalist impulse undergirding the case for reasonableness picks up one thread in a long-standing division among international lawyers. Much like American constitutional law,³¹⁶

312. *Timberlane* cited the relatively unreflective nature of private actions as an additional basis for exercising judicial control, but suggested no difference in judicial evaluation. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 n.28 (9th Cir. 1976) (citing call for prohibition of such suits by statute); see also *RESTATEMENT (THIRD)*, *supra* note 17, § 403 cmt. e (opining that when two states may reasonably exercise jurisdiction, but their regulations conflict, the *Restatement*'s evaluation is "addressed primarily to the political departments of government, but it may be relevant also in judicial proceedings"). The comment references the accompanying reporters' notes, which appear to indicate a preference for the judicial balancing of state interests, aided where appropriate by executive branch submissions. *Id.* § 403 reporters' notes 6, 7.

313. See *supra* text accompanying note 271 (discussing criticisms of agencies' positions).

314. See *supra* text accompanying notes 274-75.

315. *RESTATEMENT (THIRD)*, *supra* note 17, § 403(1).

316. Compare, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment*

international law scholarship is divided between attempts at grand unifying theories and highly particularized, if not obscure, accounts of law in context.³¹⁷ Likewise, one finds a division between those supposing that customary international law gets made in one way and one way only, and those instead gravitating toward the view that every instance of custom is as unique as a snowflake.³¹⁸ Reasonableness clearly reflects more universalist impulses; in exploring whether that exhausts the possibilities for an international law of antitrust, I develop in this section an alternative, "local" methodology for custom. Such a theory stresses the importance of context in deciding the content of particular international law, and is well-illustrated by insights from antitrust extraterritoriality. At the same time, it is intended to be a generalizable theory of how custom may be perceived in other contexts as well, not a theory applicable for "this day and train only."³¹⁹

This warrants two cautions. First, the local theory is not mutually exclusive with more universalist approaches. If a broader custom is also apparent, nothing in the local theory suggests the meaner form has to be preferred; to the contrary, custom may come into being among all nations, without regard to domestic conditions or subject matter, just as in the classical description.

Problems, 47 IND. L.J. 1, 1 (1971) (arguing for "the necessity for theory" in constitutional law), with Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1110 & n.13 (2000) (rejecting, in principle, any and all attempts at grand constitutional theory).

317. In my view, it lapses toward the former. It is difficult to imagine, for example, many fields that would attempt something like the Hague Lectures, which typically enlist a highly esteemed scholar to explain much or all of international law. For very different estimations, see THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 5 (1995) (describing increased specialization of international scholars and practitioners as a function of maturity and attending complexity); Phillippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85, 88 (1998) ("The world of international law is invariably presented as one in which the various substantive subject matters areas exist in quasi-hermetical isolation . . . taught and treated as discrete areas, subject to their own norms and institutional structures. The separate subject matter areas are treated as a part of general international law, but often presented as organically disconnected from each other. The whole is made up of a collection of fragmentary parts, the implication being that the different parts only seldom, if ever, connect.") (footnote omitted).

318. HENKIN, *supra* note 257, at 30 (remarking that "every 'piece' of customary law is different, develops in different circumstances, at a different rate of growth").

319. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (voicing fear that shifting precedent will appear like a restricted railroad ticket, "good for this day and train only").

Instead, the local theory is intended to establish an alternative methodology that may prove useful for identifying actual or potential instances of custom.

Second, notwithstanding the above, the local theory is not designed to generate custom in order to meet some unfulfilled need, though such a demand-centered perspective is occasionally voiced.³²⁰ Thus, although Part IV contends that there is a budding principle of antitrust comity that deserves recognition, it would not be a failure of the local theory were it otherwise. Even in such circumstances, the local theory may usefully suggest that if custom cannot be established under such accommodating conditions, it may not exist at all.

A. Local Consent: The Possibility of Special Custom

Consent is the bugbear of custom. While some argue that individual state consent is a prerequisite for any customary obligation,³²¹ and others shrink from the merest mention,³²² many argue that some form of consent is necessary³²³—but that it may be supplied by acquiescence,³²⁴ subscription to the *system* of

320. *E.g.*, Kirgis, *supra* note 247, at 147-48 (noting, with approval, the tendency to recognize custom to respond to "need for stability" in cases involving armed force, as well as the need to fill "ominous silences" regarding fundamental human rights); *cf.* Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 111 (1995) ("As a growing number of international legal scholars are recognizing, there is a divergence between the traditional theory of customary law, which emphasizes consistent and uniform state practice, and the norms generally espoused as 'customary.'") (citing authorities).

321. This view found its most concrete expression in contentions by Soviet writers that new states were not bound by earlier custom. *E.g.*, HENKIN, *supra* note 257, at 30-31 & n.* (citing G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 133 (E.E. Butler trans., 1974)); *id.* at 35-36.

322. *E.g.*, Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 315 (1999) (identifying as "incorrect[]" the assertion "that state 'consent' is the basis of customary law"); *accord* International Law Ass'n, *supra* note 32, at 38-40.

323. KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 162 (2d rev. ed. 1993) (concluding that states may be bound "exclusively by their own sovereign will"); *cf.* BYERS, *supra* note 125, at 142 ("International lawyers have generally assumed that rules of international law do not bind States against their will.").

324. BYERS, *supra* note 125, at 142-43 ("Most international lawyers have relied on inferred consent, in the form of acquiescence, to explain the consensual basis" of obligations not expressly accepted); WOLFKE, *supra* note 323, at 97 (describing will relevant to custom as

customary international law,³²⁵ consent by representative nations,³²⁶ or perhaps by simply looking the other way.³²⁷

There is no disputing, at least, that consent is a desirable attribute, and it seems relatively well-satisfied when an identifiable group of states choose to recognize a custom as binding—that is, give express or implicit consent to be governed by a norm that may or may not be more generally applicable. The existence of such norms, variously described as “local,” “special” or “particular” custom, is now widely accepted, as is the notion that the common interests addressed by the custom need not be regional in nature.³²⁸

Special custom remains, however, a controversial method for analyzing international law.³²⁹ Among its virtues are the potential

“most often reduced to a mere tacit acquiescence in the practice”); Charney, *supra* note 24, at 536-38.

325. BYERS, *supra* note 125, at 143-44 (citing examples among commentators).

326. HENKIN, *supra* note 257, at 36 (describing customary law as “not a product of the will of states but a ‘systemic creation,’ reflecting the ‘consent’ of the international system, not the consent of individual states”); *id.* at 38 (“Consent of the system need not include the consent of all states but it must have the consent or acquiescence of many, varied states, ‘active’ states, influential states, those that may be deemed to represent the whole system on a particular issue.”).

327. Fidler, *supra* note 292, at 208.

328. Right of Passage over India (Port. v. India), 1960 I.C.J. 6 (Apr. 12) at 39 (“It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be greater than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.”); RESTATEMENT (THIRD), *supra* note 17, § 102 cmts. b, e; ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW ch. 8 (1971); WOLFKE, *supra* note 323, at 88-89.

329. As previously noted, the objection that special customary law is limited to regional matters attracts less support nowadays. BYERS, *supra* note 125, at 3 n.3. But whether nonregional special custom requires more rigorous attention to consent is a point of continuing dispute. According to one view, nonregional special custom requires explicit recognition by all the states concerned, whereas the relative homogeneity of regional interests permits custom to be enforced among all states absent persistent objection. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 56-57 (2d ed. 1997); see also H. W. A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 135-40 (1972) (evaluating whether new members of a given community are bound by preexisting local, nonregional custom, and noting that the apparent presumption against local custom means that any “State which invokes such a rule will have to prove that it exists and is opposable to the State against which it is invoked”). Others argue more generally that all of special custom requires a distinctive focus on consent. Compare RESTATEMENT (THIRD), *supra* note 17, § 102 cmt. e (indicating that special custom “may be seen as essentially the result of tacit agreement among the parties”), and D’AMATO, *supra* note 328, at 234 (concluding that, in contrast to general custom, “[s]pecial custom does indeed require stringent proof of consent or

for accommodating diverse interests and values,³³⁰ and tempering the antidemocratic tendency of custom to impose rules on nations, subnational governments, and citizens that are offered little genuine opportunity for participation.³³¹ Deliberately opting to form rules by special custom may, on the other hand, be regarded as detracting from any parallel efforts at establishing general rules.³³² As a forensic matter, in any event, there are sound reasons for routinely examining whether special custom addresses a particular international problem. Obviously, a special custom may exist even in the absence of a more general custom, perhaps warranting its examination in the alternative. But special custom may also function as the proverbial canary in the coal mine: if no subset of the world community has recognized a particular norm, its existence in any wider setting may legitimately be called into question. Such an analytic technique, if sound, may at least make custom more falsifiable, a not unwelcome attribute in light of its famous uncertainty.

There are evident advantages, certainly, to exploring the possibility of special custom relating to extraterritorial antitrust. The one-size-fits-all approaches of *Hartford Fire* and the *Restatement (Third)*—the former taking the view that only “true” conflicts merit moderation, and the latter subjecting conflicts of every type to the same reasonableness analysis—derived from the self-imposed challenge of addressing wildly different contexts for

recognition of a practice on the part of the defendant state”), with WOLFKE, *supra* note 323, at 90 (finding consensual requirement for all custom, including general custom, with stronger evidence tending to be required for particular customary rules). Most, I think, would agree that courts are inclined to demand clearer evidence of consent with respect to special custom, and nonregional special custom at a minimum requires greater attention to establishing a relevant community. *E.g.*, THIRLWAY, *supra*, at 139-40. *But see* O.A. ELIAS & C.L. LIM, *THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW* 128-30 (1998) (contesting any distinctions, including relating to burdens of proof, between general and special custom).

330. VILLIGER, *supra* note 329, at 56.

331. *See supra* text accompanying notes 290-91. *But see supra* text accompanying notes 292-93.

332. *See* VILLIGER, *supra* note 329, at 56-57 (“Ultimately, however, special rules will exclude general customary law, since the more States adhere to the special rule, the less will the general rule attract the requisite widespread practice.”); *cf.* D’AMATO, *supra* note 328, at 236 (criticizing oral advocacy in South West Africa litigation against apartheid on ground that it undermined force of argument for broad norm). Assuming a general rule is established, of course, states are not ordinarily at liberty to opt out by tailoring a special custom for themselves. DANILENKO, *supra* note 237, at 110-13.

conflict.³³³ Given that charge, one may forgive *Hartford Fire* for isolating only the most pointed type of conflict, thus avoiding the prospect of creating an “unregulated middle” in which no state could exercise jurisdiction,³³⁴ while equally appreciating the *Restatement (Third)* for refusing categorically to disregard any potential conflicts, and so avoiding the dismal prospect that the most stringent regulations would routinely prevail.³³⁵

Special custom avoids the need for such extremes by focusing on relatively homogenous countries, practices, and problems.³³⁶ Among nations with established antitrust authorities, for example, there may be serious disagreements as to the legality of particular conduct, but less so than among countries with fundamentally different commitments toward free competition. Similarly, there is less likelihood of fundamental jurisdictional disputes among countries that recognize the effects doctrine or its equivalent. Such an examination may reveal principles for determining the best means of proceeding against conduct that would be illegal under one or more regimes, as well as appropriate remedies. Determining whether such principles amount to enforceable custom, however, raises an entirely separate set of considerations.

B. Local Law: Accommodating New, and Emerging, Custom

In dualist systems like that of the United States, identifying customary international law, and explaining why it is binding on

333. See *supra* text accompanying notes 279-85 (describing different types of conflict subjected to reasonableness).

334. Robinson, *supra* note 268, at 1153 (objecting to draft *Restatement (Third)* on ground that expanded breadth of conflicts imposed the risk that individuals might “create an ‘unregulated middle’ in which no state could exercise jurisdiction”).

335. Such a result is particularly perverse in cases where the majority of interested plaintiffs and defendants are foreign. Guzman, *supra* note 10, at 1533 (describing a variation on the facts of *Hartford Fire* in which the defendants and plaintiffs are almost uniformly British).

336. Even antitrust, of course, can be disaggregated. Eleanor M. Fox, *National Law, Global Markets, and Hartford: Eyes Wide Shut*, 68 ANTITRUST L.J. 73, 81-82 (2000) (suggesting distinction among offshore cartels aimed at the regulating nation, offshore targeted boycotts, internal market conduct with spillover effects, and mergers in world markets with production assets in supportive home states); *id.* at 84-85 (suggesting prospect for international consensus on choice-of-law for cases of naked, targeted restraints, cases of internal market restraints, and cases of world markets and world effects).

the sovereign, is only half the battle. An equivalent challenge lies in unpacking its domestic consequences. For some, customary law is an independent source of federal law, effective in all courts.³³⁷ For others, custom is only part of federal law where it has been authorized by the federal political branches.³³⁸ The range of dispute includes, naturally enough, whether Congress or the executive branch may properly be deemed to have violated custom, and whether such transgressions are matters more for the judgment of other nations than for the domestic political process. The consensus is especially unclear as to whether subsequently developed custom overrides, by virtue of a "later-in-time" principle, a pre-existing statute.³³⁹

337. Among the statements customarily cited for this proposition are the declaration in *The Paquete Habana* that "[i]nternational law is part of our law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), and the statement in *The Nereide* that U.S. courts are "bound by the law of nations which is a part of the law of the land," *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815). See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (concluding that, for jurisdictional purposes, "the law of nations . . . has always been part of the federal common law"); *Republic of Argentina v. City of New York*, 250 N.E.2d 698, 700 (N.Y. 1969) ("It is settled that, where there is neither a treaty, statute nor controlling judicial precedent, all domestic courts must give effect to customary international law."); RESTATEMENT (THIRD), *supra* note 17, § 111(1) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."); *id.* at § 111 cmt. d ("As law of the United States, international law is also the law of every State, is a basis for the exercise of judicial authority by State courts, and is cognizable in cases in State courts, in the same way as other United States law."). See generally Koh, *supra* note 21 (defending position that international law is federal law); Neuman, *supra* note 21 (responding to critiques of federal handling of customary international law); Paust, *supra* note 322.

338. Professors Bradley and Goldsmith have consistently argued for this view. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849-70 (1997); Bradley & Goldsmith, *Federal Courts*, *supra* note 21, at 2260; Bradley & Goldsmith, *The Current Illegitimacy*, *supra* note 21, at 319.

339. Thus, most case law and commentary indicate that later-in-time statutes would prevail over prior inconsistent custom, but hedge as to whether the converse is true. See *supra* note 307 (discussing *Restatement (Third)* sections 114, 115); Bradley, *The Charming Betsy Canon*, *supra* note 34, at 497-98 (observing that "it is well settled that, when confronted with a clear conflict between a federal statute and an earlier treaty or customary international law, U.S. courts are to apply the statute") (emphasis added); *id.* at 498 n.98 (describing "unanimous[]" view of lower courts, and Supreme Court dicta, to the effect that "Congress can violate customary international law"); Stefan A. Riesenfeld, *The Powers of Congress and the President in International Relations: Revisited*, 87 CAL. L. REV. 817, 824 (1999) ("[C]ustomary international law, even if self-executing, will not be enforced for the benefit of individuals if it conflicts with a Congressional statute, at least so long as the rule of customary international law is not a newly emerging one.") (citations omitted). See generally Paust, *Customary International Law*, *supra* note 322, at 319-20 (describing split in authorities, but claiming tentative trend supporting the proposition that customary law

Such squabbles have no direct bearing on the underlying international obligation—even if U.S. law does not permit its courts to enforce international law, the United States is still responsible for any violations³⁴⁰—but surely have internal and external repercussions. A compromise position, as it happens, is that U.S. law may at least *indirectly* reflect customary international law. The presumption against extraterritoriality, for example, is designed to construe statutes so as to minimize conflicts between U.S. and foreign or international law.³⁴¹ To the extent that the presumption actually depends on international law, however, it is regrettably static; increased acceptance of extraterritorial legislation, whether generally or in the relevant field, surely undermines its premises.³⁴² The presumption against extraterritoriality is also quite crude. Even if it were overcome long ago in the antitrust context,³⁴³ that says very little about whether and how jurisdiction ought be moderated.

The *Charming Betsy* presumption against construing statutes to violate international law is a more nuanced and discerning tool.³⁴⁴ The canon's broadbased support stems at least in part from its wide

prevails over inconsistent state statutes); Garland A. Kelley, Note, *Does Customary International Law Supersede a Federal Statute?*, 37 COLUM. J. TRANSNAT'L L. 507, 512-14 (1999) (describing "theoretical adjustments" made to accommodate claim for permitting later-in-time custom to prevail, but concluding that the position is unsound).

340. Thus, evaluating Judge Wilkey's concerns in *Laker Airways*, Professor Meessen observed:

International law mainly prescribes obligations binding upon sovereign states. It always leaves undecided which branch of government should ensure compliance with those obligations. An international law rule requiring some balancing of interests could therefore be assumed to exist independently of whether, within the domestic legal system, it would have to be applied by the judiciary and/or the executive branch.

Meessen, *supra* note 51, at 801; see also *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 950 (D.C. Cir. 1984) (setting forth Judge Wilkey's concerns).

341. *E.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-59 (1991).

342. See *supra* text accompanying notes 60-66.

343. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d. Cir. 1945)).

344. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). This canon is "wholly independent" of the presumption against extraterritoriality. *Arabian Am. Oil Co.*, 499 U.S. at 264 (Marshall, J., dissenting).

variety of rationales.³⁴⁵ Courts and commentators often endorse it as an unalloyed principle of legislative intent, on the assumption that Congress would not ordinarily elect to violate international law.³⁴⁶ Others defend the canon as a means of reconciling domestic law with international legal values;³⁴⁷ although it does not permit enforcement of international law in the event of pitched conflict with a federal statute, it avoids a "pathological" focus on those relatively rare occasions,³⁴⁸ in keeping with an internationally reputable technique.³⁴⁹ Professor Bradley has recently defended it more in separation of powers terms, based on the constitutional assignment of foreign affairs to the political branches and their functional advantages in conducting foreign relations.³⁵⁰ As he explains, applying the *Charming Betsy* canon allows the courts to sound out the political branches as to whether and how they wish to violate international law, reduces judicial interpretations mistakenly placing the United States in conflict with customary international law, and reduces inadvertent interference by Congress with the president's diplomatic prerogatives.³⁵¹

345. But see Jonathan Turley, *Dualistic Values in the Age of International Jurisprudence*, 44 HASTINGS L.J. 185 (1993) (arguing for rejection of the *Charming Betsy* canon, in favor of a more expansive judicial role).

346. Bradley, *The Charming Betsy Canon*, *supra* note 34, at 495-97 (describing theory); e.g., RESTATEMENT (THIRD), *supra* note 17, § 115 cmt. a (stating that "[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law").

347. Professor Bradley describes this as an "internationalist conception." Bradley, *The Charming Betsy Canon*, *supra* note 34, at 497-504 (describing, and rejecting, this conception); e.g., *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428, 438 (1989); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

348. Steinhardt, *supra* note 347, at 1109-10.

349. E.g., Brief for the Government of Canada as Amicus Curiae in Support of Certain Petitioners, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (Nos. 91-1111, 91-1128) (citing similar practices in Canada and the United Kingdom).

350. Bradley, *The Charming Betsy Canon*, *supra* note 34, at 524-29.

351. *Id.*; cf. Steinhardt, *supra* note 347, at 1129-34 (describing possibility of an incomplete, "dualist" rationale based on separation of powers concerns). As Bradley notes, the result resembles the Supreme Court's reasoning in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-34 (1964), which affirmed the act-of-state doctrine based on concerns about judicial competence and authority. Bradley, *The Charming Betsy Canon*, *supra* note 34, at 528-29.

Nothing in the *Charming Betsy* canon speaks, however, to the standard that domestic courts should apply in reckoning the customary law that bears on statutory questions,³⁵² and here the consensus begins to unravel. An internationalist approach would take a relatively expansive view of the forms of custom that might contribute to statutory analysis, arguing that even "soft" law, or other indicia of custom valued in the "international community as a whole," ought play a role.³⁵³ In Professor Bradley's view, on the other hand, the separation of powers warrant for the canon can only be maintained if courts play a more modest role, deferring to the political branches as to the content of international law and requiring "clear evidence of the international law principles alleged to be violated," especially in nontraditional areas of custom.³⁵⁴

Custom's innate subjectivity surely raises serious questions regarding the judiciary's role. The problem is only worsened by the difficulty of ensuring internal consistency: because U.S. judicial precedent construing custom may easily be overtaken by evolving international behaviors, recurring questions of custom may legitimately generate divergent answers in successive cases.³⁵⁵ This is not to deny the possibility of a common discourse for evaluating custom.³⁵⁶ But the looseness with which custom is examined in

352. Steinhardt, *supra* note 347, at 1164.

353. *Id.* at 1180-82.

354. Bradley, *The Charming Betsy Canon*, *supra* note 34, at 533.

355. The problem is not unlike, for example, the difficulty federal courts may have in reckoning state common law in diversity cases. In the instant context, however, federal courts construing international custom have no equivalent to state supreme courts to which they might turn.

356. In addressing the issue of *opinio juris*, Sir Humphrey Waldcock noted that [i]t may . . . be conceded that the formation of custom is often a gradual process, so that it is difficult to say exactly when it becomes a matter of legal right and obligation; and it may further be conceded that there is a large element of appreciation in making that determination. Nevertheless, the appreciation must ultimately be based upon some legal criterion and Article 38 is quite explicit that the test is whether or not there is a general practice *accepted as law*.

Humphrey Waldcock, *General Course on Public International Law*, in 106 RECUEIL DES COURS 5, 47 (1962). Such a discourse might, conceivably, generate determinative answers as to the content of international law used for interpretive purposes. *E.g.*, Steinhardt, *supra* note 347, at 1143, 1146-52 (arguing that it is ironic to construe statutes in light of comity, since it would be a poor candidate for status as customary law even under undemanding standards).

Charming Betsy and like cases,³⁵⁷ and the underlying theoretical difficulties, raise the question of whether "clear" evidence adequately constrains the courts, or whether we even can develop a collective sense of what would constitute clear evidence.

The best solution, I would argue, lies within the *Charming Betsy* opinion itself. The Court's failure there to engage in a close reading of the custom at issue is less of a lapse than part of a practice of compounded avoidance—avoiding, that is, not only statutory constructions that would violate international law, but also constructions that might be regarded as violating international law (or, for that matter, lesser principles),³⁵⁸ and by the same token avoiding definitive constructions of international law that might place a statute or other political act in jeopardy were they maintained. Such an approach certainly helps prevent unnecessary international controversies of the kind the canon generally seeks to avoid. More tentative readings of custom also maximize the freedom of the political branches to persist in contrary readings of international law, or to evolve toward divergent views in the future. The

357. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (asserting that duty to avoid constructions "violat[ing] the law of nations if any other possible construction remains" entails the duty to avoid constructions that would "violate neutral rights, or . . . affect neutral commerce, further than is warranted by the law of nations as understood in this country," without construing law of nations); e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991) (noting that extraterritorial reading of title VII would raise "difficult issues of international law"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959) (stating that "in the absence of a contrary congressional direction," courts should apply "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," so heeding "the interacting interests of the United States and of foreign countries"). For criticism, see Steinhardt, *supra* note 347, at 1135-38; *id.* 1138-39 (discussing *Charming Betsy*); *id.* at 1168-71 (discussing *American Baptist Churches v. Meese*); *id.* at 1171-73 & n.297 (discussing appellate decision in *Argentine Republic v. Amerasia Shipping Corp.*).

358. Numerous cases thought to depend at least in part on the *Charming Betsy* canon advert less to concrete legal matters than to international controversies stemming from foreign effects and perceived legal conflicts. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, for example, the Court alluded to a "well-established rule of international law," that "the law of the flag state ordinarily governs the internal affairs of a ship," without explaining whether the application of U.S. labor laws would present a true conflict. *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21 (1963). The greater weight was given to "[t]he possibility of international discord," or retaliation, and the "highly charged international circumstances" in a manner disassociated with the presence of any actual violation. *Id.* at 21.

Charming Betsy canon, in this regard, is like the principle of construing statutes to avoid deciding "serious" constitutional questions,³⁵⁹ in that courts should construe statutes to avoid "potential violations of international law."³⁶⁰

According this broader swathe to custom may serve the separation of powers in some respects, but it clearly poses offsetting risks. One is that courts will underenforce federal mandates.³⁶¹ In addition, heeding less determinate international law—even within the limitations imposed by statutory text—may verge on a political enterprise.³⁶² In the instant context, indeed, it may appear to let the reasonableness standard in through the back door.

Those concerns are largely contained, I believe, by a second element of *Charming Betsy*: its attention to "the law of nations *as understood in this country*."³⁶³ Local courts are probably inevitably biased toward the local understanding of international law,³⁶⁴ and every rationale that might be mustered for the *Charming Betsy* canon suggests that they ought to be. If the canon is at least partly an estimate of congressional intent,³⁶⁵ that clearly places a premium

359. *E.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (citing *McCulloch*, 372 U.S. at 21, and *Charming Betsy*, 6 U.S. at 118). *But see* Steinhardt, *supra* note 347, at 1131 (describing this application of *Charming Betsy* as "seriously flawed").

360. *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (emphasis added). In *Sabbatino*, the Court took on a time-honored doctrine of obscure footing, and did relatively little to lend clarity—as evidenced by the continuing debate over whether the Court was really applying customary international law, *see, e.g.*, Bradley & Goldsmith, *Customary International Law*, *supra* note 338, at 828-30, 859-60; Koh, *supra* note 21, at 1833, or at least cleared the way for its incorporation into federal common law, RESTATEMENT (THIRD), *supra* note 17, § 111 reporters' note 3 ("Based on the implications of *Sabbatino*, the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts."); Neuman, *supra* note 21, at 375-76.

361. Bradley, *The Charming Betsy Canon*, *supra* note 34, at 532.

362. *Cf. Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("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."); *see also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2386-87 (1991).

363. *Charming Betsy*, 6 U.S. at 118 (emphasis added).

364. Born, *supra* note 252, at 82 & n.399 (observing that cases applying the *Charming Betsy* canon have particularly stressed the ALI's *Restatements of Foreign Relations Law and Conflicts of Law*, as well as case law from common law countries).

365. While it is hard to defend the canon entirely on an interpretive conceit, given the difficulties in generalizing about congressional intent and in assuming that Congress always

on determining what the political branches understand to be international law. A separation of powers approach also suggests that courts should be attentive to occasions when the political branches have deliberately flouted international norms, and equally sensitive to the possibility that they may have done so inadvertently.³⁶⁶ Finally, though an internationalist approach favors rigorous judicial supervision,³⁶⁷ it would be difficult to maintain adequate respect for the primacy of custom's inter-governmental character were judicial decisions—themselves evidence of custom—allowed to proceed heedlessly.

This preference for local understanding does not require a parochial focus on the positions staked by those branches themselves, which we should assume are also capable of appreciating the views of their sovereign counterparts.³⁶⁸ Nor does it require subscribing to the view that custom is federal law only by virtue of independent, political-branch lawmaking.³⁶⁹ But where

avoids conflict, see Bradley, *The Charming Betsy Canon*, *supra* note 34, at 518-23, it is equally hard to disregard that objective altogether, see *id.* at 533 (concluding that the *Charming Betsy* canon's legislative intent warrant, though not strong, "probably still carries some force").

366. Bradley, *The Charming Betsy Canon*, *supra* note 34, at 525-26, 533.

367. *E.g.*, FRANCK, *supra* note 317.

368. Though arguing along somewhat similar lines, Gary Born seems to equate "U.S. understandings of international law" with "the treatment of international law in the United States," laying particular emphasis on the readings of international law by U.S. courts. Born, *supra* note 252, at 82. For reasons previously discussed, such authorities are not the most convincing evidence of international law; given frequent criticism in official U.S. commentary, they may not even be terribly probative of the political branches' understanding of the law.

369. Professor Bradley, for example, argues that it is inconsistent to suppose that both the federal courts and the president have been delegated the authority to construe custom, and in fact finds no authority for either exercise; the conflict, he concludes, "recogniz[es] that customary international law is not inherently part of United States federal law, whether common law or otherwise," and only achieves that status "if brought in by the political branches." Bradley, *Chevron Deference*, *supra* note 34, at 708-09. Treating custom as federal law may indeed be problematic. See *supra* text accompanying notes 337-39 (discussing controversy). But the president's authority to contribute to custom's interpretation need not invariably be located in a separate, mutually exclusive statutory or constitutional grant. Bradley, *Chevron Deference*, *supra* note 34, at 708-09. Instead, it derives from the national government's inherent function in contributing to custom's formation. Compare *id.* at 707 ("Customary international law is not made by an act of the President, or the President and the Senate acting together; it is made instead by the overall beliefs and practices of the world community."), with *id.* at 688 ("The executive branch is considered this nation's principal representative with respect to international law matters, and courts generally give

primary sources suggest that the inquiry is a close one, any clear position staked out by the local sovereign should be favored in construing local political enactments.³⁷⁰ This approach also bears on the treatment of emerging custom. As noted previously, it is inappropriate for a court to regard a yet-emerging custom as equivalent to one that has fully bloomed; at the same time, the line between the two is often hard to draw, and gainsaying a position taken by the political branches on the question may unduly interfere. The best approach, on balance, is to permit legitimate, if not necessarily wholly mature, assertions of customary international law to influence the judicial construction of domestic law, without requiring that courts take a position on the existence or relevance of that norm at the precise moment of decision.

Perhaps unsurprisingly, this approach is well suited to antitrust. The Sherman Act is notorious for conferring interpretive freedom on the courts and federal agencies,³⁷¹ including the authority to reconcile its reach with international law. In enacting the Foreign Trade Antitrust Improvements Act of 1982³⁷² and the International

substantial weight to the executive branch interpretations of international law.”).

370. Born suggests that those considerations “at a minimum” ought to counsel in favor of U.S. political constructions whenever “there are differences” between U.S. and foreign government positions. Born, *supra* note 252, at 82-83; see also HENKIN, *supra* note 257, at 511 n.21 (arguing that courts “ought to follow” executive branch positions on international law questions). That duty of consistency surely should be limited, however, where the political branches are so at odds with foreign sentiment as to be outliers, without having secured the right to object to custom’s formation; otherwise, the judiciary would in effect be sanctioning lawbreaking, and suggesting a course of conduct more likely to encourage than discourage clashes with foreign sovereigns.

371. *E.g.*, *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) (describing the Sherman Act as a “charter of freedom,” with “a generality and adaptability comparable to that found . . . in constitutional provisions”); see also AREEDA & HOVENKAMP, *supra* note 50, ¶ 103, at 63 (explaining that “the Sherman Act effectively vested the federal courts with a power to make competition policy analogous to that of common law courts”); *id.* ¶ 103 at 62-63 (observing that “judges sometimes talk as if Congress has already decided the question before them but [t]his is usually a misconception”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544-47, 551-52 (1983) (contrasting broad enactments such as the Sherman Act that invite courts to fashion common law with more precise enactments whose gaps should not be filled).

372. 15 U.S.C. §§ 1, 6a, 45(a)(3) (2000). The House Report explained that the bill was: [I]ntended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts’ ability to employ notions of comity, or otherwise to take account of the international character of the transaction.

Antitrust Enforcement Assistance Act of 1994,³⁷³ Congress appears to have deliberately avoided addressing the propriety of *Timberlane* and kindred jurisdictional tests. In taking advantage of this latitude, courts applying the *Charming Betsy* canon have properly refrained from resolving the scope of the custom bearing on the question.³⁷⁴ The result allows arguably "soft" principles like comity the opportunity to emerge as international law.³⁷⁵ If such

H.R. REP. NO. 97-686, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 (citation omitted). Commentators vary in assessing the relevant legislative history. *Compare, e.g.,* Dam, *supra* note 130, at 301 (construing the House Report as having "apparently endorsed" comity), *with* O.N.E. Shipping Ltd. v. Flota Mercante Grancolumbia-NA, S.A., 830 F.2d 449, 457 (2d Cir. 1987) (Cardamone, J., dissenting) (concluding, based on legislative history of FTAIA, that Congress left to the courts "how to employ notions of international comity in extraterritorial antitrust cases"), *and* Kramer, *supra* note 50, at 756 (noting that the legislative history indicates that "Congress deliberately left the problem of extraterritorial limits to the courts"). *See also* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 615 (2d ed. 1992) (noting congressional consideration of bill that would have explicitly included comity in Clayton Act).

373. 15 U.S.C. §§ 6201-6212 (2000); H.R. REP. NO. 103-772, at 8 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3647, 3648 (noting changing judicial interpretation of the "plain language of the Sherman Act" from *American Banana* to *Timberlane* to *Hartford Fire*, and noting that "[t]he affirmative commitment of our economic partners to develop a comprehensive and binding competition policy would do much to free the courts of having to play the periodic role of arbiter on questions very often involving international political concerns as much as the substantive interpretation of the Sherman Act"); *id.* at 10, *reprinted in* 1994 U.S.C.C.A.N. 3647, 3651 (noting that "there have also been a number of more recent cases in which courts have addressed the subject of when comity considerations may counsel against the exercise of jurisdiction").

374. *E.g.,* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting) (invoking the *Charming Betsy* canon); *id.* at 817 (citing other invocations in Sherman Act context); *id.* at 818 ("[W]hether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests."); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9-13 (1st Cir. 1997) (Lynch, J., concurring) (citing *Charming Betsy* canon, and applying principles of the *Restatement (Third)* thought to be "derived from international law"); *O.N.E. Shipping Ltd.*, 830 F.2d at 452 (concluding that Congress "left it to the courts to decide when to employ notions of abstention from exercising jurisdiction in extraterritorial antitrust cases"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (cautioning that "we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws'").

375. I OPPENHEIM'S INTERNATIONAL LAW 51 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("[M]any a rule which formerly was a rule of international comity only is nowadays a rule of international law. . . . It is probable that many a present rule of international comity will in future become one of international law."); *see also* *The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925) (concluding that, though customary international law "bends to the will of

principles are more than merely colorable, and can be reconciled with federal antitrust laws, unnecessary conflict with domestic political enactments perhaps may be avoided.

C. Local Actors: Differentiating Authority

Respect for the separation of powers may seem superficial when the judiciary posits customary norms that purportedly bind the political branches. An international law of antitrust, for example, might constrain not only the initial exercise of prosecutorial discretion by the U.S. government, but also the ability of the federal courts to assist in any party's enforcement of the Sherman Act. In the face of such custom, half-measures are awkward. Deferring to the executive stewardship of foreign relations, for example, would simply leave U.S. law inconsistent with our international obligations.³⁷⁶

Even the reasonableness norm, however, suggests that U.S. courts need not always play such an intrusive role in order to vindicate international law. Arguments in support of reasonableness generally supposed that the norm should be applied equally to public and private enforcement of the laws. But the United States and a number of other nations consistently indicated that they did not regard sovereign enforcement as open to judicial review; absent their support, in fact, it is quite difficult to find sources of international law that would support reasonableness or any kindred constraint. Under the circumstances, domestic norms favoring judicial review may be misplaced.³⁷⁷ Judicial review is not, after all,

the Congress . . . unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it").

376. Unless, of course, the international law is later-in-time, and is deemed to override the domestic law. See *supra* text accompanying note 339.

377. *E.g.*, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, Int'l, 493 U.S. 400, 409 (1990) (stating that "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them"); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986) (stating that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance'" (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1969))); *The Paquette Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

the only (or even the principal) means of ensuring compliance with international law,³⁷⁸ and its absence is scarcely tantamount to denying a norm's status as law.³⁷⁹

This illustrates a more general methodological point: the terms of customary international law must be carefully scrutinized with an eye toward the parties a norm is supposed to constrain, as well as the means by which it is to be enforced against them. As previously mentioned, international law ordinarily binds the nation as a whole, without respect to horizontal or vertical division of powers within the municipal system. But it would be perfectly intelligible—for example, were custom to constrain national governments without constraining private parties or subnational governments—to constrain all three while limiting the power of judicial review, or compose different constraints on different parties. The mere fact that subnational governments or private

378. *Head Money Cases*, 112 U.S. 580, 598 (1884) (noting that, while a treaty may provide for individual redress, it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress."); HENKIN, *supra* note 257, at 62 (explaining that compliance may be self-induced or encouraged through horizontal negotiation on a bilateral or multilateral plane, third-party intervention, or even self-help); *id.* at 50 (describing horizontal enforcement by the victim state, often threatened retaliation, as "[t]he principal inducement[s] to compliance with international law"); cf. Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 15 (1988) (observing that "[i]n international law, as well as in these frequently non-justiciable stretches of constitutional terrain, embarrassment is the principal, and sometimes the only, sanction that the law can impose. It often is the central means of maintaining the integrity of the legal system, of preserving the rule of law."). But cf. *Chorzów Factory* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26) ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.").

Somehow, in any event, such informal means manage to ensure that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis omitted); Robert O. Keohane, *When Does International Law Come Home?*, 35 HOUS. L. REV. 699 (1998); see also INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss ed., 1997) (discussing observance of international law even in cases of soft law).

379. Cf. H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 139-65 (1933) (arguing that denominating issues as political rather than legal, and withdrawing them from international consideration, still permits "the possibilit[y] of judicial settlement").

parties are inherently unable to conform to internationally binding principles, accordingly, may suggest that a national government is compelled to take prophylactic action to limit their exercise of authority, or connote that customary international law is simply inapplicable to them, depending upon the context.

The nature of the legal duty may be highly instructive on these questions. Proponents of the reasonableness norm, as we have seen, generally regard it as an enforceable jurisdictional limitation, to be evaluated *de novo* in judicial proceedings. But it might also be conceived of as a procedural principle, an "instruction to decision-makers to undertake the process of analysis and assessment,"³⁸⁰ while maintaining the principal's sovereignty over the principle's application. Whether or not this is the only sort of custom that ought be recognized,³⁸¹ there is a good argument for indulging constructions of this kind, particularly where—as in *comity's* case—they are designed to perfect, rather than supplant, political relations. Such norms plainly demand different treatment than those susceptible to independent, ahistorical evaluation by courts. To take an infamous example, the Vienna Convention on Consular Relations—which largely codifies customary international law—requires notifying the relevant consular post when a foreign national is detained, but does not purport to license judicial review of whether subsequent diplomatic communications are given due consideration, let alone demand the independent evaluation of whether and how foreign interests ought be heeded.³⁸²

Custom may, indeed, vest discretion in individual states to implement an objective in the fashion best suited to their municipal orders, including as to the kind of parties it constrains. As the original Draft Articles on State Responsibility indicated, inter-

380. SCHACHTER, *supra* note 240, at 259; *see also* Meessen, *supra* note 252, at 62.

381. Professor Kelly, arguing generally against custom as a source of international legal obligation, appears to look more favorably on what he characterizes as "structural norms"—apparently including diplomatic immunity—that are "primarily permissive and uncontroversial." Kelly, *supra* note 21, at 479-81.

382. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 596 U.N.T.S. 261 (imposing duty to notify consular post of national's detention, and to notify national of attending rights). The Convention does not, it should be stressed, impose a different obligation on U.S. state authorities, though enforcing it against the states has proven difficult. *Breard v. Greene*, 523 U.S. 371, 377-78 (1998). *See generally* Jonathan I. Charney et al., *Agora: Breard*, 92 AM. J. INT'L L. 666 (1998).

national obligations may oblige a state to follow a certain course of conduct, but equally may give the state latitude to achieve an obligatory end.³⁸³ In an international order premised on national sovereignty,³⁸⁴ it seems appropriate to presume that such discretion exists absent evidence to the contrary. Such a presumption is particularly appropriate where the principle in question is abstract in nature, such as reasonableness,³⁸⁵ and still more so when it is objective-oriented, as with rules designed to minimize conflict over the exercise of national jurisdiction.

By affecting the appraisal of otherwise ambiguous cases, such presumptions may be perceived as undermining the national commitment to judicial enforcement of custom, or as betraying our obligation to conform U.S. law to international norms irrespective of municipal eccentricities. But such concerns put the cart before

383. International L. Comm'n, Draft Articles on State Responsibility, arts. 20, 21 (first reading, 1996) [hereinafter Draft Articles on State Responsibility (First Reading)] (distinguishing between obligations of particular conduct and obligations to achieve, "by means of its own choice," a specified result), available at <http://www.un.org/law/ilc/reports/1996/chap03.htm#doc38>; see also 2 Y.B. Int'l L. Comm'n. pt. 2, at 11-30 (1977), U.N. Doc A/CN.4/SER.A/1977/Add.1 (78.V.2) (commentaries to articles 20 and 21, adopted by the Commission at its 29th session). Both articles were deleted in the draft second reading, in part to avoid confusion created by contrary terminology in French law. James Crawford & Pierre Bodeau, *Second Reading of the ILC Draft Articles on State Responsibility: Further Progress*, 2 INT'L L.F. 45 (2000); *Report of the International Law Commission on the Work of its Fifty-First Session*, International L. Comm'n, 51st Sess., no. 10, ¶¶ 132-186, U.N. Doc. A/54/10 (1999), available at <http://www.un.org/law/ilc/reports/1999/english/99repfra.htm>. But much the same basic distinction exists in the revised article 12's reference to the varying "character" of international obligations. Crawford & Bodeau, *supra*; State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Intentionally Wrongful Acts Adopted by the Drafting Committee on Second Reading, art. 12, Int'l L. Comm'n, 53d Sess., no. 10, at 4, U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter Draft Articles on State Responsibility (Second Reading)], available at <http://www.un.org/law/ilc/sessions/53/english/602rev1e.pdf>. A similar distinction is present in the law of remedies. *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984) (noting responsibility of individual nations to develop remedies appropriate to violation of international law against torture); *id.* at 863-64 (considering Paraguayan law and interests under U.S. choice-of-law principles to determine remedy).

384. But see STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (arguing that claims for sovereignty, particularly those relating to the right to exclude external authority, are routinely exaggerated).

385. See, for example, the separate opinion of Judge Alvarez in *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18), in which he concluded that states may individually determine the extent of their territorial seas, and the means of measuring them, so long as their approaches satisfied general criteria—including reasonableness, as reckoned by geographic and economic considerations.

the horse—presupposing that norms are articulated, adopted, and sustained without regard to complications in their eventual enforcement.³⁸⁶ It may, in any event, be possible to develop alternative strategies for ensuring compliance with international norms. One such possibility, as we will see, is presented by the U.S. federal system and the divided responsibility for enforcing antitrust.

IV. THE CASE FOR ANTITRUST COMITY

It seems fairly clear, for reasons already detailed, that the reasonableness principle comports neither with the conventional approach to custom nor with that of local international law. State practice does not specify the factors elaborated (inconsistently) by the theory's various proponents, nor suggest that they are regarded as legally binding in the antitrust context or otherwise. As presently articulated, moreover, the reasonableness norm is applied as a decisive limit on all attempts to invoke antitrust jurisdiction, albeit with little practical effect. The question remains, however, whether any *other* legal principles might be divined. I suggest below that a local law of antitrust may exist, founded on many of the same premises as regulatory comity, but without certain of its signal limitations. After examining whether the uncertain status of antitrust comity is compatible with U.S. law, I argue that the norm may be most significant as a basis for re-examining the authority of private and state attorneys general.

A. *Antitrust Comity as Special Custom*

Comity, writ large, is considered by many to be something less than law.³⁸⁷ Not everyone agrees, of course. Some commentators,³⁸⁸

386. Cf. Bradley, *Chevron Deference*, *supra* note 34, at 650-53 (describing reservations to "*Marbury* perspective").

387. See *supra* text accompanying notes 244-49, 428-29.

388. I INTERNATIONAL LAW: COLLECTED PAPERS OF HERSCH LAUTERPACHT 43-46 (E. Lauterpacht ed., 1970) (cautioning that excluding issues described as involving comity would marginalize matters "clearly governed by international law"); F.A. MANN, FOREIGN AFFAIRS IN ENGLISH COURTS 134, 137 (1986) (arguing that "in most cases the meaning of comity is coextensive whith [sic] public international law"); I OPPENHEIM'S INTERNATIONAL LAW, *supra* note 375, at 50-51 (noting that comity is sometimes used—especially by English and American courts—to describe matters that would otherwise be termed questions of

and countries,³⁸⁹ contend that comity has become binding in principle. Others dismiss comity because they regard it as a misleadingly "soft" term for genuine limits, or regard jurisdiction as limited by more stringent principles, such as a stricter sense of territoriality.³⁹⁰ Although these divergent reactions might illustrate comity's unprincipled character,³⁹¹ they might equally support recognizing some principle such as the least-restrictive common ground.

It is more productive, though, to consider comity's potential in the particular context of antitrust. The principles of traditional and positive comity are derived largely from a series of antitrust-specific cooperation recommendations developed within the OECD.³⁹² Since 1967, members conducting antitrust investigations have been exhorted to notify other members with important interests at

international law); *id.* at 139-40 (criticizing attempt in *Laker Airways* to describe comity as obligatory limit on antitrust jurisdiction, rather than differentiating between comity and international law limits); *id.* at 22 n.38 (asserting that "[t]he language of the 19th century was in many ways different from that of the present day. Those writers who developed the idea of comity were not merely thinking of the State's duty to be courteous. They were thinking in terms of an obligation, of what today one would designate as public international law."); *see also* Mann, *supra* note 241, at 31 (assenting to the view that foreign law is applied on the basis of comity only if, "[a]s so often, comity may in truth mean public international law"); *id.* at 87 ("In truth 'comity' is only another word for international law.").

389. See, for example, the position attributed to Australia and Greece that "comity is a policy base from which rules or principles of international law have developed." OECD, MINIMIZING CONFLICTING REQUIREMENTS, *supra* note 249, at 9.

390. In 1987, for example, Canada, Switzerland, and the United Kingdom reportedly took the view that "moderation and restraint" was "an approach based on principles or rules of international law with respect to jurisdiction, that require each state to respect the sovereignty of every other state," albeit with a different understanding of the law and its implications. *Id.* The Swiss "specifically reject[ed] comity as the basis for moderation and restraint because of its non-compulsory nature," arguing instead that moderation and restraint derived from principles of sovereignty. *Id.* at 9-10. Belgium, likewise, considered comity as "devoid of any legal consequence," *id.* at 9, but expected that internal sovereignty would be secured by universal recognition of territoriality, *id.* at 38 n.12.

391. *E.g.*, Paul, *supra* note 22, at 3-4 (1991) ("Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or 'considerations of high international politics concerned with maintaining amicable and workable relationships between nations.'") (footnotes omitted).

392. The OECD recommendations themselves appear to have been inspired by U.S.-Canadian Antitrust Notification and Consultation Procedure. D.H.W. Henry, *The United States Antitrust Laws: A Canadian Viewpoint*, 1970 CAN. Y.B. INT'L L. 249, 269-71.

stake, and to consider their views.³⁹³ Amendments made clear that members learning of investigations potentially touching on their important interests should provide such input—rather than, perhaps, retaliating after the fact—and that overlapping investigations should be coordinated and information shared. The recommendations made clear that foreign input was *not* binding, and acknowledged that circumstances might prevent even advance notice, but provided that any important interests voiced were to be considered as grounds for exercising constraint.³⁹⁴ Positive comity, introduced in 1973, provided that members substantially harmed by restrictive practices within another member's territory should request consultation, to which the other member was to give "full consideration," where convinced, the requested member was supposed to act "on a voluntary basis and considering its legitimate interests."³⁹⁵

These recommendations inspired bilateral antitrust agreements among members,³⁹⁶ and probably contributed to the flowering of similar, if similarly limited, principles under the WTO and NAFTA.³⁹⁷ In light of the absence of any more conspicuous inter-

393. 1967 Cooperation Recommendation, *supra* note 68 (recommending that a member nation pursuing an investigation or proceeding involving another member's "important interests" should (where possible and appropriate) notify that nation in advance, and "while retaining full freedom of ultimate decision" take account of its views and of any remedial action it might feasibly take to address the challenged practice). As a later OECD report explained, the 1967 Cooperation Recommendation provided for notice, but not a right of consultation, which was dropped for unexplained reasons during the drafting process—along with a positive comity provision that was added and then deleted. OECD REPORT ON POSITIVE COMITY, *supra* note 66, at 8-9 (describing evolution of provisions). The recommendations also contained a conciliation procedure, *see* 1967 Cooperation Recommendation, *supra* note 68, but it seems never to have been applied. *See* ICPAC FINAL REPORT, *supra* note 1, at 228.

394. 1995 Cooperation Recommendation, *supra* note 48 (suggesting that members coordinate overlapping proceedings, share information permissible and consistent with the disclosing nation's legitimate interests, notify other members upon learning of investigations or proceedings touching potentially legitimate interests, and give "full and sympathetic" consideration to such views); *accord* 1979 Cooperation Recommendation, *supra* note 68.

395. *Recommendation of the Council Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade*, OECD Doc. C (73)99/final (1973) [hereinafter 1973 Consultation and Conciliation Recommendation], reprinted in 19 ANTITRUST BULL. 283 (1974), revised by 1979 Cooperation Recommendation, *supra* note 68, revised by 1995 Cooperation Recommendation, *supra* note 68.

396. *E.g.*, Parisi, *supra* note 81, at 134 (noting that OECD recommendations inspired U.S. agreements with Germany, Australia, Canada, and the European Community).

397. *See supra* text accompanying notes 147-49.

national antitrust law, it is worth considering whether the OECD recommendations have somehow contributed to the development of any legal restrictions, and what those restrictions might be. It is occasionally hinted that OECD recommendations and like measures *must* contribute, somehow, to international law³⁹⁸—that they are more than the disconnected aspirations of their members³⁹⁹—and it is worth being precise as to why that might be.

Their format, surely, is not propitious. Assuming ostensibly nonbinding measures can ever have legal effect,⁴⁰⁰ recommen-

398. E.g., Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, 22 GER. Y.B. INT'L. 11, 39 (1979) (arguing that while OECD recommendations do not constitute "instant international law," they can be "transformed into customary international law through state practice" as "declarations of general principles of international public policy which the declarant states are legally obliged to respect"); R.R. Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L.Q. 549, 556 (1980) (explaining that the 1967 OECD Recommendations, and like instruments, "have more of the character of agreed procedures of international public administration than of law, yet they do belong to the domain of law in a qualified sense that makes it impossible to bring them within any of the existing categories of international law"); Ingrid Delupis, *The Legal Value of Recommendations of International Organisations*, in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 47, 52 (W.E. Butler ed., 1987) (noting that while recommendations are not themselves binding, they may "have important legal consequences"); Gunther F. Handl et. al., *A Hard Look at Soft Law, Panel at 82nd Annual Meeting of the American Society of International Law* (Apr. 22, 1988) [hereinafter *A Hard Look at Soft Law*], in 1988 PROC. AM. SOC'Y INT'L L. 371, 388 (1990) (remarks of Pierre Marie Dupoy, stating that "[n]ot one of these standards, it seems, should suffice, if not respected, to create an illicit act in the case when it has been ignored. But this deficiency can play as a presumption of illicitity, the gathering of a certain amount of which shall consolidate the demonstration of the reality of an illicit act."); Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations"*, 72 S. CAL. L. REV. 1601, 1645 (1999) (arguing that WTO tribunals "should give due consideration to emerging international norms in the area of competition policy," such as the consensus for limiting certain harmful exclusive dealing policies, since "[w]hile this emerging consensus does not in itself create an international legal obligation, it can nevertheless give rise to a presumption of unreasonableness sufficient to justify good faith negotiations"); *id.* at 1645 n.228 ("WTO tribunals might give similar weight to decisions and recommendations issued by the OECD.").

399. Cf. THIRLWAY, *supra* note 329, at 65 ("It cannot be denied that when a resolution is formally adopted in so universal an organization as the United Nations, the resolution is something more than the consistent statements or wishes of the member States; that, in a sense, the whole is more than the sum of its parts.").

400. The literature on this question is voluminous. For balanced discussions, see INGRID DETTER, *THE INTERNATIONAL LEGAL ORDER* 212-51 (1994); HIGGINS, *supra* note 298, at 22-28; THIRLWAY, *supra* note 329, at 61-79; *A Hard Look at Soft Law*, *supra* note 398 (panel discussion by Gunther Handl, W. Michael Reisman, Bruno Simma, Pierre Marie Dupuy, and Christine Chinkin). Compare, e.g., G.M. DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 20-22 (1993) (noting need for distinction between "soft law" and binding

dations are particularly unpromising. A recommendation itself does not show any state practice,⁴⁰¹ unless we count the members' supporting votes⁴⁰² or the text itself.⁴⁰³ Likewise, while resolutions and the like might evidence *opinio juris*,⁴⁰⁴ the whole idea of a recommendation is inconsistent with any present sense of legal

international norms), and V.D. DEGAN, *SOURCES OF INTERNATIONAL LAW* 238-40 (1997) (disputing conceptual clarity of "soft law," but contending that as conventionally understood, such rules are not legally binding), and Norbert Horn, *Normative Problems of a New International Economic Order*, 16 J. WORLD TRADE L. 338, 347-51 (1982) (criticizing "soft law" for failing to distinguish between underlying ethical and political principles and authoritative lawmaking), and Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983), with Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986) (describing the diplomatic practice of creating informal agreements), and Baxter, *supra* note 398 (describing soft law as part of legal continuum).

401. *E.g.*, WOLFKE, *supra* note 323, at 84 (explaining that nonbinding General Assembly resolutions, "that is, non-binding recommendations, being merely verbal postulates, proposals, declarations of principles, etc., do not constitute acts of conduct described in their content, nor, even multiplied, any conclusive evidence of any practice"). But cf. G.I. Tunkin, *The Role of Resolutions of International Organisations in Creating Norms of International Law*, in *INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM*, *supra* note 398, at 5, 12 (reporting consensus among participants in Institute of International Law study that resolutions may evidence practice).

402. *E.g.*, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (citing acceptance of U.N. resolutions concerning use of force as establishing customary international law); RESTATEMENT (THIRD), *supra* note 17, § 102 reporters' note 2 (considering degree of support probative for purposes of determining value of U.N. and other resolutions as sources of international law); MALCOLM N. SHAW, *INTERNATIONAL LAW* 91 (1986) ("Where the vast majority of states consistently vote for resolutions and declarations on a topic, that amounts to state practice and a binding rule may well emerge."); cf. RESTATEMENT (THIRD), *supra* note 17, § 103 reporters' note 2 (noting reservations, under certain circumstances, to relying on degree of support for resolutions in determining weight as evidence of international law). For some of the many criticisms, see, *e.g.*, WOLFKE, *supra* note 323, at 83-85; Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987); cf. Susan H. Bragdon, *National Sovereignty and Global Environmental Responsibility: Can the Tension Be Reconciled for the Conservation of Biological Diversity?*, 33 HARV. INT'L L.J. 381, 386 (1992) ("[A]lthough these resolutions adopting declarations, recommendations, or principles are evidence of customary international law, they are not themselves a form of international legislation."); C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 858 (1989) (claiming that precedential value of the *Nicaragua* case for international economic law is limited).

403. Some commentators, like Professors Wolfke and D'Amato, espouse the view that actions alone may count as state practice, a point of view that has proven quite controversial—particularly for those concerned with how custom might be changed. See BYERS, *supra* note 125, at 134-36 (describing controversy). One need not go so far, however, to regard recommendations as relatively low-value speech.

404. *E.g.*, *id.* at 135; THIRLWAY, *supra* note 329, at 66.

obligation.⁴⁰⁵ OECD recommendations, in particular, appear designed to lack binding force.⁴⁰⁶ As if that were not enough, the cooperation recommendations themselves stress that implementation does not compromise "the legal positions of Member countries with regard to such questions of sovereignty, and in particular the extra-territorial application of laws concerning restrictive business practices, as may arise."⁴⁰⁷ Maybe members could independently invest the recommendations with legal significance,⁴⁰⁸ but instead they seem to have eschewed any

405. DETTER, *supra* note 400, at 250-51; Delupis, *supra* note 398, at 52. But see HIGGINS, *supra* note 298, at 25 (noting that in some international organizations, "even the term 'recommendation' in its context sometimes signals more than one would expect from a literal reliance on that word"). Formally, too, there is the problem that the recommendations emerge directly from the organizations, rather than their members. WOLFKE, *supra* note 323, at 84. Custom, in any case, normally progresses from mere practice to something regarded as legally binding, whereas a recommendation more plausibly sets the stage for subsequent practice that must itself, separately, communicate legal obligation. See Tunkin, *supra* note 401, at 13-15. There is a line of thought, accordingly, that recommendations may, if preceded by practice, "contribute to the presumption of acceptance as law of such a practice, that is, to a customary rule of international law." WOLFKE, *supra* note 323, at 84.

406. Compare Convention on the Organisation for Economic Cooperation and Development, Dec. 14, 1960, art. 5(a) (empowering OECD to "take decisions which, except as otherwise provided, shall be binding on all the Members"), available at <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-589-17-no-6-5610-589,00.htm>, with *id.* art. 5(b) (empowering OECD to "make recommendations to Members"). Commentary almost universally supports the inference that recommendations lack the binding quality of decisions. *E.g.*, UNCTAD, *supra* note 79, at 13-14.

407. 1967 Cooperation Recommendation, *supra* note 68 (Preamble); 1973 Consultation and Conciliation Recommendation, *supra* note 395 (Preamble); 1979 Cooperation Recommendation, *supra* note 68; 1995 Cooperation Recommendation, *supra* note 68; see also Recommendation of the Council Concerning Action against Restrictive Business Practices Affecting International Trade Including those Involving Multinational Enterprises, C(78)133 (final), July 20, 1978 [hereinafter 1978 Restrictive Business Practices Recommendation], available at <http://www1.oecd.org/daf/clp/Recommendations/REC3com.htm>. Perhaps this was intended to avoid the waiver of legal arguments against nonmember, third-party countries, but the import seems broader. *E.g.*, Kurt E. Markert, *Recent Developments in International Antitrust Cooperation*, 13 ANTITRUST BULL. 355, 363 (1968) (arguing that recommendations make clear that members "retain entirely their freedom to decide generally or in particular cases whether or not to apply any of the recommended measures," making it "a purely academic question whether, and if so to what extent, recommendations by the Council of OECD have binding effects on member states").

408. DETTER, *supra* note 400, at 251 (claiming that "in specific cases, recommendations provide useful, provisional norms which, by the consent, and the convenience of States, can later be adopted ... by way of clear, parallel unilateral undertakings"); *id.* at 250 ("Recommendations may thus serve as support for future action or they act as a *cadre de reference* for such action. Thus, recommendations must be seen in their context as they are

suggestion that the recommendations are obligatory in and of themselves.⁴⁰⁹

It may be argued, nonetheless, that the recommendations have influenced other international instruments, resulting in a conscious parallelism that evidences custom.⁴¹⁰ Some such instruments, like those of the OECD⁴¹¹ or UNCTAD,⁴¹² are also

proteiforme.") (citations omitted); WOLFKE, *supra* note 323, at 85 (explaining that where national practices implementing a resolution as law rise to the level of custom, "the resolutions do not participate directly in the custom-formation as its elements, but do so often indirectly, as ready drafts of desirable rules, incentives for practice or other factors mobilizing world opinion").

409. EC officials, typically the quickest to embrace international antitrust obligations, have cited the recommendations as insufficiently binding. Faull, *supra* note 2; Alexander Schaub, *International Co-Operation In Antitrust Matters: Making The Point In The Wake Of The Boeing/MDD Proceedings*, 4 EC COMPETITION POL'Y, no. 1 (Feb. 1998). U.S. officials, likewise, have avoided any suggestion that the recommendations imposed a legal obligation. *E.g.*, Klein, *A Reality Check*, *supra* note 157; Submission From the United States to the Working Group on the Interaction between Trade and Competition Policy, *supra* note 101.

410. *Cf.* South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 292 (Jul. 18) (Tanaka, J., dissenting) (describing how resolutions and like instruments may, if repeated, contribute to a "collective, cumulative and organic process of custom-generation" in a "middle way between legislation by convention and the traditional process of custom making").

411. The principles of the cooperation recommendations are reflected in the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, *supra* note 37 (relating "principles of comity" to hard-core cartels, and encouraging further agreements consistent with those principles); Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies, C(86)65(final) (1986), ¶ I.A.b.8 (recommending that members, pursuant to the 1979 Recommendations, coordinate under "existing national laws" respecting "any investigation into possible anti-competitive effects of arrangements located in their countries, recognising the jurisdictional difficulties that sometimes arise when information is sought from abroad or where the parties to a restrictive agreement are located abroad"), available at <http://www1.oecd.org/daf/clp/Recommendations/REC6com.htm>; *id.* ¶ I.B.b.13 (providing that "[m]ember countries should respond as positively as possible" to requests for consultations, "without prejudice to each government's full freedom of action"); 1978 Restrictive Business Practices Recommendation, *supra* note 407, ¶ 2 (urging members "to develop, consistent with established rules of international law and taking international comity into account, appropriate national rules to facilitate investigation and discovery by their respective competition authorities of relevant information within the control of an enterprise under investigation, where such information is located outside their respective national territories and when its provision is not contrary to the law or established policies of the country where the information is located"); *id.* ¶ 3 (urging disclosure of information to other authorities); *id.* ¶ 4 (urging "facilitat[ion], through conclusion of or adherence to bilateral or multilateral agreements or understandings, mutual administrative or judicial aid in the field of restrictive business practices"); *id.* ¶ 5 (urging, consistent with vigorous antitrust enforcement, use of OECD procedures on cooperation). As previously noted, the significance of the 1984 annex on conflicting requirements for antitrust is somewhat obscure.

facially nonbinding, and offer little potential for legal evolution; binding multilateral instruments like the TRIPs agreement and NAFTA, on the other hand, are relatively limited in scope.⁴¹³ But the recommendations' role in inspiring binding bilateral agreements is more concrete. Such agreements might be regarded as an independent source of custom,⁴¹⁴ or supply the practice, and indicate a sense of legal obligation, that invest the OECD recommendations themselves with custom's requisites.⁴¹⁵

Such an account is robust precisely because of how it differs from typical analyses of custom. The OECD recommendations, properly understood, act as a template for custom: rather than letting a thousand flowers bloom,⁴¹⁶ the recommendations carefully describe practices that, where implemented, convert matters of courtesy into obligation. The OECD recommendations and their implementation also surmount the typical inability to explain how and why custom arises,⁴¹⁷ since the entire initiative can only be understood as an antidote to clashes over extraterritoriality. Merely issuing the recommendations was not supposed to resolve the controversy, as their preambles consistently cautioned, but *implementing* the recommendations surely was. Negative comity provided a principled basis by which countries otherwise inclined to assert extra-territorial jurisdiction might moderate its exercise in response to requests from affected nations. Investigative assistance and positive comity, in turn, afforded such countries a regulatory alternative to

See *supra* note 290.

412. UNCTAD, Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/ CONF/10 (1980), revised by U.N. Doc. TD/RBP/CONF/10/Rev.1 (1981), available at <http://www.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm>.

413. See *supra* text accompanying notes 148-49.

414. RESTATEMENT (THIRD), *supra* note 17, § 102 cmt. i ("A wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law."). See generally Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986); Stephen C. McCaffrey, *The Restatement's Treatment of Sources and Evidence of International Law*, in COMMENTARIES ON THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 1 (1992).

415. See *supra* text accompanying note 120.

416. See Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 23, at 1116 (depicting custom, by conventional accounts, as norms "said to arise spontaneously from the decentralized practices of nations").

417. *Id.* at 1119.

exercising unilateral extraterritoriality, by offering the assistance of foreign countries.⁴¹⁸ Complying with the recommendations provided, in this view, a safe harbor for moderated extraterritoriality.⁴¹⁹

The evolving text of the recommendations suggests a growing appreciation for this function. As previously noted, the 1967 Cooperation Recommendation purposefully left unresolved "such questions of sovereignty, and in particular the extra-territorial application of laws concerning restrictive business practices, as may arise," a caveat reiterated in other recommendations. The sovereignty issue, the original recommendation made clear, concerned the "unilateral application of national legislation" to foreign business operations; the unresolved question, in other words, being the legality of unilateral extraterritoriality, rather than extraterritoriality pursued in a cooperative context.⁴²⁰

Subsequent recommendations further articulated the international expectations associated with accommodating extraterri-

418. OECD REPORT ON POSITIVE COMITY, *supra* note 66, ¶ 67 (citing Commission's description of the 1998 agreement as one by which the parties agree "to co-operate with respect to antitrust enforcement rather than seeking to apply their antitrust laws extraterritorially"); *id.* (citing Assistant Attorney General Klein's assertion that "positive comity 'respects the sovereignty principle of participating countries since it recognises that the country whose market is most directly affected has the principal responsibility for enforcement'"); ICPAC FINAL REPORT, *supra* note 1, at 235 (quoting James Rill, then-Assistant Attorney General, as claiming that the positive comity provisions in the 1991 agreement would "be an important step toward minimizing disputes over the extraterritorial application of the antitrust laws"); Charles F. Rule, Introductory Note, *European Communities-United States: Agreement on the Application of Their Competition Law*, 30 I.L.M. 1487, 1488 (1991) (claiming that "rather than seeking primarily to protect the sovereign interests of one jurisdiction against encroachments by the antitrust authorities of the other, the agreement between the United States and the [European] Commission is more clearly designed to facilitate cooperative, and in some cases coordinated, enforcement by antitrust authorities").

419. Cf. Ignaz Seidl-Hohenveldern, *Hierarchy of Norms Applicable to International Investments*, in *INTERNATIONAL LAW AND ITS SOURCES* (Wybo P. Heere ed., 1989) (claiming that nonbinding OECD guidelines, though not binding law, "do produce some legal effects all the same": "[a] country having voted in favor of the adoption of such rules could no longer maintain that behavior in conformity with these rules would be contrary to international law"); David W. Johnston, Comment, *Cuba's Quarantine of AIDS Victims: A Violation of Human Rights?*, 15 B.C. INT'L & COMP. L. REV. 189, 195 (1992) ("To the extent that a single resolution has any bearing on international law, it is that it gives a state the right to act in ways consistent with that resolution. Actions states take in accordance with such resolutions, therefore, cannot be legally challenged.").

420. See 1967 Cooperation Recommendation, *supra* note 68.

toriality. The 1978 Restrictive Business Practices Recommendation urged adopting "appropriate national rules" to pursue extra-territorial investigation and discovery, consistent not only with national laws and established policies, but also "with established rules of international law and taking international comity into account."⁴²¹ As amended in 1995, the Revised Cooperation Recommendation "recognis[ed]" for the first time "*the need for Member Countries to give effect to the principles of international law and comity* and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices."⁴²² The change in tenor also recognizes, indirectly, the role played by the recommendations themselves in establishing that custom.

Leading members of the OECD confirmed the legalization of antitrust comity, albeit with occasional expressions of uncertainty as to its universality. The European Union, unsurprisingly, has been in the vanguard.⁴²³ In 1991, Sir Leon Brittan (then Vice President of the European Communities) acknowledged the difficulty of identifying a discrete principle of comity and determining whether it had "yet hardened into a rule of international law,"⁴²⁴ but concluded that "in any case, the Commission does consider itself obliged to have regard to comity when exercising its jurisdiction in competition cases with a foreign element"⁴²⁵—based on respect for the OECD recommendation and attendant relationships. Six years later, the Commissioner responsible for competition policy agreed that "we believe [comity] to be an established part of international law and know [it] to be part of the EU/US Agreement of 1991," thus constituting "a rule which governs our international relations," even while noting the contrary estimation by the D.C. Circuit in *Laker Airways*.⁴²⁶

421. 1978 Restrictive Business Practices Recommendation, *supra* note 407, ¶ 1.2.

422. 1995 Cooperation Recommendation, *supra* note 48, Preamble (emphasis added).

423. Griffin, *supra* note 271, at 167.

424. BRITTAN, *supra* note 274, at 16. The quoted passage referred in particular to non-interference, but Sir Brittan subsequently noted the resemblance to comity, which he described as "more a principle than a rule." *Id.*

425. *Id.*

426. Karel Van Miert, *International Cooperation in the Field of Competition: A View from the EC*, 1997 ANN. PROC. FORDHAM CORP. L. INST. CONF.: INT'L ANTITRUST L. & POL'Y 13, 20 (Barry E. Hawk ed., 1998); see also Jonathan Faull, *Antitrust and Trade Policy—Round Table*, 25th Annual Fordham Corporate Law Institute Conference (Oct. 22-23, 1998), at

It is the U.S. political branches, rather than the courts, that have been the most equivocal about any universal principle of comity. Official discourse has variously suggested that comity has an obligatory character,⁴²⁷ lies between law and pure discretion,⁴²⁸ or even that it arises from the absence of law.⁴²⁹ But respect has been somewhat more even in the antitrust context, and comity's evolutionary potential has never been contested.⁴³⁰ U.S. officials sometimes indicated adherence to comity principles in an undifferentiated fashion,⁴³¹ even stating baldly that comity, at least

http://europa.eu.int/comm/competition/speeches/text/sp1998_048_en.html ("The Commission complies scrupulously with the rule of negative or traditional comity. The European Community has concluded a special positive comity agreement with the USA, believing it to be an essential instrument in a world of economic interdependence and a robust alternative to extraterritorial extravagance."); Georgios Kiriazis, *Positive Comity in EU/US Cooperation in Competition Matters*, EC COMPETITION POL'Y NEWSLETTER, Oct. 1998, at 11 ("More than an 'aspiration' or a 'matter of grace,' comity is a rule increasingly applied to bilateral competition relations.") (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997)), available at <http://europa.eu.int/comm/competition/publications/cpn>; Stephen Ryan, *Positive Comity*, EC COMPETITION POL'Y NEWSLETTER, Oct. 2000, at 33 ("The notion of comity, whereby one jurisdiction may take into account the interests of another jurisdiction in the application of its laws, is well-established in international law. In pursuit of this principle, a jurisdiction may elect to exercise restraint or moderation in its law enforcement activity, out of deference to the important interests, and sometimes conflicting laws, of another jurisdiction."), available at <http://europa.eu.int/comm/competition/publications/cpn>.

427. See, e.g., Small, *supra* note 52, at 292 (indicating that attempts to exercise extraterritorial jurisdiction should "avoid interference with the territorial sovereign in certain predominantly domestic situations, such as local labor regulation," seemingly as an exceptional "binding legal constraint[]"); *id.* at 292-93.

428. *Id.* at 291 ("As defined by long-standing precedent, [comity] is between pure discretion and hard law, a guide to practice from which legal rules may arise.") (citation omitted).

429. *Id.* at 301 ("Comity is the conceptual tool for managing potential conflict in the area where law does not provide an exclusive jurisdiction.")

430. *Id.* at 292 (describing comity as "a guide to practice from which legal rules may arise").

431. Lee Marks, *State Department Perspectives on Antitrust Enforcement Abroad*, 12 J. INT'L L. & ECON. 153, 154 (1978) ("The State Department emphasizes to foreign governments that comity is a two-way street. The U.S. must take their interests into account in making enforcement decisions and expects foreign governments to reciprocate."); Letter from James R. Atwood, Deputy Legal Advisor of the U.S. Department of State, to Michael Gadbow, Assistant General Counsel, Office of the Special Trade Representative (Nov. 19, 1979), in 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 821 [hereinafter 1979 DIGEST] (explaining that "the principle of comity should be given due weight in cases involving extraterritorial enforcement" of antitrust law); U.S. Associate Attorney General Egan, Address Before the International Bar Association (Nov. 3, 1977), *quoted in* Warren

as reflected in the *Restatement (Second)*, "is the law of the United States" and "in keeping with the requirements of international law."⁴³² The federal agencies also occasionally declined to proceed

Pengilly, *Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View from "Down Under,"* 16 VAND. J. TRANSNAT'L L. 833, 872 (1983) (stating that "an unyielding and unresponsive antitrust policy, heedless of considerations of comity, could seriously disrupt United States foreign policy"); Davis R. Robinson, U.S. Economic Regulation: Conflicts of Jurisdiction, Address at Columbia University's Parker School of Foreign and Comparative Law (June 30, 1982), in 2 CUMULATIVE DIGEST, *supra* note 269, at 1316, 1321 (citing reliance of the State Department on *Timberlane*-type principles in internal legal analyses, consultations with other agencies and with Congress, and litigation).

432. Davis R. Robinson, Address Before the Association of the New York City Bar Association (Feb. 14, 1984), in 2 CUMULATIVE DIGEST, *supra* note 269, at 1329-30; *see also* *Energy Antimonopoly Act of 1979: Hearings on S. 1246 Before the Comm. on the Judiciary*, 96th Cong. 712-16 (1979), reprinted in *Transnational Corporations, Foreign Investment, and Tax Law*, 1979 DIGEST, *supra* note 431, at 1405, 1406-07 (testimony of James R. Atwood, Acting Legal Advisor of the U.S. Department of State) (explaining that where U.S. and foreign interests in regulating conduct are both significant, "international law establishes standards for reconciling conflicts of jurisdiction and directs that each state should consider moderating the exercise of its jurisdiction [in light of relevant factors] The international legal obligation is not necessarily to give precedence or deference to another state's interests, but rather to consider those interests in good faith and, where appropriate in light of all circumstances, to temper the exercise of enforcement jurisdiction."); S. REP. NO. 96-444, at 69-73 (1979), reprinted in 1979 Digest, *supra* note 431, at 1401, 1404 (explaining that proposed legislation limiting acquisitions by major petroleum-producing companies would minimize impact on foreign acquisitions, and unnecessary conflicts with foreign nations, through "[e]xpress regard for international law and comity . . . [s]ince both the agency enforcing this Act, the Department of Justice, and the courts adjudicating it will consider and honor the law of nations and the principles of comity"); *accord* Letter from J. Brian Atwood, Assistant Secretary of State for Congressional Relations, to Senator Edward M. Kennedy (Sept. 27, 1979), in 1979 DIGEST, *supra* note 431, at 1410, 1412; Griffin B. Bell, Address Before the American Bar Association (Aug. 8, 1977), in 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 500-01 (representation by then-Attorney General that "[w]here conflicts arise between sovereigns, the sovereigns have an obligation to resolve the conflicts with restraint, cooperation, and good will. That is the essence of comity [it] is more than a legal principle."); John H. Shenefield, Address to the International Law Section, American Bar Association (Aug. 9, 1978), in 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1346, 1348 (observation by then-Assistant Attorney General for Antitrust that while "international law normally does not" contravene the exercise of U.S. effects jurisdiction, "considerations of comity may require U.S. forbearance in particular antitrust matters," and endorsing the "jurisdictional rule of reason" approach taken in *Timberlane*).

criminally on comity grounds.⁴³³

Other treatments, however, began less promisingly. The 1977 International Guidelines remarked that comity and other defenses were often claimed "much more broadly" than appropriate in light of the government's responsibility for enhancing U.S. competitiveness and anticipated *Hartford Fire* in regarding comity and proper enforcement policy to be nearly coterminous with effects jurisdiction.⁴³⁴ The 1988 Guidelines seconded this vision of effects jurisdiction, and further anticipated *Hartford Fire* in describing the limits to that jurisdiction in a fashion resembling the "true conflicts" approach.⁴³⁵

Rather than celebrating *Hartford Fire*'s confirmation of this approach, as might be predicted by a unilateral interests analysis,⁴³⁶ the 1995 Guidelines instead indicated a broader understanding of comity's obligatory character. The new guidelines directly stated that "[t]he Agencies also take full account of comity factors beyond whether there is a conflict with foreign law," including a more nuanced appraisal of the parties' latitude under foreign law.⁴³⁷ Most important, the guidelines recognized something

433. WALLER, *supra* note 45, §§ 6.14-6.15 (citing failure to seek indictments against foreign uranium producers in 1978 and in *Laker Airways* controversy in 1984).

434. 1977 International Guidelines, *supra* note 48, at E-1 to E-3 ("[C]onsiderations of jurisdiction, enforcement policy, and comity often, but not always, lead to the same conclusion: the U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations."). The Guidelines' illustrations indicated that comity "may" direct resolving an "unresolvable and direct conflict between the laws of two countries impos[ing] substantial hardship upon the affected parties" in favor of the nation with the greater interest, but appeared to regard U.S. antitrust policy, particularly instantiated by a *per se* violation, as trumping any possible counterweight. *Id.* at E-15 (case K); *id.* at E-16 n.99 (case L, cross-referencing case K). Those illustrations were relied upon by the New Mexico Supreme Court in rejecting an act-of-state defense against a private state-law antitrust suit. *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 265 n.50 (N.M. 1980) (finding cases to "have a direct bearing on the allegations").

435. 1988 International Guidelines, *supra* note 48, § 5 n.170.

436. Guzman, *supra* note 10, at 1533 (concluding that whatever its global welfare effects, "[f]rom the point of view of the United States, *Hartford Fire* is welfare enhancing," and thus "the United States would not want a negotiated agreement to govern this case").

437. 1995 International Guidelines, *supra* note 48, § 3.2 ("In deciding whether or not to challenge an alleged antitrust violation, the Agencies would, as part of a comity analysis, consider whether one country encourages a certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies."). Explaining the

that both the *Restatement (Third)* and *Hartford Fire* had missed: the notion of *antitrust comity*. To the laundry list of reasonableness considerations, the agencies added the effect of U.S. enforcement efforts on foreign enforcement (and the relative efficacy of such foreign efforts), and attributed their inclusion to the U.S.-E.C. cooperation agreement.⁴³⁸ The guidelines particularly identified foreign antitrust enforcement as a reason the agencies might stay their hands,⁴³⁹ and further indicated an amenability to exploring positive comity.⁴⁴⁰

The resulting principle of antitrust comity was very elementary. Nations exercising antitrust authority over foreign parties or relating to activities taking place in foreign nations are to consider moderating the exercise of their authority in order to accommodate that nation's legitimate interests, including by considering the prospect that the other nation might redress any harm by exercising its own antitrust jurisdiction. Nations should also give full consideration to requests that they investigate and regulate restrictive business practices having adverse effects on other nations. Finally, in order to facilitate these ends, antitrust

Guidelines' relationship with *Hartford Fire*, then-Deputy Assistant Attorney General Diane Wood explained that:

[T]here is nothing inconsistent in the commitment to comity, on the one hand, and the fact that the U.S. agencies retain the responsibility and the right to bring appropriate actions in U.S. courts when the necessary effects are occurring in the U.S. market and U.S. enforcement action appears to be necessary, on the other.

Diane P. Wood, *Effective Enforcement of Antitrust Law for International Transactions*, Address Before Business Development Associates, Inc. (March 15, 1995), available at <http://www.usdoj.gov/atr/public/speeches/950315dw.htm>.

438. 1995 International Guidelines, *supra* note 48, § 3.2 (indicating relevance of "(7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action").

439. *Id.* § 3.2 ("In addition, the Agencies take into account the effect of their enforcement activities on related enforcement activities of a foreign antitrust authority. For example, the Agencies would consider whether their activities would interfere with or reinforce the objectives of the foreign proceeding, including any remedies contemplated or obtained by the foreign antitrust authority.").

440. *Id.* ("The Agencies also will consider whether the objectives sought to be obtained by the assertion of U.S. law would be achieved in a particular instance by foreign enforcement. In lieu of bringing an enforcement action, the Agencies may consult with interested foreign sovereigns through appropriate diplomatic channels to attempt to eliminate anticompetitive effects in the United States.").

authorities should provide notice and share information to the extent consistent with their domestic laws and interests. The result is reasonableness as a procedural requirement, echoing Judge Fitzmaurice's instruction in his *Barcelona Traction* opinion that even lacking "hard and fast" limits to national jurisdiction in areas like antitrust, international law does entail "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."⁴⁴¹

Antitrust comity, thus conceived, resolves some of the more objectionable features of substantive reasonableness. First, by including the consideration of foreign enforcement efforts, the guidelines reduced the risk of creating an "unregulated middle," because deference would be due at least in part to the possibility that foreign antitrust authorities would step in. Second, any enforcement forbearance was not compelled—only the *consideration* of forbearance was—and was thus wholly dynamic, permitting the Justice Department or FTC to initiate proceedings in the event they disagreed with foreign evaluations. Third, as previously explained, it was to be left to the agencies to decide whether to intercede or refrain, and a decision by one of the agencies to seek enforcement was not to be second-guessed by the courts.⁴⁴²

Antitrust comity may have been overlooked, however, because its footprint as special custom is relatively small. Most obviously, any principle was confined to antitrust, and did not extend easily to areas less amenable to agreement on the acceptability of

441. *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 105 (Feb. 5) (separate opinion of Judge Fitzmaurice); see also Peter D. Durack, *Extraterritorial Application of United States Law*, Address to the American Bar Association (Aug. 12, 1981), in *LOWE*, *supra* note 275, at 90, 95 (claim, by then-Attorney General of Australia, that while "the process of negotiation and persuasion involved in intergovernmental consultation will [not] necessarily resolve all conflicts ... it may," and "the principle of sovereignty and the notion of equality of sovereigns implicit in that principle require that such negotiations take place"); Meessen, *supra* note 252, at 62; Robinson, *supra* note 431, at 1321 (explaining that what balancing "can do is help to ensure that decisions which implicate significant foreign concerns follow an informed and careful evaluation and weighing of the relevant U.S. and foreign interests").

442. See *supra* text accompanying notes 225-26, 270-76.

extraterritoriality or less susceptible to complimentary regulatory solutions.⁴⁴³ Antitrust comity may well be restricted in its adherents as well. The 1995 International Guidelines indicate that the United States subscribes to the comity principles in the OECD instruments at least with respect to other members, so that in its view no bilateral agreement would be necessary to effectuate the underlying comity principles.⁴⁴⁴ Whether the norm extends beyond the OECD and, even more acutely, whether it is sufficiently common even among other members to influence the interpretation of the Sherman Act, are questions deserving careful consideration.

At least within its core constituency, however, antitrust comity appears to be quite resilient, in no small part because of the diminished demands it imposes. After the European Commission prohibited the GE/Honeywell merger—involving, not incidentally,

443. Extraterritorial sanctions, for example, raise distinct problems, because the domestic effects they seek to redress—for example, harms inflicted by Cuba on the United States and its citizens—are not attributable to the third parties and countries they end up regulating. Andreas F. Lowenfeld, *Congress and Cuba: The Helms Burton Act*, 90 AM. J. INT'L L. 419, 431-32 (1996).

444. 1995 International Guidelines, *supra* note 48, § 2.92 (explaining that “[t]he Agencies have agreed with respect to member countries of the OECD to consider the legitimate interests of other nations in accordance with relevant OECD recommendations”); *id.* § 2.92 n.50 (“The Agencies follow recommended OECD practices with respect to all member countries.”); *id.* § 3.2 n.73 (noting that the agencies “have agreed to consider the legitimate interests of other nations in accordance with the recommendations of the OECD and various bilateral agreements”); *see also* ANTITRUST DIV. MANUAL, *supra* note 122, at ch. VII, 27 (including, among agreements requiring the notification of foreign governments, the 1995 Revised Recommendation); *cf.* Small, *supra* note 52, at 294 (notwithstanding vagueness and ambiguity of 1984 OECD understanding, “by signing on to the OECD consensus, the United States Government politically committed itself to a substantial part of the extraterritoriality management approach adopted by the Department of State following the pipeline crisis”); *id.* at 296 (“[T]he Administration was able to maintain a clear position in the OECD that comity, including interest balancing, is appropriate and required in the political branches of government.”).

The recommendations themselves, for example, appear to have been regarded as a sufficient basis for bilateral notification and policy coordination. George P. Schultz, Address Before the South Carolina Bar Association (May 5, 1984), in 2 CUMULATIVE DIGEST, *supra* note 269, at 1328 (citing 490 antitrust consultations under OECD recommendations since 1967); *e.g.*, *Communications and Transportation*, 1976 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 565 (describing notification to and coordination with Belgium, France, the Federal Republic of Germany, the Netherlands, Sweden, and the United Kingdom “in keeping with agreements within the [OECD] on antitrust cooperation”); James F. Rill, *A Framework for Cooperation: The Status of International Antitrust Enforcement*, 18 WHITTIER L. REV. 321, 323-24 (1997) (describing U.S. coordination with the United Kingdom).

two U.S.-based companies⁴⁴⁵—based on antitrust theories that had little appeal to U.S. authorities, many took the view that the case demonstrated the weakness of present mechanisms for cooperation,⁴⁴⁶ or at best presented further evidence that unilateral acts were necessary to give them a jump start.⁴⁴⁷ It is important to note, however, that the authorities also cooperated through the entire process, and viewed the discrepant results as being substantive in nature—suggesting a limitation in convergence rather than the absence of any commitment to cooperate.⁴⁴⁸ Indeed, as in the Boeing/McDonnell Douglas case before it,⁴⁴⁹ the continued cooperation by the antitrust authorities during and after the controversy, and even the resistance of the Commission to external political pressure, may best be read as reinforcing a modest legal principle.

445. The fact was much emphasized in U.S. commentary, causing the European Commissioner for Competition matters to repeatedly stress the irrelevance of nationality. See, e.g., Mario Monti, *The Future for Competition Policy in the European Union*, Extracts from a Speech Before Merchant Taylor's Hall (July 9, 2001) (Speech/01/340), available at <http://europa.eu.int/rapid/start/cgi/guesten.ksh>.

446. See *supra* notes 8, 38 (citing authorities). Two counselors for GE and Honeywell had a partial but entirely representative view:

In the aftermath of GE/Honeywell, and absent either complete substantive convergence or more willingness to take international comity into account, there is too great a danger that trans-Atlantic merger review will cease being a facilitator of efficient globalization and become an impediment. U.S. and EC regulators might conclude that they were no longer working toward common goals and stop cooperating; political pressure to retaliate could build; and merger review might degenerate into a game of tit-for-tat in which each jurisdiction protests that the other is killing deals for political, rather than policy, reasons. One need only observe the tension in trans-Atlantic trade relations—with all the accusations of protectionism and retaliatory tariffs—to see where that could lead.

Kolasky & Greenfield, *supra* note 38.

447. See Jaret Seiberg, *Monti, U.S. Regulators Hope to Align Policies*, THE DAILY DEAL, Sept. 25, 2001, available at <http://www.thedeal.com/cgi-bin/gx.cgi/AppLogic+FTContentServer?pagename=FutureTense/Apps/Xcelerate/Render&c=TDDArticle&cid=TDDBOKSF1SC>; Monti, *supra* note 445; Statement by Assistant Attorney General Charles A. James, *supra* note 8.

448. Statement by Assistant Attorney General Charles A. James, *supra* note 8.

449. Youri Devuyt, *Transatlantic Competition Relations*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 127, 142-45 (Mark A. Pollack & Gregory C. Schaffer eds., 2001).

B. Antitrust Comity Under U.S. Law

Despite the relative clarity lent to antitrust comity by the OECD recommendations and their implementation, the lack of a more definitive statement of custom leaves important aspects uncertain. One question is whether OECD members are obliged to heed comity with respect to nonmembers, absent a bilateral agreement to the same effect. If, for example, the Justice Department were asked by Russia to consider its views before filing an action against a Russian company, would it be obliged to do so? The European Community, if its antitrust officials are to be believed, *would* be, but U.S. representations have been far less clear.⁴⁵⁰

The impediment, in the U.S. view, may be the lack of reciprocity. The *Restatement (Third)* took pains to distinguish between reasonableness and reciprocity, lest reasonableness be confused with "discretion and courtesy."⁴⁵¹ At stake was the integrity of a principle supposed to apply universally, one that could not be made to depend on another country's posture. That principle, too, was not one confined to state interests and state control, but instead was one that involved personal interests demanding judicial supervision.⁴⁵²

450. The Guidelines are equivocal, though they do suggest that the OECD recommendations themselves will be followed solely with respect to member nations. See 1995 International Guidelines, *supra* note 48; accord 1988 International Guidelines, *supra* note 48, § 5 ("The Department has in fact committed itself to consider the legitimate interests of other nations in accordance with recommendations of the . . . (OECD) and with bilateral agreements with several foreign governments."); Varney, *supra* note 107 ("Both the Commission and the Department follow OECD recommended practices with respect to all member countries."). On the other hand, the Guidelines' illustrative example, while alluding to "obligations under various international agreements," suggests that comity will be considered regardless of a foreign country's identity. 1995 International Guidelines, *supra* note 48, § 3.2 illus. 1. This enforces the impression that the same principles, if not the recommendations per se, apply in every case. *E.g.*, Varney, *supra* note 107 ("The Guidelines also list the comity factors we consider and emphasize that we consider all relevant factors in every case.").

451. RESTATEMENT (THIRD), *supra* note 17, § 403 cmt. a. The *Restatement (Third)* acknowledged, however, that a regulating state's perception of the outcome were the tables turned might be "useful" in balancing under section 403(2). *Id.* § 403 cmt. a. & reporters' note 5. It also commended consideration of "the extent to which another state may have an interest in regulating the activity." *Id.* § 403(2)(g).

452. *Id.* § 403 reporters' note 5 (suggesting that "[a] condition of reciprocity is not among the criteria set forth in this section, since a determination as to whether an exercise of jurisdiction is reasonable must take account of the interests of the persons affected as well

Antitrust comity entails a different approach, and one plainly more amenable to requiring reciprocal commitments. The cooperation recommendations and bilateral agreements squarely rely on them. The underlying principle, moreover, involves a particular complementarity: not only should the other nation be able to make similar requests for assistance, but it also should be capable, at least in theory, of offsetting regulatory oversight. Traditional comity, in other words, involves coordination not only with regulatory impulses antithetical to antitrust—such as might find expression in diplomatic protests, or blocking and clawback legislation—but also with other antitrust regulators and positive comity, in the expectation that nations will cooperate toward moderated antitrust enforcement.

This emphasis on regulatory reciprocity makes it unlikely that antitrust comity applies to all nations, particularly given the potential gulf between the relatively similar policies of OECD members and the divergent approaches taken by many third world countries.⁴⁵³ The views taken by both the U.S. executive branch⁴⁵⁴ and Congress⁴⁵⁵ suggest that it would be premature for U.S. courts to interpose a comity-based defense, beyond that recognized in

as the interests or practices of other states”).

453. *A.B.A. Report*, *supra* note 1, at 50-59 (distinguishing between “soft harmonization” among OECD nations and the “very large differences between restrictive business practice (RBP) laws of nations that fear the power of multinationals and the competition laws of the OECD countries”); *see also* Rill, *supra* note 444, at 328 (“Since the OECD’s membership consists of nations with the most fully developed competition laws and extensive enforcement experience, the OECD will need to play a primary role in the advancement of international cooperation on antitrust enforcement issues.”).

454. The guidelines consider not just “true conflicts” in the *Hartford Fire* sense, but also “the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected,” and the relative effectiveness of such efforts. 1995 International Guidelines, *supra* note 48, § 3.2.

455. 15 U.S.C. § 6211(2)(A)-(B), (F) (2000) (conditioning negotiation of “antitrust mutual assistance agreements” on assurances that foreign authorities will provide comparable assistance, provide at least as much protection of confidential information, and return evidence received following the conclusion of an investigation); H.R. REP. NO. 103-772, at 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3647, 3648 (describing “specifications . . . designed primarily to require that the arrangement be reciprocal—that the foreign antitrust authority provide similar antitrust investigatory assistance in return—and that sensitive business information be kept strictly confidential and be used only for specified law enforcement purposes”). Neither the IAEAA nor the FTIAA, nor their legislative histories, spoke directly to the question of whether comity as defined by *Timberlane* was appropriate. *See supra* text accompanying notes 49, 85-89.

Hartford Fire, on behalf of nations other than those belonging to the OECD or involved in bilateral agreements.⁴⁵⁶ The federal agencies may, of course, choose to moderate their own actions on such grounds, just as they may enter into bilateral agreements (including, as appropriate, IAEA agreements) or participate in the broadening of the custom through regional or other associations.

Even within the OECD, there is room for dispute as to whether every member shares the views espoused by the United States and the EU Member States.⁴⁵⁷ Some have been slower to concede the legitimacy of extraterritoriality or to accept the virtues of cooperation. Japan, for example, unequivocally (and unsuccessfully) opposed the extraterritorial criminal enforcement of the Sherman Act as late as 1997,⁴⁵⁸ but subsequently amended its competition

456. As explained below, the judicial role with respect to *any* nation may be minimal.

457. The United Kingdom is somewhat difficult to lump with the rest of the EU, given its history of hostility toward effects jurisdiction and its broad view of comity. *UK, Others Acerbic on International Guides*, FTC WATCH, Feb. 13, 1995, at 3, 4 (describing critical comments of U.K. government on draft 1995 International Guidelines, including regarding extraterritorial jurisdiction, the narrow view of comity, and concerns that the agencies' interest in "the effectiveness of foreign enforcement to be weighed in comity analysis" suggests that they would be "increasingly prepared to consider unilateral action on the basis of the perceived inadequacy of the remedies available in a particular jurisdiction"). *But see* Diane P. Wood, *The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction, Address Before the Spring Meeting of the ABA Antitrust Section* (Apr. 5, 1995) (describing revisions to draft Guidelines intended to expand potential for exercising comity), available at <http://www.usdoj.gov/atr/public/speeches/950405dw.htm>. Until quite recently, however, the U.K. has had a relatively lax national enforcement policy, and might be expected to freeride on the expansion of EU jurisdiction. It has not, in any event, consistently opposed extraterritoriality as of late. In 1994, for example, Japan protested the settlement of a civil enforcement action brought by the Department of Justice against a British company, Pilkington P.L.C., predicated on overseas activities allegedly affecting U.S. export trade. A British diplomat, on the other hand, reportedly stated that "[w]e've noted the settlement, but it's really a matter for the Department of Justice and Pilkington." Keith Bradsher, *U.S. Sues British in Antitrust Case*, N.Y. TIMES, May 27, 1994, at A1.

458. *Compare* Reply Brief of Appellant United States of America at 4, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001) (quoting contention in amicus brief submitted by the Japanese government that "the extraterritorial application of the Sherman Act not only is invalid under international law but also runs counter to the spirit of international comity"), *and* Appellant's Brief at 4, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (No. 96-2001) (quoting amicus brief to the effect that "[i]t is clear that the Sherman Act is properly construed as lacking extraterritorial reach in general"), *with id.* at 19 ("But Japan concedes that some concurrent jurisdiction between States is valid and admits that the assertion of jurisdiction over foreign nationals for acts engaged in abroad may be proper if there is a 'direct and substantial connection between the State asserting jurisdiction' and the foreign acts.").

legislation to afford extraterritorial jurisdiction,⁴⁵⁹ signed an antitrust cooperation agreement with the United States,⁴⁶⁰ and opened discussions with the European Union.⁴⁶¹ Australia, too, has a history of protesting U.S. extraterritoriality, though it has not found that incompatible with cooperation agreements. Other nations, like New Zealand, have limited experience with international enforcement which one could evaluate;⁴⁶² some, like Taiwan and the Republic of Korea, may have had independent antitrust authorities for too short a period.⁴⁶³

The possibility that other OECD members may have materially different views cannot be dismissed easily, especially given the voluntary nature of the original recommendations, and the fact that OECD members continue to sign bilateral agreements may suggest that they regard the recommendations as insufficient by

459. Mitsuo Matsushita, *United States-Japan Trade Issues and a Possible Bilateral Antitrust Agreement Between the United States and Japan*, 16 ARIZ. J. INT'L & COMP. L. 249, 250 (1999).

460. See *supra* text accompanying note 76.

461. See *supra* text accompanying note 79.

462. New Zealand does, however, share an integrated competition policy with Australia, and is a member of the Asia-Pacific Economic Cooperation (APEC) forum—together with Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Republic of the Philippines, Russia, Singapore, Chinese Taipei, Thailand, the United States, and Vietnam—which in 1999 pledged to “[d]evelop effective means of co-operation between APEC economy regulatory agencies, including competition authorities.” APEC Principles to Enhance Competition and Regulatory Reform, ¶ 10 (adopted Sept. 13, 1999), available at <http://www.usinfo.state.gov/regional/ea/apec/leader99.htm>.

463. Each is less than ten years old. Merit E. Janow, *Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 NW. J. INT'L L. & BUS. 947, 991 (1997). Officials of the Republic of Korea were among those critical of the draft 1995 International Guidelines. *UK, Others Acerbic on International Guides*, *supra* note 457, at 4 (quoting submission arguing that draft Guidelines “claim a degree of U.S. jurisdiction over foreign commercial activity that is far in excess of internationally-acceptable norms and likely to generate a variety of jurisdictional conflicts with foreign sovereigns,” and concluding that “the extraterritorial application of antitrust laws should not be based on unilateral compulsion or self-proclaimed authority but rather on international agreements or other international standards to be established through extensive multilateral discussions which incorporate the views of all countries, time-consuming as this course of action might be”). But see Wood, *supra* note 457 (noting revisions to draft); but cf. A. Douglas Melamed, *Antitrust at the Turn of the Century*, Address Before the Fourth International Symposium on Competition Policy, Seoul, Korea (Dec. 7, 1999) (describing “the commitment of the Korean Fair Trade Commission and the Korean Government to promoting sound and effective competition law, not only within Korea, but internationally as well”), available at <http://www.usdoj.gov/atr/public/speeches/5232.htm>.

themselves.⁴⁶⁴ At the same time, ironically enough, their hesitancy respecting antitrust comity may be due precisely to excessive claims regarding comity's universality and its intrusiveness.⁴⁶⁵ Much as in *Hartford Fire*, associating comity claims with a judicially prescribed assessment of the permissible reach of jurisdiction, rather than with the intergovernmental preconditions for its exercise, may have been fatal.

Such matters deserve clarification, and surely the proliferating fora for international antitrust—including the OECD's own Competition Law and Policy Committee, and the new International Competition Network—might take an important step forward by confirming the norm's existence and terms. In the interim, the methodology of local international law suggests that the Sherman Act ought be read as reflecting a principle of antitrust comity, at least to the extent of favoring OECD members and other partners in bilateral agreements. First, antitrust comity would not in any case bind the United States with respect to uncharted subjects-matter or manifestly uncertain partners. Second, judicial recognition of any such principle, should that be occasioned, would not need to be definitive, and thus could avoid judicial gainsaying of any considered and plausible position that the political branches might take. Third, as explained in the next section, antitrust comity is largely unintrusive with respect to federal enforcement actions, though it may play a more substantial role with respect to other enforcement mechanisms.

464. But the mere fact of concurrent agreements is not dispositive—few rules of customary international law would not benefit from concrete reiteration—absent any reason to suspect that additional agreements have not been pursued in order to *avoid* broader recognition of the principle. The more likely explanation, in the present case, is the relative paucity of occasions on which such agreements would be employed.

465. In the *Wood Pulp* case, for example, the Advocate General rejected the British Government's argument that the Commission had failed to adequately take comity into account by adverting to general skepticism about the "concept of international comity." *Wood Pulp*, *supra* note 60, 1988 E.C.R. at 5227 ("[T]here is no rule of international law which is capable of being relied upon against the criterion of the direct, substantial and foreseeable effect. Nor does the concept of international comity, in view of its uncertain scope, militate against that criterion either."). The Court of Justice, on the other hand, considered the issue to have been asked and answered by its holding that jurisdiction might theoretically be exercised. *Id.* at 5244 ("As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected.").

Hartford Fire remains an important obstacle to any such construction, but it should not be considered fatal. *Hartford Fire*'s comity analysis secured a narrow 5-4 majority—including two Justices who have since retired—and surely could be reconsidered, though *stare decisis* is particularly prized in statutory cases.⁴⁶⁶ It might also be distinguished. The majority professed to leave for another day the issue of comity's influence on prescriptive jurisdiction, seemingly preserving the possibility of arguing that comity bears on the proper construction of the Sherman Act.⁴⁶⁷ The Court also arguably deferred the question of comity's function in different sorts of conflicts,⁴⁶⁸ allowing litigants to distinguish

466. *E.g.*, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (concluding that *stare decisis* is especially influential in matters of statutory construction, where Congress would have been free to alter judgment); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction . . .").

467. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795 (quoting concession at oral argument by counsel for the London reinsurers); *id.* at 796 n.22 ("The parties do not question prescriptive jurisdiction, however, and for good reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act.") (citing BORN & WESTIN, *supra* note 372, at 542 n.5); *id.* at 797 n.24 (proposing that Justice Scalia's "contention [that comity pertains to prescriptive jurisdiction] is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction. . . . In any event, the parties conceded jurisdiction at oral argument and we see no need to address this contention here.") (citation omitted).

The Court's emphasis on waiver may give hope to future litigants, *Dam*, *supra* note 130, at 306; Andreas F. Lowenfeld, *Jurisdictional Issues Before National Courts: The Insurance Antitrust Case*, in *EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE*, *supra* note 265, at 1, 12 (comments of Gary Born). But its comment that the issue was dropped "with good reason" surely diminishes the argument's promise. The Court's citation to the Born treatise in support of that point is simply confusing: the treatise observed that prescriptive and subject matter jurisdiction under the Sherman Act were simultaneously granted (and presumably coextensive), but said nothing about the extent of either. BORN & WESTIN, *supra* note 372, at 542 & n.5; see also GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 605 (3d ed. 1996) (challenging Justice Souter's reading of the book's previous edition).

468. *Hartford Fire*, 509 U.S. at 799 (describing absence of conflict "for these purposes," having recited London reinsurers' argument that U.S. law would penalize conduct lawful under comprehensive U.K. regulatory scheme); *id.* at 799 n.25 (responding to dissent's argument concerning the proper order of inquiry under section 403, and the need to apply the reasonableness test, by claiming that "whatever the order of cart and horse, conflict in this sense"—i.e., "true" conflict between laws that could not simultaneously obeyed—"is the only substantial issue before the Court").

One might also construe the majority's statement that "[w]e have no need in this litigation

sharper conflicts posing greater risk to the national interest—and, potentially, weaker conflicts, like a relatively subtle disagreement over antitrust policy, that may be more easily resolved than the choice between antitrust regulation and immunity presented in *Hartford Fire*.⁴⁶⁹

In any case, *Hartford Fire* failed (like the *Restatement (Third)* before it) to appreciate that international law might warrant treating pure antitrust conflicts differently. The Court also failed to contemplate that different treatment might be accorded the different agents of antitrust. As the next section explains, the key instigators of *Hartford Fire*—state attorneys general—may actually have merited the most searching scrutiny for their compliance with international norms. But the Court's inattention to that nuance—and to related variables, such as the national government's judgment regarding comity—certainly undermine the decision's authority, and justify a more careful assessment.

C. Local Authority Under Local International Law

Antitrust comity has become accepted, one might suspect, largely because it imposes so few absolute limitations on the nations subscribing to it, raising the question whether it is too "soft" a norm

to address other considerations that might inform a decision to refrain from the exercise of jurisdiction," *id.* at 799, as raising the prospect that future claims involving some less direct American interest might be treated differently, Dam, *supra* note 130, at 307; *see also* Spencer Weber Waller, *From the Ashes of Hartford Fire: The Unanswered Questions of Comity*, 1998 ANN. PROC. FORDHAM CORP. L. INST. CONF.: INT'L ANTITRUST L. & POLICY 33, 38 (Barry E. Hawk ed., 1999) (describing a "plausible, but optimistic reading" of *Hartford Fire* under which "litigants are free to make comity arguments relying on the other factors outlined in the cases and the Restatements, but may not rely upon the conflict between national policies, unless the conflict rises to the level of outright compulsion"). Equally plausibly, the majority was warning that a "true" conflict would not invariably warrant declining jurisdiction, since other factors favoring jurisdiction might come into play. Brief for the United States as Amicus Curiae Supporting Respondents at 10, *Hartford Fire* (Nos. 91-1111, 91-1128) ("In any event, the court of appeals correctly concluded that other relevant factors support the exercise of jurisdiction and outweigh any possible conflict.").

469. *See* Memorandum of Points and Authorities in Support of Plaintiff United States' Opposition to Defendants' Motion to Dismiss at 20 n.18, *United States v. LSL Biotechnologies, Inc.* (D. Ariz. 2001) (No. CV-00-529-TUC-RCC) (characterizing *Hartford Fire* as holding that "a court cannot decline jurisdiction on the ground that the conduct in question is lawful in a foreign state, or even strongly encouraged"), available at <http://www.usdoj.gov/atr/cases/f7300/7382.htm>.

to be considered law. Softer norms, like those setting procedural expectations, surely contribute to the formation of further, more binding agreements.⁴⁷⁰ But in order to be regarded as law themselves, it should be possible to determine the existence of a breach and possible remedy.⁴⁷¹ As explained below, antitrust comity satisfies these criteria, but the details very much depend on the enforcement agent in question.

1. *Federal Enforcement of Federal Law*

With respect to national governments, antitrust comity's constraints are decidedly less stringent than those asserted by the *Restatement (Third)*. Comity-based defenses to a U.S. enforcement action would ordinarily be resolved entirely by the relevant agency's submission that it had consulted with the interested foreign government—or, for that matter, by a submission from the foreign government to the same effect.⁴⁷² It should equally be sufficient for the United States to indicate that it independently considered the foreign government's legitimate interests, at least where circumstances were such as to make consultation infeasible. Perhaps the only credible basis for a defense would be evidence that a foreign government had in fact requested that enforcement restraint be considered, but its request was entirely rebuffed; even then it would be permissible for the government to reach the same

470. Cf. Chinkin, *supra* note 402, at 862 (describing soft law as “pre-eminently suitable” for “avoiding the need for adjudication by providing a framework for negotiation and other non-adjudicative forms of dispute resolution by creating expectations as to the frame of reference for the conduct of negotiations”).

471. Cf. *id.* at 859 (arguing that “[i]f claims that soft law principles have become hard law are to be accepted, it must be possible both to determine breach and the legal outcome of any claim of breach”).

472. When the consultations occur may be of little moment. In one civil case recently brought by the Justice Department, a defendant argued that contract actions it had filed in Israel against the alleged victim of its anticompetitive conduct warranted dismissal on comity grounds. In addition to arguing that dismissal on comity grounds was inappropriate in any U.S. enforcement action, the Department observed that:

In this instance, there is no reason to believe that the Government of Israel opposes the United States' decision to prosecute despite any potential issues of comity. In fact, the Israel Antitrust Authority has explicitly supported this U.S. antitrust enforcement action and is holding its own investigation of the [allegedly anticompetitive contract] in abeyance pending outcome of this case.

Memorandum of Points and Authorities, *LSL Biotechnologies*, *supra* note 469, at 19 n.17.

conclusion following consideration.⁴⁷³ Putting issues of standing to the side,⁴⁷⁴ the incentive even to raise a comity defense may well be lacking.

This lack of utility in domestic litigation, however, does not deprive antitrust comity of its meaning as international law. Some elements of antitrust comity, such as the respect afforded requests for positive comity, are unlikely to ever form the basis for litigation, yet may have been intergovernmental relevance. Where another nation's interests were wholly disregarded—where diplomatic dialogue reveals a refusal to consider a patently legitimate interest or request for assistance, or total abdication of responsibility for antitrust policy in favor of other sovereign interests—that refusal might be the basis for a claim or demarche, either on a purely bilateral basis or within an institution like the OECD.⁴⁷⁵ A failure to cooperate would also form the basis for a defense to any antitrust nonviolation claim under GATT article XXIII(1)(b), should such a thing exist.⁴⁷⁶ However feeble this may seem compared to the reasonableness norm, that norm's purported decisiveness in government actions invited considerable dissent from its supposed adherents in the international community, and it was, in any event, ineffective in securing court-directed dismissals.

2. *Private Enforcement of Federal Law*

It may be more productive to consider the application of antitrust comity to parties essentially overlooked by regulatory comity—and by *Hartford Fire*. Under the reasonableness approach, private plaintiffs were subject to the same standard as the government, an

473. Cf. *SEC v. Chenery Corp.*, 332 U.S. 194, 200-01 (1947) (upholding authority of administrative agency to reach same conclusion following remand for reconsideration).

474. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (assuming that the *Vienna Convention on Consular Relations of 1963* "arguably confers on an individual the right to consular assistance following arrest"); *id.* at 377-78 (questioning whether Paraguay had standing under the *Vienna Convention* to object to criminal conviction and sentence due to failure to provide consular notification).

475. See *supra* text accompanying note 147 (discussing availability of OECD mediation procedure).

476. WTO, Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998) (rejecting nonviolation claim absent showing of relationship between governmental measures and antitrust injury).

approach that flowed naturally from the supposition that custom constrained all exercises of subject matter jurisdiction by American courts. Whatever its defects, that approach offered the reassurance that judges would sometimes constrain private plaintiffs; even if that did not satisfy foreign demands for more direct government responsibility, it might at least reduce the frequency of disputes.⁴⁷⁷ The potential significance of such a limit should not be discounted. Many of the most controversial antitrust cases have arisen from private litigation, including the uranium antitrust litigation and the *Laker Airways* dispute,⁴⁷⁸ and the interest of private plaintiffs in international matters continues unabated.⁴⁷⁹

As we have seen, however, the reasonableness norm is difficult to support as a matter of international law, and differs from the emerging prescription in several material respects. Unlike reasonableness, antitrust comity appears to be a procedural principle requiring intergovernmental consideration, rather than a substantive inquiry into certain specified factors with a command that they be balanced. That principle does not, in any event, entail any absolute limitation on government antitrust actions.

Private attorneys general are obviously unlikely to internalize antitrust comity. Because they are less likely to be long-term, repeat players in international antitrust circles, they will be inclined to sacrifice the potential benefits of reciprocity and cooperation in order to maximize their immediate return.⁴⁸⁰ Given a sufficient financial stake in U.S. remedies, private plaintiffs are unlikely to be satisfied by the possibility of foreign intervention on their behalf; foreign antitrust authorities are less likely to alter their otherwise-preferred course in order to assist them, which further diminishes any practical restraint. The result is a serious prospect that private plaintiffs will initiate and maintain cases that the government would not, and so risk undermining any gains due

477. Kestenbaum & Olson, *supra* note 27, at 589 n.5 (citing U.S. officials); *id.* at 589 n.6 (citing continuing concerns by foreign observers).

478. See *supra* text accompanying notes 54-55 (noting controversies), 196-204 (describing *Laker Airways*); see also *infra* note 494 (noting intergovernmental dispute in the uranium antitrust litigation).

479. See *supra* text accompanying notes 124-26.

480. Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY 18-20 (Kenneth A. Oye ed., 1986) (explaining that cooperation is most likely to arise in repeated interactions among a small number of players).

to antitrust comity⁴⁸¹—particularly given the irritant of treble damages.⁴⁸²

The question remains, however, whether any of this actually violates the norm itself, particularly as might be reflected in the interpretation of U.S. antitrust law. Private antitrust actions arguably implicate the federal government's international commitments, either by virtue of the federal courts' involvement or as a matter of government responsibility for exercising due diligence in preventing injurious acts.⁴⁸³ Yet the very incongruity of private actions suggests that they are not addressed by the international norm at all—not, it should be stressed, because of the inherently sovereign nature of international obligations,⁴⁸⁴ but because of the

481. Joel Davidow, *Recent Developments in the Extraterritorial Application of U.S. Antitrust Law*, WORLD COMPETITION L. & ECON. REV., March 1997, at 5, 13-14 (arguing that private actions are significant in clarifying law concerning extraterritoriality); Pengilly, *supra* note 431, at 882 (noting that experience suggests that "private litigation, not government enforcement, may be the chief concern," and that bilateral arrangements will be of limited utility absent U.S. intervention in private suits).

482. See Buxbaum, *supra* note 27, at 252-53.

483. The actions of personnel not legally empowered to exercise governmental authority are not ordinarily regarded as actions of the state giving rise to international liability. Draft Articles on State Responsibility (Second Reading), *supra* note 383, art. 5 (attributing to a state the conduct of persons empowered to exercise state authority); *id.* art. 8 (attributing to a state conduct by persons "in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct"). But cf. Draft Articles on State Responsibility (First Reading), *supra* note 383, art. 8 (attributing conduct by persons "in fact acting on behalf of [the] State"); *id.* art. 11(1) ("The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law."). Actions of courts in enforcing the rights of private parties, however, may provide a separate basis for state liability. BROWNLEE, *supra* note 32, at 452. States may also be held responsible for their failure to take reasonable steps to prevent certain kinds of harm. See I OPPENHEIM'S INTERNATIONAL LAW, *supra* note 375, § 166. American antitrust law thus presents, in theory, the delicate question of whether the state may be held liable either for sponsoring or failing to prevent judicially enforced actions initiated by private parties in lieu of, or in conjunction with, government enforcement. As noted above, though, matters may differ if international law regards the private activities in question as differentiable in character.

484. These are points of considerable and even growing controversy, ever since the D.C. Circuit's opinions in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). *E.g.*, *id.* at 776 (Edwards, J., concurring) (indicating doubt that "the law of nations imposes the same responsibility or liability on non-state actors . . . as it does on states and persons acting under color of state law"); *id.* at 780 n.4 (concluding that, at least in most cases, international law "provides no substantive right to be free from the private acts of individuals, and persons harmed by such acts have no right, under the law of nations, to assert in federal court"). Generally speaking, international law does not impose duties on individuals, with the important exception of matters like war crimes and genocide. *E.g.*, *Kadic v. Karadzic*, 70 F.3d

intergovernmental focus of antitrust comity. One might well argue, of course, that the interference of private actions touching on foreign matters warrants a prophylactic rule, such as resuscitating reasonableness, detrebling claims against foreign defendants, permitting follow-on private actions only, or even the invariable dismissal of private actions.⁴⁸⁵ Each has distinct drawbacks, and all save reasonableness depend upon an increasingly tenuous distinction between foreign and domestic matters.⁴⁸⁶

More important, permitting courts to decide which matters are sufficiently foreign to warrant caution, and to choose the best means of tempering private suits touching on that realm, would betray the separation of powers virtues of local international law. Assuming the resulting rules were facially compatible with the terms of the antitrust statutes, their implication would distend the *Charming Betsy* canon: one may perhaps presume Congress desires to avoid international infringements, and to leave the courts free to yield to custom, but permitting the courts to elect among limits to statutory causes of action casts them much more as common law principals than as agents of Congress.⁴⁸⁷ Any rule requiring that courts selectively abstain from certain cases creates still greater

232, 239-40 (2d Cir. 1995); BROWNLIE, *supra* note 32, at 36. *But see* Paust, *supra* note 322, at 203-10 (vigorously disputing theses of *Tel-Oren*).

485. Among the many such suggestions, the most comprehensive were amendments sponsored by Senator DeConcini in the mid-1980s, which would have codified the reasonableness approach and, in addition, permitted both detrebling and dismissal at the Attorney General's behest. 131 CONG. REC. 35,103 (1985) (reporting and explaining amended S. 397).

486. *E.g.*, Cira, *supra* note 268, at 277-78 (arguing that Congress should reconsider automatic trebling of damages in all cases, owing largely to the need in context of cases with foreign aspects and the difficulty of segregating such cases).

487. The argument may, of course, be presented directly to Congress, as in the State Department's strong invocation of international law objections to the private civil remedies in the Libertad Bill. 141 CONG. REC. S15,106 (daily ed. Oct. 12, 1995) (submission by U.S. Department of State) ("As a general rule, even when conduct has a 'substantial effect' in the territory of a state, international law also requires a state to apply its laws to extra-territorial conduct only when doing so would be reasonable in view of certain customary factors."); *id.* at S15,107 ("International law also requires a state assessing the reasonableness of an exercise of prescriptive jurisdiction to balance its interest against those of other states, and refrain from asserting jurisdiction when the interests of other states are greater."). A critical element of the administration's objections, moreover, turned on the prospect of unregulated private suits, *id.* at S15,108, thereby implicating the common distinction between the enforcement of international jurisdictional limits on the federal government and on private actors, *see supra* text accompanying note 269.

tension.⁴⁸⁸ The alternative, barring all private actions of a certain class, simply worsens the distension of the statute's terms, and is all the more questionable in light of the growing acceptance in principle of private actions in international antitrust.⁴⁸⁹

Similar problems also afflict any attempt to simulate the intergovernmental character of antitrust comity, though there the issue is much closer. The federal government might, for example, be asked to espouse private claims to foreign governments,⁴⁹⁰ or even to assume control over them on a *parens patriae* basis;⁴⁹¹ private plaintiffs could, at a minimum, be asked to exhaust such possibilities before filing. Alternatively, the government might be encouraged to submit its views on the compatibility of particular suits with comity.⁴⁹² But neither variant does a good job of imitating antitrust comity, and they are objectionable on other grounds as well. Each invites political pressure the political branches usually prefer to avoid, and the unpredictability of government intervention will likely provide little succor either to litigants or foreign govern-

488. For similar objections to the reasonableness norm, see generally Grippando, *supra* note 204; Rahl, *supra* note 204; Michael Sennett & Andrew I. Gavil, *Antitrust Jurisdiction, Extraterritorial Conduct and Interest Balancing*, 19 INT'L LAW. 1185 (1985).

489. E.g., OECD Joint Group on Trade and Competition, *Remedies Available to Private Parties Under Competition Laws* at 8, Doc. Com/Daffe/CLP/TD(2000)24/final (July 14, 2000) (urging availability of private remedies through competition agencies or suits on transparent and nondiscriminatory basis, tempered by the need to avoid undue interference with the basic mission of the competition agency to enforce the competition law on behalf of all citizens and to protect against the filing of "baseless or vexatious" private petitions or lawsuits), available at http://www1.oecd.org/daf/clp/trade_competition/private.pdf.

490. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (describing constitutional authority of the president to settle claims under certain circumstances); cf. *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 811-13 (D. Del. 1990) (emphasizing limitations of presidential authority). For a pre-*Dames & Moore* discussion, see Jesse W. Hill & Steven M. Lucas, Note, *The Nature and Extent of Executive Power to Espouse the International Claims of United States Nationals*, 7 VAND. J. TRANSNAT'L L. 95, 104-05 (1973).

491. *Cira*, *supra* note 268, at 273 (noting possibility, but concluding that difficulties in line-drawing would be prohibitive).

492. Kestenbaum & Olson, *supra* note 27, at 594 (arguing in favor of regular amicus participation "in cases which present substantial issues of the exercise of antitrust jurisdiction over conduct abroad and/or foreign entities, and in which there are significant conflicting foreign interests"); see also *supra* note 485 (noting proposed DeConcini amendments).

ments.⁴⁹³ Foreign governments might represent their own interests, but that too has proven unrewarding.⁴⁹⁴

Whether any of these solutions are warranted as a matter of federal common law, executive branch authority, or legislative edict are different questions; much might be said in their favor.

493. *Cira*, *supra* note 268, at 270-71, 273-74 (noting that "[t]he Executive Branch has attempted to minimize its intervention in private litigation," but urging enhanced participation); Kestenbaum & Olson, *supra* note 27, at 590-91 (noting problems created by inability of Justice Department to intervene regularly and predictably at the trial stage); Robinson, *supra* note 268, at 1153 (arguing that compelling U.S. government participation in private cases "could well exacerbate the dispute and impede its resolution or at least its management by negotiation").

Testifying in another context about espousal, Judge Sofaer suggested that State Department espousal of claims by U.S. victims of foreign crimes is undependable because Department "is likely to be influenced, not only by the merits of the case, but by [its] concern for offending a foreign state and creating a potential irritant in its dealings with that state." *The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong. 83 (1994) (statement of Abraham D. Sofaer). If espousal is to be effective, it also raises separation of powers concerns. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 772-73 (1972) (Douglas, J., concurring) (warning that deferring to so-called *Bernstein* letters invoking act-of-state doctrine would render the Court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others"); *id.* at 773 (Powell, J., concurring) (noting discomfort "with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction"); *id.* at 776-77 (Brennan, J., dissenting) (explaining that six Justices definitively rejected the exception); *see also* Bradley, *Chevron Deference*, *supra* note 34, at 718-21 (describing, with approval, subsequent judicial practice departing from any emphasis on executive branch submissions); *cf. Dames & Moore*, 453 U.S. at 687-88 & n.13 (noting that presidential espousal authority is limited by congressional authority to enact legislation requiring renegotiation).

494. The most pronounced debacle was the *Uranium Antitrust Litigation*: the United States declined to file, but encouraged foreign governments to file amici briefs, only to have the court lambaste them for shilling for their nationals. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1256 (7th Cir. 1980) (expressing "shock[]" that governments of defaulting defendants "have subversively presented for them their case against the exercise of jurisdiction"); Letter from Roberts B. Owen, Legal Adviser of the Department of State, to John H. Shenefield, Associate Attorney General (Mar. 17, 1980), *reprinted in* 74 AM. J. INT'L L. 665 (1980) (letter, later transmitted to the Seventh Circuit, asking that the court be informed that foreign governments had filed amicus briefs at prompting of U.S. government); Letter from John H. Shenefield, Associate Attorney General, to Hon. Prentice H. Marshall (May 6, 1980), *reprinted in* [1969-1983 Transfer Binder-Current Comment] Trade Reg. Rep. (CCH) ¶ 50,416, at 55,928 (1980) (letter, following remand, urging balancing of U.S. and foreign interests). More commonly, foreign government participation is simply ineffective. In addition to the *Uranium Antitrust Litigation*, in which the governments of Canada, Australia, and the United Kingdom participated, Canada and the United Kingdom filed briefs objecting to U.S. jurisdiction in *Hartford Fire*, and the government of Japan did likewise in *Nippon Paper*, to no avail.

It is more difficult, however, to justify them as a matter of customary international law. As discussed further below, however, the apparent omission of private attorneys general is not only consistent with the positive description of antitrust comity, but also ameliorates some of its potential drawbacks.

3. *State Enforcement of Federal Law*

State attorneys general suing under the federal antitrust laws are often described as private plaintiffs,⁴⁹⁵ and it may be wondered why they would be treated any differently. Like private actors, states are not ordinarily the subjects of international obligations, nor are they addressed by the sources giving rise to the specific norm of antitrust comity. Two differences may be relevant. First, precisely because they are more public-oriented, states may prove even more disruptive to antitrust comity. Second, unlike private behavior, conduct by state governments is generally attributed to the United States under international and foreign relations law; for related reasons, states are legally incapacitated from engaging in effective self-regulation, warranting different treatment in the domestic implementation of antitrust comity.

a. *The Potential Risk to Comity*

State antitrust enforcers are often drawn to precisely the sort of matters in which they offer the greatest added value: that is, local matters unlikely to be scrutinized by federal officials or private-party plaintiffs.⁴⁹⁶ But attempts to confine the states to those matters, or even to distinguish between federal and local matters,

495. *E.g.*, RESTATEMENT (THIRD), *supra* note 17, § 415 cmt. g; Dam, *supra* note 130, at 290, 321, 325. *But cf.* Dam, *supra* note 130, at 327 (regarding state participants in *Hartford Fire* as essentially private parties, but noting that instead of engaging in direct regulation of insurance, "the states used the Federal judiciary, in effect, to exercise regulatory power over foreign commerce"); Lowenfeld, *supra* note 220, at 48 (describing states suing in *parens patriae* capacity as "intermediate group of plaintiffs").

496. *E.g.*, Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 41 (1995) (contending that "[t]he states have been very selective in their [merger] enforcement efforts, concentrating on cases having local consumer impact in a few highly visible consumer markets or adverse employment effects on vital local industries").

failed long ago, and the borders were largely erased in the 1980s. Spurred by an infusion of federal funds and a decline in federal enforcement,⁴⁹⁷ state enforcement activities increased dramatically, including as to interstate matters.⁴⁹⁸ Desiring to coordinate efforts and husband resources,⁴⁹⁹ the states formed the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG) to coordinate multistate investigations and

497. The Crime Control Act of 1976 provided moneys to fund state antitrust enforcement programs, Pub. L. No. 94-503, § 309, 90 Stat. 2407, 2415 (1976), and the Hart-Scott-Rodino Antitrust Improvements Act authorized state *parens patriae* treble damages actions, as well as allowing certain investigative assistance by the Department of Justice, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394 (1976) (codified at 15 U.S.C. § 15c-h (2000)). See generally Flexner & Racanelli, *supra* note 122, at 507-08.

498. By one estimate, the number of state-initiated actions increased by over 350% between 1979 and 1988. Thomas Greene et al., *State Antitrust Law and Enforcement*, in 28TH ANNUAL ANTITRUST LAW INSTITUTE 645, 651 (1997); see also Flexner & Racanelli, *supra* note 122, at 508-09; Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 73-81 (1994) (describing revival of state antitrust enforcement); 60 Minutes with the Honorable Michael F. Brockmeyer, Chief, Antitrust Division, Office of the Attorney General, Maryland, 59 ANTITRUST L.J. 25, 32 (1990) (identifying additional factors). As Professor Kovacic has noted, the offsetting rise in state enforcement should not have surprised federal officials: state activities had begun to pick up in the 1970s, and such cycles were a firm part of U.S. antitrust history. William E. Kovacic, *The Sherman Act: The First Century - Comments and Observations*, 59 ANTITRUST L.J. 119, 124-25 (1990).

499. Robert Abrams, *Developments in State Antitrust Enforcement*, 62 N.Y.U.L. REV. 989, 991 (1987) (emphasizing that coordinated, often unanimous, state action is "indicative both of a recognition at the state level of the need for stronger enforcement to protect our competitive economy, and of a conscious effort to act in a consistent, unified manner so that business does not find itself moving from the evil of federal nonenforcement to the evil of fifty different state antitrust enforcement policies"); Lloyd Constantine, *Current Antitrust Enforcement Initiatives by State Attorneys General*, 56 ANTITRUST L.J. 111, 120 (1987) (explaining that states "were not willing to come into [merger policy] and substitute no enforcement on the federal level with balkanized, disjointed enforcement on the state level").

Federal officials concerned about state efforts were less than entirely satisfied. *E.g.*, 60 Minutes with Charles F. Rule, Assistant Attorney General, Antitrust Division, 58 ANTITRUST L.J. 377, 381 (1989) (commenting on "disturbing" trend in which "some state attorneys general, more interested in headlines than in sound law enforcement, have begun to use antitrust enforcement as a means of advancing their political careers"); 60 Minutes with Daniel Oliver, Chairman, Federal Trade Commission, 57 ANTITRUST L.J. 235, 242 (1988) (describing the National Association of Attorneys General as a "group of antitrust counterrevolutionaries" that "seeks to undo our progress through a process that poses a serious threat not only to consumers, but to our basic constitutional scheme as well"); see also Report of the ABA Antitrust Law Section Task Force on the Antitrust Division of the U.S. Department of Justice, 58 ANTITRUST L.J. 735, 745 (1989) (urging enhanced federal involvement to "ameliorate the trend toward the balkanization of antitrust policy and help to restore major enforcement policy-making to the national level where it belongs").

litigation⁵⁰⁰ and issue joint guidelines.⁵⁰¹ By 1990, according to one analysis, "the sovereign states, acting voluntarily through the Antitrust Committee and the Antitrust Task Force of NAAG, function as a de facto third national antitrust enforcement agency."⁵⁰²

This is hyperbole, of course; the states lack the unity, expertise, and resources of the federal agencies.⁵⁰³ But their authority under federal antitrust law indeed has a public dimension with evident international implications. States have the privilege of representing natural residents,⁵⁰⁴ and enjoy substantially enhanced standing to challenge mergers,⁵⁰⁵ arguably the most significant and problematic

500. For a description of the Task Force's operation, see ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 734-35; for examples of its efforts, see *id.* at 735-38. The states also continued to cooperate informally. Stephen Paul Mahinka & Kathleen M. Sanzo, *Multistate Antitrust and Consumer Protection Investigations: Practical Concerns*, 63 ANTITRUST L.J. 213, 216-19 (1994) (citing examples).

501. NAAG Vertical Restraints Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,400 (1995); 1993 NAAG Horizontal Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,406 (1993).

502. Robert Abrams & Lloyd Constantine, *Dual Antitrust Enforcement in the 1990s*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 484, 487 (Harry First et al. eds., 1991).

503. ANTITRUST DIV. MANUAL, *supra* note 122, at VII-9 & VII-18; Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001). This may be, however, itself the source of coordination problems, and reduce the added value of state enforcement. *Id.* at 940 (suggesting that "[s]tates do not have the resources to do more than free ride on federal antitrust litigation, complicating its resolution").

504. Acting in *parens patriae* capacity, states may seek injunctive relief based on potential injury to the state's economy, a potentially significant weight in the balance. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945); *In re Insurance Antitrust Litig.*, 938 F.2d 919, 927 (9th Cir. 1991) ("The state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction."), *aff'd in part and rev'd in part sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *cf. Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972) (distinguishing between state actions for injunctive relief and those seeking damages based on economic injury).

Such actions may be aggregated without some of the burdens of private class actions. ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 734. *Parens patriae* actions may also sometimes establish injury and estimate aggregate damages by means not open to private plaintiffs. 15 U.S.C. § 15d (2000); ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 733-34. Even with respect to its suits as a "person," a state may bring a class action on behalf of its political subdivisions, perhaps even without the customary attention to procedure for joinder and certification. *Id.* at 729-30.

505. David A. Zimmerman, Comment, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 EMORY L.J. 337, 341-44 (1999) (reviewing comparative standing challenges, and concluding that "in most cases merging parties need not worry about private suits challenging the transaction. However,

context for international cooperation.⁵⁰⁶ Although state officials lack the overriding profit motives of private plaintiffs, they are by the same token relatively free to pursue judgments without financial incentive,⁵⁰⁷ and enjoy their own immunity from antitrust claims.⁵⁰⁸ Such authority will increasingly be exercised with respect to international matters, broadly construed. Like interstate commerce before it, globalization is effective at reducing the significance of borders, and state attorneys general may legitimately perceive that foreign conduct has local effect; in addition, their involvement with local or interstate matters will increasingly touch on matters of interest to foreign sovereigns, perhaps by dint of these governments' own extraterritorial authority.⁵⁰⁹

One may fairly assume that state enforcers pay some heed to international comity,⁵¹⁰ but their participation makes it more difficult to observe just the same. The problem is not just that state enforcement will catch additional anticompetitive transactions or

the parties to the proposed transaction do need to worry about a challenge from a state attorney general who may be using very different criteria than the FTC and DOJ to evaluate the merger."); *Roundtable Discussion with Enforcement Officials*, 63 ANTITRUST L.J. 951, 977 (1995) (remarks of California State Sen. Tom Campbell) ("Given the standing problems for private actors in mergers, it is basically going to be a state attorney general or the feds, and that's where I had the worry about balkanization or one AG going off on her or his own").

506. E.g., ICPAC FINAL REPORT, *supra* note 1, ch. 2; Dieter Wolf, *International Mergers, in TOWARDS WTO COMPETITION RULES: KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION*, *supra* note 101, at 205-07 (arguing international mergers may be more serious than cartels, and yet receive far less critical attention).

507. E.g., *Roundtable Conference with Enforcement Officials*, 66 ANTITRUST L.J. 805, 816 (1998) [hereinafter 1997 Roundtable] (remarks of Rep. Tom Campbell) (describing relative lack of financial disincentive for state antitrust actions).

508. Though states are "persons" for purposes of enforcing antitrust laws, they are not persons capable of violating the Sherman Act. *Parker v. Brown*, 317 U.S. 341 (1943). States are also entitled to assume responsibility for certain activities by exempting them through application of the state action doctrine. This doctrine permits states, unlike ordinary plaintiffs, to elect—at least in a limited number of cases—not only between suing and not suing, but between federal antitrust law and its regulatory alternatives. Cf. B. Guy Peters, *United States Competition Policy Institutions: Structural Constraints and Opportunities, in COMPARATIVE COMPETITION POLICY: NATIONAL INSTITUTIONS IN A GLOBAL MARKET* 40, 52 (G. Bruce Doern & Stephen Wilks eds., 1996) (claiming that "[t]he states have been acting to limit competition at least as often as they have acted to promote it").

509. See *supra* text accompanying notes 60-67.

510. *60 Minutes with Robert M. Langer, Chair, National Association of Attorneys General Multi State Task Force*, 61 ANTITRUST L.J. 211, 223 (1992) [hereinafter 60 Minutes with Robert M. Langer] (stressing consideration of comity by state officials).

conduct;⁵¹¹ reduced barriers to competition presumably benefit foreign companies and consumers as well, and one might discount any interest in protecting foreign companies from the application of federal antitrust law. The additional scrutiny, however, comes at a price. State enforcement is criticized domestically for imposing additional administrative costs and delay, and for undermining legal certainty by creating divergent or inconsistent legal standards.⁵¹² Such problems are only magnified for multinationals that must increasingly comply with foreign antitrust regimes as well.⁵¹³ Variations between the federal and state interpretations of federal law (as well as state-by-state differences) mean that after *Hartford Fire*, transnational businesses will be compelled not only to conform to the most restrictive national regime, but also to "the levels set by the most restrictive state interpretation of federal law."⁵¹⁴

Apart from these cumulative and incremental concerns, the distinctive nature of state enforcement policies also makes heeding legitimate foreign interests more difficult. The states' sharpest critics accuse them of being motivated by treble damages⁵¹⁵ or even craven political opportunism.⁵¹⁶ Viewed more benignly, states are

511. *But cf.* Wise, *supra* note 123, at 32 (noting that "state enforcers have tried to block some mergers that the federal government did not challenge, and they have brought actions against vertical restraints that the federal enforcers probably would not have challenged").

512. Peters, *supra* note 508, at 52 ("[State] officials have begun to file cases of potential national significance in state courts, a practice that could fragment national policy and make the environment of business very uncertain."); Robert Bell, *States Should Stay Out of National Mergers*, ANTITRUST, Spring 1989, at 37, 39 (arguing that "[t]he upshot of dual enforcement is to permit a single state or group of states to make judgments about transactions that affect the national economy. . . . State enforcement imposes direct costs and delay on transactions state attorneys general challenge, and additional uncertainty (and therefore indirect costs) on all transactions.").

513. Wise, *supra* note 123, at 63; *see also supra* text accompanying note 5 (noting burdens).

514. Ernest Gellhorn, *States' Rights in Regulation of Local Conduct*, 2 ANTITRUST REP. 6 (1989). For some commentators, it follows that states may engage in a "race to the bottom" to establish the most restrictive federal and state-law requirements. Flexner & Racanelli, *supra* note 122, at 532.

515. The clearest financial incentive, to be sure, is to achieve damages on behalf of the state's residents, rather than for the state government itself. 1999 *Roundtable*, *supra* note 139, at 466-67 (remarks of Thomas Greene) (defending redundancy of federal and state authority by noting that "the major difference is the fact that we are going for damages and relief for the actual victims of the conduct"). Some states do, however, enjoy the benefit of "revolving fund" provisions that enable attorneys general to retain damages they recover. Flexner & Racanelli, *supra* note 122, at 511.

516. *See* Peters, *supra* note 508, at 52 (arguing that increase in state enforcement "is in

certainly attuned to public policy considerations other than consumer welfare, such as local employment and local competitors.⁵¹⁷ Even where this happens to coincide with foreign enforcement philosophies, state promotion of such values is unlikely to spill over to foreign jurisdictions, and neither are any innovations state-based experimentation may generate in the administration of U.S. antitrust law; foreign parties, for their part, may feel particularly vulnerable to the more subjective elements of state antitrust analysis.⁵¹⁸ Finally, even where state and foreign enforcers agree that particular conduct or a particular transaction poses antitrust concerns, conflicts may arise over state cherry-picking.⁵¹⁹

part a function of the populist appeal of this activity and the political capital it can build for state attorneys general (elective officials in almost all states)"); Posner, *supra* note 503, at 940-41 (charging that the states are "too subject to influence by interest groups that may represent a potential antitrust defendant's competitors"); cf. Lande, *supra* note 138, at 1065 (citing authorities); *id.* at 1067-68 (noting difficulty in documenting instances of parochial merger enforcement). *But see* Jesse W. Markham, Jr., *20 Davids vs. Goliath*, INTELL. PROP. MAG., June 1998, LEXIS, NEWS Library, By Individual Publication/Intellectual Property Magazine File (defending state attorneys general from allegations of political motivation).

517. Brodley, *supra* note 496, at 41-42 (noting preoccupation of state antitrust enforcers with labor, employment, consumer, and tax issues, and motivation to focus on local rather than national benefits); Ginsburg & Angstreich, *supra* note 5, at 228 ("At bottom, the states are more likely to be concerned with a merger's local impact upon jobs, and may also be influenced by concern for a local competitor; neither consideration enters into the calculus at the national level.").

518. There is some evidence that antitrust enforcement reacts to the threat posed by foreign competition. See William F. Shughart II et al., *Antitrust Enforcement and Foreign Competition*, in *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* 179 (Fred S. McChesney & William F. Shughart II eds., 1995); see also Guzman, *supra* note 10 (describing selfish interests of national participants in international antitrust); cf. *supra* note 294 (observing antidemocratic nature of extraterritoriality). It seems plausible to suppose that the less direct the connection between a party and a regulatory jurisdiction, the less likely the jurisdiction is to perceive any offsetting benefits from the party's economic activity—and the more likely it will be to intervene, particularly when a local competitor is at stake. Posner, *supra* note 503, at 941 ("A situation in which the benefits of government action are concentrated in one state and the costs in other states is a recipe for irresponsible state action.").

519. E.g., Stephen Labaton, *From the Pipeline to the Courtroom: Gap on BP Amoco-ARCO Deal Is Wide*, N.Y. TIMES, Jan. 4, 2000, at C1, C13 (noting that in BP Amoco/Arco merger, "[t]o satisfy the states, the two oil companies have offered a variety of benefits—what one lawyer has called 'grease'—that have nothing to do with antitrust issues," including "pledg[ing] to spend at least \$15 million to clean up 'orphan' environmental sites caused by other companies," giving "\$2 million annually, in perpetuity, to the University of Alaska . . . rais[ing] their charitable contributions in California by more than 25 percent, to at least \$100 million over the next decade," and pledging to California's governor to "continue ARCO's

The *Hartford Fire* case hints at some of the problems. The lawsuit arose after local governments, experiencing difficulties in obtaining liability coverage, complained to their state attorneys general, who filed suit when the federal government declined to take action.⁵²⁰ According to the states, the federal government's inaction was due to its flawed analysis of the prospects for collusion in the insurance industry.⁵²¹ To the foreign insurers and their governments, on the other hand, the states' intervention was politically tinged, and observers considered the lawsuit as one part of the tort reform movement.⁵²² The result, in any event, was that the domestic and foreign insurers paid the states \$36 million to settle the claims after the Supreme Court decision, including the costs of the states' legal action.⁵²³

Particularly in the wake of *Hartford Fire*, state authority seems likely to make national compliance with antitrust comity more difficult. Cooperative investigations and information sharing may pose some difficulties.⁵²⁴ Conflicts seem more likely regarding

program of providing gasoline at lower prices than competitors"); see also Paul Merolli, *California Plans Probe of Super-Major Mergers*, OIL DAILY, Nov. 23, 1999 (reporting BP concessions to California to early-phase out of gasoline additive and to retain Arco's discount gasoline pricing strategy); *id.* (describing reported Exxon concessions to California, including divestiture of refinery and 300 retail gasoline stations).

520. Henry J. Reske, *Was It Collusion or Just Good Business?: The Liability Insurance Crisis Revisited*, A.B.A. JOURNAL, May 1993, at 76; Lawrence M. Fisher, *States and Insurance Industry Battling on Liability Coverage*, N.Y. TIMES, Mar. 23, 1988, at A1.

521. Michael F. Brockmeyer, *State Antitrust Enforcement*, 57 ANTITRUST L.J. 169, 170 (1988) ("The Justice Department declined even to investigate this industry, purportedly because the Federal Trade Commission, during a brief investigation, failed to uncover any evidence of collusion and because 'collusion is highly unlikely' in unconcentrated industries like the property and casualty insurance industry.") (quoting Letter from Assistant Attorney General Douglas H. Ginsburg to Jay Angoff (Apr. 22, 1986)).

522. Reske, *supra* note 520.

523. NAAG ANTITRUST REP., Sept./Oct. 1994, at 1.

524. To the extent that states possess information, they do not appear bound to share it with foreign authorities; at the same time, they may have access to information obtained by U.S. officials. This was an evident difficulty under "soft" bilateral cooperation agreements, which did not purport to change existing U.S. law. See Dennis A. Yao & Joseph G. Krauss, *Prospects for Harmonization of United States and European Union Antitrust Laws Concerning International Strategic Alliances*, in INTERNATIONAL HARMONIZATION OF COMPETITION LAWS 427, 451 n.124 (Chia Jui Cheng et al. eds., 1995) (noting that federal-state agreements to share information "might have some impact on what information is shared under the 1991 US-EC Bilateral—for example, if the European Commission provides information to either of the US agencies, can (or will) that information be then transmitted to individual state agencies?"); see also *supra* text accompanying notes 82-89. It may or may

enforcement and remedial matters. Because states have different visions of the public interest and different constituencies, they may find it difficult to coordinate with the federal government and its foreign counterparts—even assuming that they can cooperate among themselves.⁵²⁵ The conflict is inherent. States tend to

not persist under the IAEAA. By its terms, the Act permits the disclosure of confidential information received from the federal agencies (and, reciprocally, from foreign authorities) so long as it is "essential to a significant law enforcement objective," subject to careful review of any requests and the express consent of the authority providing the information. 15 U.S.C. § 6211(2)(E)(ii) (2000); e.g., 1999 U.S./Australia Agreement, *supra* note 72, art. VII(c). Even with an IAEAA agreement in place, foreign authorities may have cause for concern. See Laraine L. Laudati & Todd J. Friedbacher, *Trading Secrets—The International Antitrust Enforcement Assistance Act*, 16 J. INT'L L. BUS. 478, 482 (1996) (arguing that "the IAEAA does not relieve the DOJ/FTC of other obligations to reveal information," as it "leaves open some avenues for discretionary release of information to other parties, including state attorneys general"); *id.* at 485-86 (noting that federal agencies might retain the right to refuse requests for information provided by a foreign partner); ICPAC Hearing (April 22, 1999) (testimony of Philip Proger, Chair, Antitrust Section, American Bar Association) ("While the existence of private litigation and multiple sovereigns does not make mandated confidential disclosure impossible, it does complicate the process."), available at <http://www.usdoj.gov/atr/icpac/2601.htm>. The United States, for its part, is concerned that the European Commission will share information with the Member States. E.g., ICPAC FINAL REPORT, *supra* note 1, at 192.

Most confidentiality problems will probably be relieved by waivers, which presumably facilitated the investigation into the MCI/WorldCom merger by the Justice Department, European Commission, and ten U.S. states. Press Release, U.S. Department of Justice, Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell Its Internet Business (July 15, 1998), available at http://www.usdoj.gov/atr/public/press_releases/1998/1829.htm. But the availability of waivers does not do away with the costs of information sharing for foreign parties and governments. While some argue that the United States should make every effort to secure permission to share transaction information with cooperating states, their observation that "it would seem peculiar" for companies to balk at granting permission, Ginsburg & Angstreich, *supra* note 5, at 234 & n.67, simply illustrates its coercive nature. The MCI/WorldCom case, moreover, illustrated some of the more unfortunate features of state involvement. Over half of the states with merger authority quickly approved, but Virginia and South Carolina announced their reservations at conference facilities provided by GTE, a competitor of the merged entities and a disappointed suitor. Mike Mills, *MCI-WorldCom Deal Review Requested*, WASH. POST, Mar. 13, 1998, at F3; Rebecca Sykes, *Attorneys General Urge Scrutiny of MCI-WorldCom Merger Plan*, INFOWORLD DAILY NEWS, March 12, 1998, Lexis, News Library, NewsGroup file.

525. In some cases, like the Microsoft or MCI/WorldCom matters, state disagreement simply means that some drop out of further proceedings—potentially at a cost. See *supra* note 524; see also Viveca Novak, *The Company Courts the A.G.s*, TIME, Nov. 22, 1999, at 66 (noting that South Carolina dropped off the lawsuit after Microsoft helped fund a new group, the Republican Attorneys General Association, and afterward Microsoft donated money to the South Carolina attorney general's reelection campaign). But that is not invariably so. In the BP/Amoco merger, California, Oregon, and Washington sued to enjoin the deal, while Alaska intervened on the private parties' behalf. David Pike, *California Joins Fray By Filing*

enhance the total stability of U.S. enforcement policy over time, thus making it more predictable for foreign firms and antitrust authorities alike.⁵²⁶ But this is of diminished benefit in international matters, as the proliferation of foreign antitrust authorities, and expanded notions of foreign antitrust jurisdiction, make it likely that global practices and transactions will be caught by more than one national authority. More to the point, this *internal* complementarity, which tends to ensure a constant level of American antitrust enforcement, diminishes the ability of the U.S. government to ensure *external* complementarity, such as by suspending antitrust enforcement in deference to foreign authorities tendering a request for traditional comity.⁵²⁷ Even if that has not measurably slowed bilateral agreements and the development of a comity principle, it may retard deeper efforts at

Suit to Fight Proposed BP-Arco Deal, OIL DAILY, Feb. 9, 2000, available at 2000 WL 10340919. In contrast to the California attorney general, who is separately elected, the Alaskan attorney general was appointed by the governor, who favored the deal given negotiated concessions—much more than did the state legislature. *BP Amoco Acquisition Continues to Concern Antitrust Regulators*, HOUSTON CHRON., Nov. 13, 1999, available at 1999 WL 28707789.

526. This is demonstrated most dramatically by the surge in enforcement efforts during the 1990s, when federal efforts were flagging. See *supra* text accompanying note 498 (describing complementary trends); cf. 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, 227 (1983) (claiming that private antitrust enforcement helps to ensure “stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature”). But cf. Posner, *supra* note 503, at 940 (suggesting that states commonly pursue actions following or overlapping with federal enforcement).

527. ICPAC Hearings, Mar. 17, 1999, at 24-25 (testimony of William E. Kovacic) (“The specific problem ... is how to achieve international consistency and harmonization when there are major possibilities for divergence within a single country’s competition policy system, broadly defined. If you can’t define with a certain amount of precision and confidence a national competition policy, it makes it difficult to achieve harmony with other countries, and indeed limits the ability to achieve predictability in the decisions made by foreign parties undertaking transactions in a single country.”), available at <http://www.usdoj.gov/atr/icpac/2495.pdf>; Guzman, *supra* note 10, at 1541 (arguing that division of U.S. enforcement authority “makes it difficult for the United States government to bind itself to any particular enforcement strategy”).

cooperation,⁵²⁸ and even endanger continued observance of already precarious norms.

b. Resolving Comity's Local Application

Notwithstanding these concerns, it remains difficult to distinguish categorically between private and state antitrust enforcement based on their respective impacts. The number of state actions is relatively small,⁵²⁹ and state attorneys general are certainly more likely—whatever else may be said of them—to take some version of the public interest into account, presumably including international comity.⁵³⁰ In neither case can the U.S. government guarantee that requests from foreign authorities will be heeded.

One might yet find some basis in the international law of antitrust comity for distinguishing the states, but it would be slender. Unlike private plaintiffs, states have not been singled out for distinct treatment in any bilateral cooperation,⁵³¹ and the inference that they are directly subject to the terms of those agreements seems weak. The failure to address their function directly is unsurprising. The U.S. system of antitrust enforcement is unique in the degree to which it permits redundant enforcement of national law by subnational authorities, let alone in the degree

528. *E.g.*, ICPAC Hearing, *supra* note 524 (testimony of Donald I. Baker) ("As I understand it, we've had some trouble getting people interested in IAEAA agreements and so forth. It seems to me that one of the possibilities is that we could include in an international treaty negotiation the possibility of trumping the states on merger enforcement decisions. So we're saying to Germany or somebody like this, if you have one of these new modern antitrust agreements, one of the things we'll give you is the treaty will say there won't be any local enforcement, non-federal enforcement, and under the Migratory Bird case (*Missouri v. Holland*), the federal government can trump the states."); Guzman, *supra* note 10, at 1541; Wood, *supra* note 10, at 306-07.

529. 1997 Roundtable, *supra* note 507, at 815-16 (remarks of Kevin J. O'Connor, Ass't Att'y Gen., State of Wis., and Chair, NAAG Multistate Antitrust Task Force) (estimating that eighty percent of antitrust cases are brought by private parties, rather than government(s)).

530. See *supra* note 503 (citing representations by state officials that they heed comity); cf. Dam, *supra* note 130, at 327 (distinguishing "purely private parties" from federal officials, as public officials have no fees incentive, and are subject to ethics, financial disclosure, and congressional review).

531. See *supra* note 127 (noting treatment of private plaintiffs in 1982 U.S./Australia Agreement).

to which it permits them to reach international matters.⁵³² Even within the transnational European enforcement scheme, Commission supremacy over transnational matters is maintained by pre-emptive jurisdictional rules,⁵³³ relatively clear protocols,⁵³⁴ and constitutional principle.⁵³⁵ The Commission itself is advocating devolutionary reforms, but at pains to maintain the principles of uniformity and supremacy, and criticisms of the proposal suggest that still greater precautions may be in order.⁵³⁶ Particularly where adherence to an international agreement is at issue, Commission efforts at implementation—including cooperation with foreign authorities—appear to preclude interference by any national competition authority.⁵³⁷

532. *A.B.A. Report*, *supra* note 1, at 27 (noting practice in Canada and Mexico).

533. Article 9(1) of Council Regulation 17 provides that, subject to review by the Court of Justice, "the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty." Council Regulation No. 17 of 6 February 1962, art. 9, 1959-1962 O.J. SPEC. ED. 89. Article 9(3) further implies that once the Commission has initiated any relevant procedure, national competition authorities are ousted of jurisdiction to apply articles 85(1) or 86. As noted below, the consequences once the Commission has finally acted are somewhat less clear. *See infra* note 535.

The Merger Regulation likewise establishes exclusive jurisdiction. Council Regulation (EEC) No. 4064/89 of December 21, 1989 on the Control of Concentration Between Undertakings, art. 21(1), 1989 O.J. (L 395)1 (establishing exclusive Commission jurisdiction under the regulation); *id.* art. 21(2) (providing that "[n]o Member State shall apply its national legislation on competition to any consideration that has a Community dimension," subject to limited exceptions).

534. Commission Notice on Cooperation Between National Competition Authorities and the Commission, 1997 O.J. (C 313) 3 [hereinafter Commission Notice]. For EC competition law to apply, the activity or transaction in question must have an appreciable effect on interstate trade, *see id.* ¶¶ 27-28, at 6-7; within that class of cases, the Commission proposes that national competition authorities scrutinize only those cases involving effects "felt mainly in their territory and which appear upon preliminary examination unlikely to qualify for exemption under Article 85(3)[,]" *id.* ¶ 26, at 6, in the ordinary course leaving to the Commission "cases involving businesses whose relevant activities are carried on in more than one Member State." *Id.* ¶ 24, at 6.

535. As noted in the Notice on Cooperation with National Competition Authorities, the Commission takes the position that where it has individually exempted an arrangement, or excused it under a so-called block regulation, national competition authorities are not at liberty to condemn it through the application of stricter national law (or, for that matter, stricter interpretations of Community law). Commission Notice, *supra* note 534, ¶¶ 17-19, at 5. The issuance of a comfort letter, which does not even bind the Commission itself, is to be given weight dependent on its terms. *Id.* ¶¶ 17, 20-22, at 5-6.

536. *See generally* European Commission, White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty 35-36 (Programme No. 99/027, Apr. 28, 1999).

537. IAN MACLEOD ET AL., *THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES* 129

The key to understanding the states' unique role, instead, involves their standing under more general precepts of international law—as determined in large part by the U.S. Constitution. International law is ordinarily agnostic as to a nation's legal order, and accordingly leaves to U.S. law the question of whether states may exercise national regulatory jurisdiction.⁵³⁸ But the federal government retains ultimate responsibility for state compliance with international law unless it has specifically been discharged.⁵³⁹ The federal agencies cannot, in short, shirk their responsibility for abiding by comity through the simple expedient of relegating enforcement responsibility to the states.

That the federal government retains responsibility is not, as it develops, due to some immutable characteristic of international law—subnational governments do occasionally enjoy the authority to conduct international relations⁵⁴⁰—but instead stems from the U.S. Constitution, which purposefully deprives the states of any authority to conduct foreign relations.⁵⁴¹ The scope of this exclusive

(1996); see also Waller, *supra* note 79, at 369 (arguing that cooperation by Commission with foreign authority under valid cooperation agreement enforcement “may preempt any inconsistent legislation of the Member States, including any inconsistent national blocking legislation”).

538. RESTATEMENT (THIRD), *supra* note 17, § 402 cmt. k.

539. Draft Articles on State Responsibility (Second Reading), *supra* note 383, art. 5 (“The conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”); *id.* art. 7 (“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”); RESTATEMENT (THIRD), *supra* note 17, § 207 cmts. a, d, & reporters’ note 3; *id.* § 402 cmt. k; *id.* § 321 cmt. b; IVAN BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM 83 (1973); IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 451 (5th ed. 1998).

540. *E.g.*, BERNIER, *supra* note 539, at 105-06 (“As far as federal states are concerned, the decisive factor [in determining sovereign responsibility], in each particular instance, appears to be the federal constitution itself.”).

541. RESTATEMENT (THIRD), *supra* note 17, § 201 cmt. g (“A State of the United States is not a state under international law since under the Constitution of the United States foreign relations are the exclusive responsibility of the Federal Government.”); *e.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . [T]he interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local

federal authority is controversial.⁵⁴² It has been intimated, for example, that state activities are barred whenever they adversely affect foreign relations,⁵⁴³ though that principle has routinely been ignored.⁵⁴⁴ It is particularly difficult to imagine its application to

interference.”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[I]n respect of our foreign relations generally, state lines disappear. As to such purpose the State . . . does not exist.”); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1221 n.331 (2000) (citing additional cases). See generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (2d ed. 1996) (“At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist.’”); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-6, at 230 (2d ed. 1988) (“[S]tate action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void”); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1632 (1997) (noting “a remarkable consensus about the legitimacy of the federal common law of foreign relations”); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832, 832-33 (1989) (“The consensus today is that the central Government alone may directly exercise power in foreign affairs. Most current controversy about the foreign affairs power concerns its distribution among the federal branches, not whether it resides in the nation rather than the states.”).

542. E.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 860-70 (1997); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1410-24 (1999); Goldsmith, *supra* note 541 *passim*; A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 20-27 (1995).

543. This is one permissible reading of *Zschernig v. Miller*, 389 U.S. 429 (1968), in which the Supreme Court struck down an Oregon intestacy statute as applied by the state supreme court to limit an East German citizen’s right to inherit personal property as an “intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.” *Id.* at 432; see also *id.* at 441 (highlighting the need to avoid interfering with “the power of the central government to deal with [foreign relations]”). The grounds were unclear, but the decision might also be read as turning on Oregon’s attempted arrogation of foreign affairs authority, e.g., *id.* at 437-38 (“As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the ‘cold war,’ and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts.”); *id.* at 439 (explaining that the purpose of one provision of the Oregon statute “was to serve as ‘an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon’”) (citation omitted), or the statute’s effects, *id.* at 441 (identifying Oregon law as having a “direct impact upon foreign relations”); *id.* at 440 (“It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way.”).

544. *Zschernig* was handicapped from the onset by its uneasy coexistence with *Clark v. Allen*, 331 U.S. 503 (1947)—which had upheld a similar statute and which *Zschernig* did not pretend to overrule—and has been ignored in a variety of cases since then. E.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts procurement law limiting purchases from companies doing business with Burma (Myanmar)

state invocation of Sherman Act jurisdiction: unlike typical state activities touching on foreign affairs, state attorneys general prosecuting international matters are acting in a fashion facially licensed by Congress, making their function objectionable less in federalism terms than as a matter of the separation of powers.⁵⁴⁵

The core of the problem, rather, lies in the inability of states to practice antitrust comity in their own stead. Private plaintiffs (and defendants) may freely negotiate with foreign antitrust authorities, assuming that no one resuscitates the Logan Act.⁵⁴⁶ But states cannot do likewise. Relevant constitutional text,⁵⁴⁷ case law,⁵⁴⁸ and political practices⁵⁴⁹ indicate that state bargaining with foreign

on statutory preemption grounds); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994) (holding that the Constitution permits application of California's corporate franchise tax to a multinational banking enterprise). Some suspect, accordingly, that it effectively has been overruled. Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 678 n.23 (1998); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1266 (1999). *But cf.* Edward T. Swaine, *Crosby as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001) (arguing that *Crosby* conceals subtle inclination toward national monopoly on foreign relations).

545. *Cf. United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 266-67 (N.M. 1980) (rejecting *Zschernig* challenge to private action seeking to enforce New Mexico Antitrust Act against American corporation, notwithstanding sovereign interests of Canadian government, given that state laws were consistent with federal laws, did not single out foreign government for criticism, and fell within legitimate interests of state government).

546. Act of Jan. 30, 1799, ch. 1, 1 Stat. 613 (codified as amended at 18 U.S.C. § 953 (1994)) (criminalizing conduct by unauthorized U.S. citizens designed to influence foreign governments or officials relative to disputes or controversies with the United States, or to defeat its measures).

547. U.S. CONST. art. II, § 2, cl. 2 (conferring the treaty power on the president and the Senate); *id.* art. I, § 10, cl. 1 (prohibiting states from entering into any treaty, alliance, or confederation); *see also id.* art. II, § 2, cl. 2 (entrusting president to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint Ambassadors [and] other public Ministers and Consuls"); *id.* art. II, § 3 (authorizing president to "receive Ambassadors and other public Ministers"). *But see infra* text accompanying notes 551-57 (discussing state authority to enter into compacts).

548. *Seminole Tribe v. Florida*, 517 U.S. 44, 150 (1996) (Souter, J., dissenting) (citing the embassy prohibition as an example of how "even the Articles of Confederation" diminished state independence and sovereignty); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575-76 (1840) ("It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 11 (1824) ("By the confederation ... [n]o state ... could send or receive an embassy; nor make any treaty; nor enter into any compact with another State, or with a foreign power; nor lay duties, interfering with treaties which had been entered into by Congress.").

549. Swaine, *supra* note 541, at 1211-36.

powers is constitutionally preempted.⁵⁵⁰ There are, to be sure, exceptions, as suggested by the authority of states to enter into compacts with foreign powers;⁵⁵¹ state diplomacy may be permitted, for example, where it is unlikely to impact the national interest or the authority of the other states.⁵⁵² This makes it plausible, for example, that information sharing would not ordinarily be implicated.⁵⁵³ But the coordination of investigations and enforcement actions, as we have seen, runs a substantially greater risk of compromising the collective interest.⁵⁵⁴ As a constitutional matter, moreover, attempts to ameliorate the risk of conflicting state activities through NAAG coordination simply enhances the risk of undermining or displacing federal authority.⁵⁵⁵

550. As I argue elsewhere, this dormant treaty power further excludes ostensibly unilateral state activity that is in fact contingent upon the actions of foreign powers. *See id.* But one need not go so far in order to conclude that direct, state-to-nation bargaining over the exercise of state antitrust authority is constitutionally problematic.

551. While states are expressly prohibited from "enter[ing] into any Treaty, Alliance, or Confederation," U.S. CONST. art. I, § 10, cl. 1, they are permitted to enter, with permission of Congress, into an "Agreement or Compact" with a foreign power, *id.* cl. 3. Thus, even if we conclude that the states are precluded from negotiating toward the former class of pacts, it is less clear—though ultimately, I believe, the better view—that they are precluded from taking independent preparatory steps toward the latter. *See Swaine, supra* note 541, at 1194-98.

552. This test is spelled out at greater length in Swaine, *supra* note 541, at 1269-74; *see also* RESTATEMENT (THIRD), *supra* note 17, § 201 reporters' note 9 (contending that under the Constitution, states may make agreements of limited kinds with foreign powers with congressional consent, or without such consent if the agreements do not "impinge upon the authority or the foreign relations of the United States," and may not "exchange ambassadors and engage generally in relations with a foreign government").

553. This assumes, of course, that confidentiality restrictions can be overcome or avoided, and that foreign antitrust authorities regard a disclosure to one state attorney general as precedent for like disclosures (or at least not militating against them)—rather than considering there to be some cumulative ceiling.

554. *See supra* text accompanying notes 510-28.

555. Such activity requires congressional consent, if it is permissible at all. *Virginia v. Tennessee*, 148 U.S. 503, 520-21 (1893) (requiring consent for compacts "encroach[ing] . . . upon the full and free exercise of Federal authority"); *Waterfront Comm'n v. Constr. & Marine Equip. Co.*, 928 F. Supp. 1388, 1401-02 (D.N.J. 1996) (holding that the state Waterfront Commission Act requires consent because "[w]aterfront governance is closely related to interstate and foreign commerce, and unquestionably impinges on the supremacy of the federal government"). *Cf. Note, To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842, 858-59 (1989) (arguing that NAAG guidelines promote interstate cooperation on domestic matters in a fashion consistent with the Compact Clause).

The more plausible defense of state antitrust authority, instead, is that it has been sanctioned by federal law. Antitrust comity, it should be recalled, is a species of customary international law, and custom may be overridden.⁵⁵⁶ As a matter of constitutional law, too, otherwise suspect state foreign relations activities should be regarded as permissible where congressionally licensed, or where authorized by the president pursuant to delegated or independent constitutional authority.⁵⁵⁷

The question then becomes what federal law provides. The arguments under *Charming Betsy* for limiting the potential reach of federal antitrust authority are redoubled under *Ashwander* in light of the constitutional defects of state participation in antitrust comity.⁵⁵⁸ Even were one inclined to favor the presumption against preempting state authorities,⁵⁵⁹ the underlying values tend to backfire in the instant context. The privileges and immunities the states enjoy within a federal system make them, if anything, less acceptable participants under international law: if a state can defend itself against injunctive relief by a foreign nation on Eleventh Amendment grounds, the only domestic recourse for compelling compliance with antitrust comity would vanish.⁵⁶⁰

556. See *supra* text accompanying notes 307, 339.

557. Swaine, *supra* note 544, at 1274-77.

558. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (articulating rules for avoiding constitutional questions); see also *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.") (citation omitted); *accord id.* at 223-24 (O'Connor, J., dissenting); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (given that members of Congress are bound by and swear an oath to the Constitution, the Court will not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it"). But see, e.g., Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 72-74 (criticizing *Ashwander* approach to statutory construction as no less intrusive than judicial review of constitutionality).

559. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 176-77 (arguing that presumptions favoring and disfavoring preemption in foreign affairs are irreconcilable and should be discarded).

560. *Breard v. Greene*, 523 U.S. 371, 377 (1998) (suggesting that Paraguay's suit "might not succeed" in light of Eleventh Amendment immunity). As Professor Vázquez has suggested, *Breard* might be explained based upon a distinction between prospective and retrospective relief, at least if other cases are put to one side. Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 66-72 (1998). If so, it may be distinguishable from actions involving antitrust comity, which by their nature seek redress

For these reasons, the case for constraining state enforcement of federal antitrust law in light of antitrust comity is more persuasive than for private attorneys general. Devising the appropriate solution remains difficult. As with private attorneys general, barring state enforcement in international matters outright would be problematic. Congress typically avoids preempting state enforcement,⁵⁶¹ making it unappealing to read it as broadly doing so in the international context.⁵⁶² Any such approach would also place enormous and ungovernable stress on our ability to segregate international matters, when one of the signal virtues of the reasonableness approach was the diminished emphasis it placed on extraterritoriality as the touchstone for regulatory conflicts.⁵⁶³

The methodology for local international law suggests that progress may be made by capturing the conflict more precisely, and by recalling that decisive judicial solutions are not the only recourse. Antitrust comity requires at a minimum that the United States possess the capacity to *consider* foreign authorities' legitimate interests while enforcing its antitrust law, including by considering forgoing antitrust enforcement altogether; state standing to enforce that same law, however, deprives the federal agencies of any sovereign authority to provide any such guarantee. A positive step, then, would be to establish a mechanism for ensuring that the states do in fact consider such interests—such as by briefing the relevant state attorneys general concerning the requests, preferably according to a formal routine like those

for continuing violations. *See supra* text accompanying notes 472-73.

561. SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 13 (1988).

562. *Cf. Ginsburg & Anstreich, supra* note 5, at 228. Precluding state, but not federal, enforcement poses the risk of inconsistent interpretations, though that is not necessarily fatal. *Cf. United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 10 (1997) (explaining that, while "[i]t is, of course, generally true that, as a principle of statutory interpretation, the same language should be read the same way in all contexts to which the language applies," but noting that the basis might exist for treating civil and criminal antitrust enforcement differently) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997)) (depending on context, statutory term may have different meanings in different sections of single statute); 3 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 60.04 (5th ed. 1992) (statutes with both remedial and penal provisions may be construed liberally in remedial context and strictly in penal context).

563. *See supra* text accompanying note 315.

established for federal-state coordination in domestic matters.⁵⁶⁴ Although foreign governments may not relish the prospect of disclosing their interests in such a way, even via an intermediary, it may be a small price for improving the chances that their legitimate interests will be respected.

Ensuring the adequacy of state consideration raises a more difficult question, in part because international law and domestic law start to diverge. For foreign governments, the division of enforcement authority will likely remain troublesome to the extent it materially undermines U.S. compliance.⁵⁶⁵ And having the federal agencies interpose post hoc objections in cases where antitrust comity has not been observed is unlikely to be enough, as the experience with such filings in private actions would suggest.⁵⁶⁶ In purely domestic matters, at least, the federal agencies claim only the power to cajole their state counterparts,⁵⁶⁷ and even lack deference in construing the jurisdictional reach of U.S. antitrust law.⁵⁶⁸ The agencies would surely argue for a more privileged position in international matters,⁵⁶⁹ but it is far from clear that they

564. *E.g.*, Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (Mar. 11, 1998), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,420 (1998) [hereinafter Merger Protocol] (providing for consultation between federal and state officials regarding simultaneous merger investigations).

565. State deviation from the federal government's preferred position, without more, is not delictual; so long as the state complies with the international norm, the only basis for complaint would be internal and constitutional in nature.

566. *See supra* text accompanying note 493; *see also* text accompanying note 494 (describing failure of self-representation by foreign governments).

567. *E.g.*, Merger Protocol, *supra* note 564, § IV (noting that while "[t]o achieve the full benefits of cooperation it is imperative that federal and state antitrust enforcement agencies collaborate closely with respect to the settlement process. . . . [E]ach federal and state governmental entity is fully sovereign and independent . . .").

568. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *see also* Bradley, *Chevron Deference*, *supra* note 34, at 670-71 & n.81. *But cf.* *United States v. Kinder*, 64 F.3d 757, 771 (2d Cir. 1995) (Leval, J., dissenting) (citing Merger Guidelines as example of instance in which courts "borrow" agency guidelines, even though *Chevron* deference is not warranted).

569. The Justice Department, at least, takes the position that it is entitled to deference in considering the question of its own compliance with international comity. *See supra* text accompanying note 250. In the antitrust context, in particular, the executive branch could claim that its inherent authority is enhanced by the bilateral agreements to which the United States is a party, as well as its negotiating authority under the IAEAA. But these arguments are by no means decisive. The bilateral agreements were not intended to have legal force domestically, *see supra* text accompanying notes 84, 103, and would in any event

could overcome both state standing to enforce the law and judicial authority to resolve controversies surrounding the law's application.

The better solution, on balance, would be to involve the states in the actual mechanics of antitrust comity through the design of a federal-state international protocol.⁵⁷⁰ In furtherance of their own duties under international law, the federal agencies would request that the states inform them of any state actions potentially touching on the legitimate interests of nations owed antitrust comity.⁵⁷¹ The states would also be obligated to comply in good faith with federal requests to abstain from or modify their enforcement decisions where the national interest, and international obligations, were served. Either function would be promoted by an agreed set of criteria for identifying potentially relevant international matters.⁵⁷²

States may resist capitulating to federal requests, particularly in furtherance of foreign interests, but there is some reason to think that any objections would be subdued. The obligation to participate in such a scheme is derived from international law, and one may assume that those same states pledging at present to observe international comity would be willing to abide by its more modest antitrust variant as well.⁵⁷³ Cooperation may also benefit the states. Just as national governments are encouraged to cooperate by the prospect that their own legitimate interests will receive greater

be retarded by the uncertain legal effect of executive agreements, *see* Swaine, *supra* note 541, at 1157-58 & nn. 108-09 (reviewing case law and conflicting commentaries). IAEAA authority, on the other hand, is essentially dormant.

570. *Cf.* Lande, *supra* note 138, at 1072-94 (proposing "Federalism Guidelines" to deal with domestic conflicts); Robert M. Langer, *Should the Antitrust Division, the FTC, and State Attorneys General Formally Allocate the Market for Antitrust Enforcement?*, ANTITRUST REP., Oct. 1998, at 2, 4 (proposing further federal-state protocol).

571. This would reciprocate the Attorney General's obligation to notify states respecting potential damage claims they may pursue. 15 U.S.C. § 15f (2000); *see* ANTITRUST DIV. MANUAL, *supra* note 122, at VII-10 (construing statute to require notification to relate solely to potential state damages actions, and noting that in determining whether to notify, "the Division considers, among other relevant factors, the factual circumstances of the alleged violation, and the posture of the state as a potential damage claimant under existing law, and the likely effect of the alleged violation on cognizable state interests").

572. Provisionally, including those matters involving significant foreign conduct, mergers involving parties incorporated abroad, substantial foreign discovery or remedies involving foreign conduct, or cases in which foreign antitrust authorities are actively or potentially involved.

573. *See supra* text accompanying notes 510-28 (noting state representations that they heed comity, as well as limitations on their ability to do so independently); *cf. supra* note 377 (noting consensus that obeying international law is far more common than its violation).

attention, state attorneys general may properly be informed that the espousal of their interests—whether in the form of diplomatic requests for deference to their actions in appropriate cases, or assistance in their efforts through the exercise of positive comity—is contingent upon their acquiescence in comity's constraints as well.⁵⁷⁴ More bluntly, state acquiescence in a cooperative scheme may avoid adding fuel to recurring calls for a broader legislative retrenchment of their prerogatives,⁵⁷⁵ or even indirect commandeering of their cooperation through conditional preemption or leveraging of the federal funds presently provided for state antitrust efforts.⁵⁷⁶

Although the essentially voluntary nature of this arrangement is a far cry from the more authoritative reasonableness norm, it closely resembles the underlying international norm—which

574. States might also be encouraged to cooperate by providing them with a more active role in a limited class of matters, such as in cases involving U.S. activity or assets localized to a particular state, or where the principal grievant is a state or local governmental purchaser of goods or services. In such cases, state personnel might be appointed to assist Justice Department or FTC personnel; as in federal/state criminal protocol, such procedures would reflect the combination of local interest and lack of genuine local authority.

575. For proposed reforms, see Lande, *supra* note 138, at 1061 (citing conclusion of ABA Antitrust Section that "[i]t is probably fair to conclude that a strong majority of the antitrust bar and academic community favors exclusive federal merger enforcement except for purely local intrastate mergers") (quoting *Comments of the ABA Section of Antitrust Law with Respect to the Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings*, 59 ANTITRUST L.J. 245, 255 (1990) (alteration in original)); Posner, *supra* note 503, at 940 (suggesting that states should be "stripped of their authority to bring antitrust suits, federal or state, except under circumstances in which a private firm would be able to sue, as where the state is suing firms that are fixing the prices of goods or services that they sell to the state"); Zimmerman, *supra* note 505, at 366 (proposing legislation that "reaffirms the federal policy regarding mergers and requires state attorneys general to make enforcement decisions based on this federal policy," and permitting the agencies to withdraw funds from recalcitrant states); see also *supra* note 485 (discussing DeConcini proposals).

576. See *Printz v. United States*, 521 U.S. 898, 917-18 (1997) (holding unconstitutional statutory direction of state enforcement, but distinguishing conditional programs); *id.* at 960 (Stevens, J., dissenting) (noting that majority holding preserves exceptions by which Congress can "require the States to implement its programs as a condition of federal spending, in order to avoid the threat of unilateral federal action in the area, or as a part of a program that affects States and private parties alike") (citations omitted). The fact that only state *evaluation* of foreign antitrust concerns would be required, too, may be redemptive. *Id.* at 925-26 (interpreting *FERC v. Mississippi*, 456 U.S. 742 (1982), as construing the relevant statute to "contain only the 'command' that state agencies 'consider' federal standards, and ... only as a precondition to continued state regulation of an otherwise pre-empted field").

addresses national governments with a similar respect for their sovereign authority over enforcement decisions, and entices them to participate by subordinating the strongest objections to extraterritorial jurisdiction. By replicating international antitrust comity on the domestic level, with the federal government as the intermediary, states may have an incentive to contribute to the enrichment, rather than the curtailment, of emerging international law.

Involving states in antitrust comity may, I recognize, have the unintended effect of emboldening them to assert greater jurisdiction over international matters. But they already perceive themselves as having that authority,⁵⁷⁷ and estranging them from any official involvement may simply mean that their decisions are less informed and less sensitive to international considerations. Foreign antitrust authorities, similarly, may resent any requests from the states for assistance that might be conveyed, or prefer to avoid considering suspending their own activities in deference to the states.⁵⁷⁸ At the same time, excluding the states entirely might cause those authorities to lose the ability to call upon the states to assist in their own investigations, and diminish their assurance that American antitrust enforcement will be suspended as a reflection of traditional comity.

Failing to engage the states in the enterprise of comity, finally, may simply lead to self-help. The still developing Microsoft matter could prove illustrative. As the U.S. litigation moves into end game, to what appears to be the incomplete satisfaction of the state plaintiffs, the European Commission's investigation is just (re)awakening—and focusing on products and practices of keen interest to some states.⁵⁷⁹ According to current speculation, the new EC objections are likely to bolster the interest of the state attorneys general in attacking the same practices stateside—and potentially even to pressure the Justice Department into doing likewise.⁵⁸⁰

577. See *supra* note 139.

578. To the extent that foreign antitrust authorities like the European Commission have particular objections to state involvement, they could be discussed in the context of the ongoing fine-tuning of antitrust comity. See Seiberg, *supra* note 151.

579. See *supra* text accompanying notes 28-30.

580. Peter Spiegel, *Brussels' Microsoft Probe Moves Closer to US*, FIN. TIMES, Aug. 31, 2001, at 4.

Regardless of the Department's policy preferences on that particular issue, it is presumably in the U.S. interest to coordinate with Europe—whether by combining forces against the putative offenses, or demurring and seeking to reconcile the European proceedings with U.S. remedies in the original matter—instead of choosing a more reactive approach, and permitting the development of new and potentially divisive discourses on the subnational and international planes.

4. Coda: State Antitrust Law and the Lessons for Antitrust Comity

States also have considerable authority by virtue of state antitrust laws, and considering the relationship between that authority and the federal enforcement of antitrust law demonstrates the inevitably precarious nature of jurisdictional restraints—domestic or foreign. State law claims usually wind up in federal court,⁵⁸¹ seemingly positioning the federal judiciary to rationalize antitrust comity,⁵⁸² but congruity in a federal system may be more difficult to ensure than that. If customary international law is directly binding federal law, equivalent to treaties and statutes, then states must of course conform their state laws to it.⁵⁸³ If, on the other hand, custom merely influences the interpretation of the federal antitrust statutes, it arguably has little purchase on state law, no matter where it is applied.

At the very least, the consensus on *Charming Betsy* fractures on this question.⁵⁸⁴ One may still infer preemptive limits from federal

581. ANTITRUST DIV. MANUAL, *supra* note 122, at VII-8 (explaining “the practice of most state attorneys general to file cases in federal court with pendent state antitrust claims” as stemming from a desire to take advantage of federal court expertise); accord Edward A. Cavanagh, *New York Antitrust Bureau Pursues Mandate To Represent State Interests In Fostering Competitive Environment*, 72 N.Y. ST. B.J., Jan. 2000, at 38, 38-39 (explaining why New York state enforcers prefer federal to state court).

582. Cf. Wood, *supra* note 27, at 416 (arguing that, in contrast to systems emphasizing administrative authority, “[t]he multiplicity of authorized enforcers of [American antitrust] law ... has made the federal judiciary the only locus for the definitive coordination of substantive antitrust policy”); 1997 Roundtable, *supra* note 507, at 815 (remarks of Kevin J. O'Connor).

583. See *supra* text accompanying notes 336-38 (noting division of authority).

584. Only the internationalist conception clearly supports extension of *Charming Betsy* to state law. See Bradley & Goldsmith, *Federal Courts*, *supra* note 21, at 2273 (suggesting that canons like *Charming Betsy* “do not raise the same federalism concerns as the modern

law, particularly in the service of international norms,⁵⁸⁵ but the Supreme Court lately envisions a more limited role for federal courts in generating such rules.⁵⁸⁶ Where state antitrust law differs from federal law, at least—and does not differ so distinctly as to raise preemption issues—local international law may fail to authoritatively constraint state law enforcement not constrained of its own accord.⁵⁸⁷

The history of state antitrust law reminds us, however, how illusory jurisdictional limits may prove, and provides a useful account concerning the potential for judicial enforcement of international norms. Federal enactments have traditionally posed little preemptive constraint.⁵⁸⁸ Over half the existing states had

position because they presumably are not binding on state courts (or federal courts sitting in diversity) in their application of state law"); Bradley, *The Charming Betsy Canon*, *supra* note 34, at 533-36; see also Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 334 n.14 ("If all that is involved is using *Charming Betsy* to interpret state statutes, then the Supreme Court probably has no basis for requiring the states to go along."). But see Steinhardt, *supra* note 347, at 1114 n.45 (arguing that "the supremacy clause of the Constitution and the federal interest in relatively uniform interpretations of international law should support a *Charming Betsy* norm in these local contexts"). Other rationales may conceivably be mustered—state legislatures may, as an empirical matter, take international law into account, and federal and state courts may have cause to respect a separation of powers with regard to state legislatures—but none are immediately obvious. Bradley, *The Charming Betsy Canon*, *supra* note 34, at 534-35 (noting doubts as to the applicability of these warrants in the state-law context).

585. See Brilmayer, *supra* note 584, at 332-36 (arguing that "[f]ederal legislative silence should be understood as hostile to state efforts to violate international legal norms"); cf. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1292-311 & 1298 n.252 (1996); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1048 (1967); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 36-39, 54-59 (1985) (describing the principle of preemptive lawmaking as a potential warrant for federal common law); *id.* at 56 n.238 (identifying the federal common law of international relations as a possible example of preemptive lawmaking).

586. Cf. *Dickerson v. United States*, 530 U.S. 428, 438 (2000) (reasoning that application of *Miranda* rule to prosecution in state courts demonstrates its constitutional nature, since "[i]t is beyond dispute that we do not hold a supervisory power over the courts of the several States . . . [and that] [w]ith respect to proceedings in state courts, our 'authority is limited to enforcing the commands of the United States Constitution'" (quoting *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991)) (citations omitted); cf. Merrill, *supra* note 585 (distinguishing between federal common law that is binding on states in all respects, and that which is binding only on federal courts to the extent that they are construing federal rights and duties).

587. Some state statutes direct courts to construe the statutes in parallel to their federal counterparts, and some state courts have adopted the practice on their own initiative. LIFLAND, *supra* note 132, § 1.06, at I-25 to I-26.

588. Thomas Greene et al., *State Antitrust Law and Enforcement*, in 2 39TH ANNUAL

antitrust laws when the Sherman Act was adopted,⁵⁸⁹ Congress appears to have desired to supplement those laws,⁵⁹⁰ and the Supreme Court employs the presumption against preemption in areas traditionally regulated by the states.⁵⁹¹

The Sherman Act originally was adopted, however, largely out of the perception that the states lacked *constitutional* authority to regulate interstate or foreign commerce.⁵⁹² At the time, even nondiscriminatory state antitrust legislation was reviewed for consistency with the territorial limits on state authority imposed by the Commerce Clause⁵⁹³ and with due process limits on legislative

ANTITRUST LAW INSTITUTE 677 (PLI Corp. Law & Practice Course Handbook Series No. B-1050, 1998) (citing LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 479-96 (2d ed. 1988)).

589. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (citing Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. ANTITRUST SECTION 358, 363 (1962)).

590. *See, e.g.*, 21 CONG. REC. 2457 (1890) (remarks of Sen. Sherman) (declaring that proposed legislation would "supplement the enforcement of . . . statute law by the courts of the several States").

591. *ARC Am. Corp.*, 490 U.S. at 101 (upholding state antitrust law containing so-called *Illinois Brick* repealer, thus permitting state law to afford damages for indirect purchasers that was not available under federal law); *see also* *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (upholding state-law restrictions on price discrimination by oil companies that was permissible under Robinson-Patman Act). Given this context, it is perhaps unsurprising that few state laws have been stricken on the basis of preemption. Other federal legislation has, however, been held to preempt state antitrust statutes. *E.g.*, *Alliance Shippers, Inc. v. S. Pac. Transp. Co.*, 858 F.2d 567, 569-70 (9th Cir. 1988) (holding California antitrust statute preempted in part by federal Staggers Railway Act).

592. 21 CONG. REC. 2457 (1890) (remarks of Sen. Sherman) ("If the combination is confined to a State, the State should apply the remedy; if it is interstate and controls any production in many States, Congress must apply the remedy"); *id.* at 2462 (remarks of Sen. Sherman) (observing that federal law would regulate "combinations [which] strike directly at [that] commerce over which Congress alone has jurisdiction"); *id.* at 2567 (remarks of Sen. Hoar) ("I suppose that, so far as this is a regulation of the commerce between this country and a foreign country or between two different States of this country, the jurisdiction of Congress is conclusive over it; the States can not touch it."). *See generally* JOHN J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* (1984). As Professor May has noted, not all subscribed to Senator Sherman's views on the relative scope of federal and state power. James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 509 & n.85 (1987). Prior state enforcement actions in fact extended to multistate matters, *id.* at 501, and states persisted in asserting regulatory authority beyond their borders through a variety of means, *id.* at 509-42. *But see* Hovenkamp, *supra* note 138, at 379 (claiming that "Senator Sherman's perception of the relationship between state and federal power was correct in 1890, but has lost its vitality today") (citation omitted).

593. *E.g.*, *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 F. 242 (8th Cir. 1906); *J.R. Watkins Med. Co. v. Holloway*, 168 S.W. 290 (Mo. 1914); *People v. N. River Sugar Ref.*

jurisdiction.⁵⁹⁴ In short, as Professor Hovenkamp has observed,⁵⁹⁵ the Supreme Court's contemporaneous view likely resembled Justice Holmes's opinion on the extraterritorial application of the Sherman Act: namely, that it would be "startling" to evaluate the legality of an act by any standard other than that of the place where it was committed.⁵⁹⁶ Territorial limits protected against unjustified encroachments by a state against other states and their citizens, while Commerce Clause limits served to preserve a domain for regulation, if at all, on a federal plane.⁵⁹⁷

Just as judicial attempts to restrict federal authority to interstate matters faded as the century wore on,⁵⁹⁸ so did the limits on state authority. The Supreme Court has never squarely held that state antitrust statutes may apply freely to interstate commerce,⁵⁹⁹ and state courts developed interpretive practices designed to avoid potential conflicts,⁶⁰⁰ but there has been little attempt to hold any

Co., 24 N.E. 834 (N.Y. 1890); *In re Grice*, 79 F. 627 (N.D. Tex. 1897), *rev'd on other grounds sub nom.*, *Baker v. Grice*, 169 U.S. 284 (1898); see also FLYNN, *supra* note 592, at 56-108; Hovenkamp, *supra* note 138; May, *supra* note 592, at 517-21.

594. *E.g.*, *In re Grice*, 79 F. at 627 (declaring unconstitutional Texas antitrust statute providing, in relevant part, for criminal prosecution of persons not present within state); see also *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (cautioning that Texas could not regulate "contracts which are neither made nor are to be performed in Texas"); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *State v. Lancashire Fire Ins. Co.*, 51 S.W. 633 (Ark. 1899); *Department of Fin. Insts. v. Gen. Fin. Corp.*, 86 N.E.2d 444 (Ind. 1949). For discussion, see FLYNN, *supra* note 592, at 48-53; Hovenkamp, *supra* note 138; May, *supra* note 592, at 517-21. State laws were also subject to equal protection challenges, see FLYNN, *supra* note 593, at 24-40, and allegations that they discriminated against interstate commerce, *id.* at 96-108, in accordance with the prevailing legal standards.

595. Hovenkamp, *supra* note 138, at 380-82.

596. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355 (1909).

597. For a similar distinction within modern case law, see Hovenkamp, *supra* note 138, at 388, 390-404. As Professor Hovenkamp observes, legislative jurisdiction is also limited by the Full Faith and Credit Clause, but that standard is closely comparable to the constraints imposed by due process. *Id.* at 391 n.83.

598. *E.g.*, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991) (conspiracy to bar ophthalmologist from practice in greater Los Angeles satisfied interstate commerce requirement under Sherman Act); *Abrams*, *supra* note 499, at 990 (1987) (complaining that the federal antitrust enforcers ignored national mergers, and instead concentrated on "local cases involving horizontal restraints").

599. ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 745; Hovenkamp, *supra* note 138, at 387; see Malcolm R. Pfunder, *Constitutional Limitations on State Antitrust Enforcement*, 58 ANTITRUST L.J. 207, 213 (1989) (observing that "it is very difficult to predict whether [state action seeking broad extraterritorial relief] would survive Dormant Commerce Clause challenge").

600. LIFLAND, *supra* note 132, § 1.06, at I-25 to I-27 & nn.16-16.1 (citing cases).

line.⁶⁰¹ Despite a continued insistence on substantial contacts between a regulating state and an out-of-state activity over which it seeks control,⁶⁰² due process limits on the territorial reach of states have likewise eroded.⁶⁰³

The solution, instead, has been enlightened self-restraint, encouraged by the federal government. In the area of criminal antitrust, for example, a relatively meager program to deputize state attorneys general to assist in federal criminal prosecutions⁶⁰⁴ evolved into a more significant protocol providing for the occasional transfer to states of responsibility for potential offenses having a "particularly local impact."⁶⁰⁵ The NAAG's efforts at coordinating state enforcement in important areas like merger control has also attempted to maintain some consistency with federal enforcement,⁶⁰⁶ and federal and state officials subsequently agreed on a

601. *Compare* *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality) (holding unconstitutional an Illinois statute imposing preregistration requirement on tender offers in light of extraterritorial effect), *with* *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (distinguishing and upholding similar Indiana statute against identical challenge); *see also* *Texas v. Coca-Cola Bottling Co.*, 697 S.W.2d 677, 682 (Tex. Ct. App. 1985), *appeal dismissed*, 478 U.S. 1029 (1986) (finding no Commerce Clause obstacles barring Texas from challenging the acquisition of assets).

602. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (legislative jurisdiction).

603. *E.g.*, *Hovenkamp*, *supra* note 138, at 382.

604. ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 741; *see also* *Abrams & Constantine*, *supra* note 502, at 504 (describing cross-deputization program as "largely symbolic and of very limited utility," amounting to "show and tell" field-training exercise[s]).

605. ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 741; *see also* U.S. DEPARTMENT OF JUSTICE, PROTOCOL FOR INCREASED STATE PROSECUTION OF CRIMINAL ANTITRUST OFFENSES, *reprinted in* 70 *Antitrust & Trade Reg. Rep.* (BNA) No. 1755, at 362 (Mar. 28, 1996).

606. The NAAG's initial merger guidelines were amended somewhat to reflect changes in the federal guidelines. 1987 NAAG Horizontal Merger Guidelines, *reprinted in* 4 *Trade Reg. Rep.* (CCH) ¶ 13,405, at 21,181 (1988), *amended by* 1993 NAAG Horizontal Merger Guidelines, *reprinted in* 4 *Trade Reg. Rep.* (CCH) ¶ 13,406, at 21,193 (1993); *see* U.S. Dep't of Justice & Federal Trade Commission, Horizontal Merger Guidelines (1984), *reprinted in* 4 *Trade Reg. Rep.* (CCH) ¶ 13,103, at 20,551 (1993). State officials were consulted during the process of revising the federal guidelines, suspending work on their own guidelines in order to participate more fully; conversely, they shared their interim revisions to the state guidelines with federal officials for their input. 60 *Minutes with Robert M. Langer*, *supra* note 139. For discussion of persistent differences between the federal and state philosophies, *see* David W. Barnes, *Federal and State Philosophies in the Antitrust Law of Mergers*, 56 *GEO. WASH. L. REV.* 263-64 (1988); *Rose*, *supra* note 498, at 81-114; *Zimmerman*, *supra* note 506, at 351. For focus on the continuing differences between the post-1993 state guidelines and the federal guidelines, *see* *Rose*, *supra* note 498, at 110-14.

The NAAG also developed and refined a Voluntary Pre-Merger Disclosure Compact

protocol designed to facilitate joint investigations and settlement discussions.⁶⁰⁷ Federal and state officials also formed an Executive Working Group for Antitrust to provide for broader coordination of efforts.⁶⁰⁸

These efforts have scarcely obviated the need for a more formal protocol on international matters, one encompassing state enforcement of both federal and state laws; some state representatives, indeed, have indicated something like jealousy concerning the working relationship between the federal agencies and foreign authorities.⁶⁰⁹ But the similarities to the course of international cooperation are striking. While interstate enforcement of state law was originally thought to exceed ironclad constitutional delimitations, and potentially to conflict with the Sherman Act, neither argument won the day—just as statutory and international law objections to extraterritoriality ultimately subsided. In their stead, cooperative agreements have prevailed, without entirely resolving the potential for conflict.

designed to encourage private parties to voluntarily provide confidential information to signatory states in return for a commitment on the states' part to seek to procure supplemental materials during the Hart-Scott-Rodino waiting period by voluntary production rather than by resorting first to compulsory processes. NAAG Voluntary Pre-Merger Disclosure Compact, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,410, at 21,209 (1987). Revisions to the Compact were approved in 1994, but it has been employed only infrequently. Flexner & Racanelli, *supra* note 122, at 521.

607. Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,420, at 21,213 (1998). It is the Justice Department's policy to cooperate with the states on "mergers that affect local markets," at least "when practical." ANTITRUST DIVISION MANUAL, *supra* note 122, at VII-18. Given legal restrictions on the ability of federal agencies to share certain confidential information provided in connection with mergers, both the federal-state merger protocol and the state compact rely heavily on the consent of private parties to the sharing of confidential information, consent encouraged by the parties' interest in reducing somewhat the burden of multijurisdiction merger enforcement.

608. ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 122, at 740.

609. *Report From Officialdom: 60 Minutes with Laurel A. Price, Chair, National Association Of Attorneys General Multistate Antitrust Task Force*, 63 ANTITRUST L.J. 303, 321 (1994) (remarks of Laurel Price) (replying, when asked whether states might expect treatment equal to foreign nations with respect to access to confidential information, "I expect I would advise them that the States ought to be treated a little bit better. . . . I would point out that greater access to federal investigatory materials is a position the States have been urging for a long time. It should not come as a surprise to anyone in the Congress that the States feel that they should have access to such materials at least as readily as foreign governments.").

The difference, facially, is that while domestic cooperation on interstate matters is not legally binding, the theory of local international law suggests that international cooperation, in the form of antitrust comity, is. Even that difference may be somewhat overstated. Where subnational cooperation is inconsistent with domestic arrangements, it too has been regarded as sufficiently concrete to warrant legal intervention.⁶¹⁰ Just so, federal arrangements on the international plane may require the protection afforded by custom against both national and subnational breach. In the case of antitrust comity, at least, the domestic implementation of that custom as local international law requires the national supervision of state restraint, if only as an alternative to more decisive jurisdictional limits. If it is not forthcoming, the United States may be forced to confront awkward questions regarding the significance of subnational sovereignty in an international system,⁶¹¹ as well as the tenability of maintaining interstate cooperation that potentially threatens federal supremacy in foreign affairs.⁶¹²

CONCLUSION

The most telling complaint against antitrust comity, and against the theory of local international law it illustrates, is that (like Oakland, reputedly) there's no there there. The solution it proposes to the problems of international antitrust surely seems underwhelming. Comity may marginally improve cooperation and reduce conflict, but it does not begin to grapple with the substantive and procedural discrepancies among national rules, nor definitively

610. *Cf. Morales v. Trans World Airlines*, 504 U.S. 374 (1992) (holding NAAG fare advertising guidelines preempted under the Airline Deregulation Act of 1978).

611. U.S. and Canadian courts, at least, are of the view that state and provincial laws are themselves entitled to no consideration under general principles of international comity. *E.g.*, *Central Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 644-46 (D.S.C. 1992) (refusing to accord international comity to Quebec blocking statute); *Lyons v. Bell Asbestos Mines, Ltd.*, 119 F.R.D. 384, 386-90 (D.S.C. 1988) (same); *Hunt v. Lac d'Amiante du Québec*, [1993] S.C.R. 289, 328 (Can.) (differentiating between defensibility of federal blocking legislation with extraterritorial effect and similar provincial legislation, given that "the federal Parliament is expressly permitted by our Constitution to legislate with internationally extraterritorial effect").

612. *Cf. supra* text accompanying notes 550-54 (discussing limitations on interstate compacts).

resolve the potential for conflict with actors less beholden by nature to international niceties. The reasonableness norm, whatever its shortcomings, at least proposed to restrict all antitrust enforcement, absolutely, based upon an independent examination of relevant factors.

The absence of any more substantial implications is not necessarily a theoretical flaw, because it may simply indicate that nations do not regard it as being in their interests to go further. But even the limitations of antitrust comity highlight a path for future evolution. Complaints that comity falsely equates enforcement and nonenforcement, and systematically encourages under regulation by permitting parties to escape liability,⁶¹³ may be overcome by recognizing the less disciplined function of private and state attorneys general. Those perceiving benefit in conflict as a spur for cooperation,⁶¹⁴ too, may take comfort in the fact that antitrust comity, even if religiously observed, will not wholly derail the possibility of international conflict, but may simply improve the ability of the executive branch to determine the occasions for that conflict.⁶¹⁵

Finally, and perhaps most importantly, local international law offers a concrete basis for the proliferation of related norms. Special custom may spread to other nations, or other topics, which may in turn reinforce antitrust principles.⁶¹⁶ Deepening, committed cooperation may also expand comity's minima, requiring greater transparency by national authorities regarding the process by which they examine claims by private parties and their peers.⁶¹⁷

613. Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 70-76 (1991); see also Dodge, *supra* note 39, at 153-58; Paul, *supra* note 22, at 79 (explaining how comity can undermine public regulation).

614. Dodge, *supra* note 39, at 148, 158-68.

615. *Id.* at 159-63.

616. The European Community, for example, recently described the potential benefits that would have accrued in the Commission's investigation of the French/West African Shipowners Conference case had information sharing and comity principles been established between the Commission and the twelve West African countries involved. See Communication from the European Community and its Member States, WTO, Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/160 (March 14, 2001), available at <http://docs.wto.org/DDFD/Document/t/WT/WGTCP/W/160.DOC>.

617. Cf. Sykes, *supra* note 294, at 95 (describing potential for transparency and due process requirements related to national treatment norms).

In the absence of genuine global antitrust convergence, international antitrust and antitrust federalism have the potential for considerable conflict—but they also have much to learn from one another, including how to resolve those conflicts. Leaving comity's development to the courts alone, it would appear, leaves doctrine playing catch-up to practice, in both cases forcing the judiciary to abandon territoriality for murkier waters. Regulatory comity, on the other hand, has been relatively effective at establishing principled bilateral relations in both the American and international contexts, but has yet to connect them. The signal advantage of international law is that it allows the courts to learn from the regulatory experience, and accept its firmest commitments as law. If the law can in turn enhance the observance of comity in international cases, it may take a small step forward toward a convergence adapted to both domestic and international interests, and in the process highlight the potential for local international law.