

# Transnational Regulatory Litigation

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#### ABSTRACT

Recent years have seen much debate about the role of national courts in addressing global harms. That debate has focused on the application by domestic courts of international law—for instance, in civil actions brought in U.S. courts to enforce human rights law. This Article identifies a parallel development in the area of economic regulation. It classifies and analyzes a category of cases that seek the application of

regulatory law by domestic courts in situations involving global economic misconduct. Like the public international law cases, these cases highlight the tension between the benefits to be gained by enhanced enforcement of global *substantive* norms and the need to observe the *jurisdictional* norms that order the exercise of authority within the international community. On the one hand, traditional jurisdictional rules unnecessarily foreclose valid arguments for marshaling the resources of national courts in order to improve the global welfare. On the other hand, however, those rules reflect legitimate concerns of foreign states about the exercise of power and authority within the international community. The Article seeks a resolution to that tension in the economic context. Situating transnational regulatory litigation within the broader framework of transgovernmental theory, it proposes a more functional approach to certain jurisdictional rules, as well as a procedural mechanism for use in cross-border class actions, that would legitimize the evolving role of national courts in implementing global regulatory strategies.

#### INTRODUCTION

Defining the proper role of courts on the global stage has become an increasingly prominent topic.<sup>1</sup> While debate in this area addresses in part the proliferation of courts outside national systems,<sup>2</sup> it also addresses the development of national courts as actors within the international community. Recent analyses of the use of domestic litigation to counter global harms, drawing particularly on the spate of cases brought in U.S. courts under the Alien Tort Claims Act (ATCA),<sup>3</sup>

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1. The general rubric of judicial globalization encompasses a number of disparate issues, including the proliferation of regional, international, and ad hoc tribunals; the use of foreign law in domestic decision-making; and the “globalization” of the judicial enterprise itself. *See generally* 38, 39 & 40 *TEX. INT’L L.J.* (2003, 2004 & 2005) (symposia on judicial globalization providing an overview of these issues).

2. Such courts include new international courts (e.g., the International Criminal Court), regional courts (e.g., the European Court of Human Rights) and ad hoc tribunals (e.g., the International Criminal Tribunals for the Former Yugoslavia and Rwanda). *See generally* Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *N.Y.U. J. INT’L L. & POL.* 709 (1999).

3. 28 U.S.C. § 1350 (2000) (granting U.S. federal courts jurisdiction over claims by foreign plaintiffs for violations of international law). Another example of such litigation is that initiated in Belgian courts pursuant to Belgium’s then-expansive war crimes statute. *See* Naomi Roht-Arriaza, *Universal Jurisdiction: Steps Forward, Steps Back*, 17 *LEIDEN J. INT’L L.* 375 (2004).

have focused primarily on transnational public law litigation.<sup>4</sup> This is a form of domestic civil litigation in which courts apply international law norms in order to secure remedies for violations of those norms that are not otherwise available.<sup>5</sup> The cases are therefore viewed as a means of marshaling the resources of national courts in order to enhance global compliance with international law.<sup>6</sup> In addition to closing a gap in international enforcement mechanisms, however, these cases also give domestic courts a role in the transnational process of articulating and defending global norms for the benefit of the international community.<sup>7</sup>

The validity and scope of this role for domestic courts are highly contested. Many transnational cases put pressure on traditional jurisdictional principles, as they envision adjudication in domestic courts of cases with only tenuous connections to the forum. The claim of the forum state to prescriptive authority over the conduct in question therefore often relies on the exercise of universal jurisdiction, a theory whose parameters in the civil context remain uncertain.<sup>8</sup> The cases thus

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4. See Harold Koh's work on "transnational public law litigation," drawing on Abram Chayes' account of private litigation used to serve public goals. Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 194 (1987); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991).

5. In the human rights context, for example, plaintiffs brought cases pursuant to the ATCA as a way of increasing compliance with and enforcement of human rights law when other mechanisms had failed. See Beth Stephens, *Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts*, 40 GERMAN Y.B. INT'L L. 117 (1997) (discussing the insufficiency of other mechanisms).

6. Anne-Marie Slaughter refers to the process as "'borrow[ing]' government institutions of democratic states to achieve a measure of justice" not otherwise obtainable. Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 194 (Sept.-Oct. 1997). See also Stephens, *supra* note 5, at 140 (envisioning the spread of such civil litigation beyond the United States, creating an "international network" in the service of this goal).

7. See William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 132 (2000) (in the human rights context, noting that such litigation "affirms the role of domestic institutions in enforcing international obligations."); Koh, *Transnational Public Law Litigation*, *supra* note 4, at 2349 (describing the prospective goal of plaintiffs in transnational public cases: "provok[ing] judicial articulation of a norm of transnational law"); Paul B. Stephan, *A Becoming Modesty: U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 643 (2002) (distinguishing between the distributive function of civil litigation and the expressive function, in which litigation "serve[s] as a nexus of discourse that will instruct and elevate both the participants and the broader public.").

8. See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal), available at [http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe\\_ijudgment\\_20020214\\_higgins-kooijmans-buergenthal.PDF](http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_20020214_higgins-kooijmans-buergenthal.PDF) (discussing the status of universal jurisdiction); Regina v.

reflect significant tension between the benefits to be gained by enhanced enforcement of global *substantive* norms and the need to observe the *jurisdictional* norms that order the exercise of authority within the international community. What the debate arising out of that tension has not yet addressed, however, is a parallel role for national courts that is developing in the economic regulatory arena. This is not to say that there is a lack of interest in the use of private actions to sue for cross-border regulatory harm—quite the opposite, as the abundant commentary on extraterritorial regulation reflects. This article takes up a different issue: the evolution and viability of claims that explicitly promote litigation before national courts on the basis of shared norms and that might therefore serve as an instrument of global economic regulation.<sup>9</sup> In doing so, it seeks to fill a gap in the analysis of transnational litigation.

The Article analyzes the development in U.S. federal courts of a phenomenon analogous to that observed in the public law arena, which I will refer to as transnational regulatory litigation. It examines certain cases brought under U.S. regulatory law, including antitrust law, securities law and the Racketeering Influenced and Corrupt Organizations Act, that operate similarly to transnational public law cases: they seek to apply a shared norm, in domestic courts, for the benefit of the international community. There is of course a major structural difference between regulatory litigation and other forms of transnational litigation—while transnational public law litigation turns on the application of international law, these cases apply domestic economic law.<sup>10</sup> I will nevertheless argue that where the particular rule reflects an internationally shared norm, such cases serve the same broad purpose. They can mobilize available judicial resources to address challenges to global economic welfare, just as the public law cases address challenges in areas such as global human rights. Further, they are subject to the same criticism: that, especially while such litigation is

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Bow Street Metropolitan Stipendiary Magistrate and Others, *Ex parte Pinochet Ugarte* (No. 3) [2000] 1 A.C. 147 (differentiating the civil and criminal strands of universal jurisdiction).

9. See *infra* Part I.B.1 (distinguishing such claims from typical extraterritoriality cases). *But cf.* Stephan, *supra* note 7 (discussing not only cases involving application of a shared norm, but the broadening jurisdiction of U.S. courts generally in cases of extraterritorial regulation).

10. In some of the cases discussed below, the original complaints also included counts under the Alien Tort Claims Act (ATCA). See *infra* notes 210–212 and accompanying text. My discussion focuses on the counts alleging violations of domestic regulatory law.

conducted overwhelmingly in U.S. courts,<sup>11</sup> it may operate as an instrument of hegemony.

I have two major objectives in this Article. First, I want to systematize the category of cases that I describe as transnational regulatory litigation. This task requires an analysis of the regulatory goals such litigation serves and an explanation of how these cases differ from more traditional cases in which the jurisdictional question is one simply of extraterritoriality. Second, I want to promote a serious consideration of the substantive regulatory benefits these cases may present. This requires a close inspection of the jurisdictional framework within which they are currently considered, and an analysis of why that framework fails adequately to address arguments about these benefits. At the same time, it requires an evaluation of legitimate concerns about power and authority within the international community—concerns that traditional jurisdictional law both reflects and frames.

With these goals in mind, the Article proceeds as follows. Part I begins by describing some recent cases that illustrate the concept of transnational regulatory litigation. It then situates them within the context of transnational litigation generally, examining their use to address global harms and the regulatory benefits they promise. Part II describes the jurisdictional rules used to decide the cases, identifying various points at which those rules are insufficiently flexible to encompass valid arguments for access to U.S. national courts. Part III turns to a closer examination of the concerns that underpin the jurisdictional rules, and that are raised by commentators as well as foreign governments in opposition to transnational litigation. It addresses both specific functional concerns regarding economic litigation in U.S. courts, and also more general concerns regarding the hegemony of the United States as a global actor. It concludes that the global regulatory benefit of transnational regulatory litigation is

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11. With some exceptions, including the cases brought in Belgium under that country's war crimes statute and the Pinochet litigation in Britain, transnational litigation has taken place almost exclusively in U.S. courts. See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002) (discussing functional equivalents in other systems). See also Andrea Bianchi, *International Decision*, 99 AM. J. INT'L L. 242 (2005) (discussing a recent decision by the Italian Court of Cassation in a tort action brought against Germany for damages arising out of deportation and forced labor during World War II); Sabine Pittrof, *Compensation Claims for Human Rights Breaches Committed by German Armed Forces During the Second World War*, 5 GERMAN L.J. 15 (2004) (discussing a decision by the German Bundesgerichtshof in a similar action brought by Greek citizens against Germany).

insufficient to override entirely these concerns. Part IV seeks a solution to this dilemma: a way to permit access to national courts where that access will promote the global economic welfare, while respecting the authority of foreign nations as members of the international community. It suggests that such a solution depends on securing the consent of other states—an element that characterizes successful mechanisms within the transgovernmental legal regime. The Article concludes by proposing a procedural device for use in global class actions that would achieve this goal.

## I. TRANSNATIONAL REGULATORY LITIGATION

Transnational public law litigation takes place in the domestic courts of a particular country, but involves the application of international law norms.<sup>12</sup> The economic regulatory cases I describe below, by contrast, seek the application of domestic law—for instance, U.S. federal antitrust or securities law. The following Part sets forth some examples of these cases, and then discusses why, despite their recourse to domestic law, they fit within the framework of transnational litigation.

### A. *Categories of Cases*

#### 1. *Regulation of Hard-Core Global Cartels*

Recent litigation against participants in global cartels presents the arguments for transnational regulatory litigation particularly clearly. In a series of cases culminating in one heard by the Supreme Court in its 2004 term, foreign plaintiffs brought private actions in U.S. courts, pursuant to U.S. antitrust law, for damages caused by the activities of price-fixing cartels.<sup>13</sup> Each of the cartels in question had affected the

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12. In ATCA cases, while claims are based in federal common law, courts derive the elements of the rule to be applied from customary international law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004) (discussing the application of claims derived from the law of nations).

13. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002) (case brought by purchasers and sellers of art against two major auction houses, based on transactions occurring in England); *Den Norske Stats Oljeselskap AS v. HeereMac V.O.F.*, 241 F.3d 420 (5th Cir. 2001) (case brought by a Norwegian oil company against the providers of heavy-lift barge services, based on transactions occurring in the North Sea); *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), *vacated and remanded*, 542 U.S. 155 (2004) (case brought by purchasers of vitamins against a consortium of pharmaceuticals manufacturers, based on transactions occurring in Ecuador, the Ukraine, Australia, and Panama).

relevant U.S. market.<sup>14</sup> The foreign plaintiffs, however, sought compensation for damages arising out of purchase transactions executed outside the United States. The cases therefore raised the question whether U.S. antitrust law extended to global conduct whose effect was felt in foreign as well as domestic transactions.

The plaintiffs' arguments in these cases focused on the global aspects of the cartels' behavior. In the case later heard by the Supreme Court, for instance, which addressed a cartel operating in the bulk vitamin market, the plaintiffs stated that the success of the cartel depended on keeping vitamin prices worldwide in equilibrium.<sup>15</sup> (Otherwise, since vitamins are easily transported, buyers would simply purchase in lower-priced markets, defeating the purpose of the cartel.) They argued that the defendants had fixed prices in the United States and then used those prices as a benchmark for prices in other markets, thereby linking the harm caused in one jurisdiction with market impact in others.<sup>16</sup> Their starting point, in other words, was that the cartel had pursued a global strategy to cause integrated global harm. The plaintiffs then pointed out that the particular rules at issue—those condemning the maintenance of hard-core pricing cartels—are shared by virtually every antitrust system.<sup>17</sup> In this sense, they noted, the case was quite unlike the more common cases in which the application of domestic law in litigation involving cross-border elements creates a substantive conflict with the law of another jurisdiction.<sup>18</sup> Given the shared norm against hard-core price-fixing, plaintiffs argued, there was no such conflict and therefore no reason not to permit recovery by foreign as well as domestic purchasers.<sup>19</sup>

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14. The cartels had therefore been prosecuted in the United States, and had been sued by private plaintiffs whose purchase transactions had taken place there. For discussion of the prosecution of the vitamins cartel, see Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001).

15. See *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 388 F.3d 337, 340 (D.C. Cir. 2004).

16. *Id.* at 344. ("On this view of the alleged facts, appellants claim that the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad.")

17. Brief of Respondent, at 5, 47, 50, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724).

18. See *infra* Part I.B.1 for further discussion of this point.

19. In this sense, the plaintiffs sought application of U.S. domestic law almost as a stand-in for world antitrust law. See Ralf Michaels & Daniel Zimmer, *US-Gerichte als Weltkartellgerichte?*, 24 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 451 (2004).

The plaintiffs in the vitamins case and the other global cartel cases argued that U.S. jurisdiction over the claims of foreign purchasers would enhance global competition regulation. This argument regarding the role of U.S. litigation built on an earlier decision of the Supreme Court.<sup>20</sup> In that case, the Court considered whether a foreign sovereign was entitled to initiate private litigation pursuant to U.S. antitrust law. Although the case turned primarily on whether the relevant jurisdictional provision applied to sovereign plaintiffs,<sup>21</sup> the decision incorporated a policy argument for broad jurisdiction over foreign claims:

[A]n exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages. The conspiracy alleged by the respondents in this case operated domestically as well as internationally. If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.<sup>22</sup>

In the *Pfizer* case itself, the foreign government had suffered damages in U.S.-based transactions; thus, the case addressed whether foreign *plaintiffs* should be able to sue, but not directly whether foreign *transactions* could be the basis of a suit. Nevertheless, this passage articulates a link between private enforcement in U.S. courts and the

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20. *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978).

21. *Id.* at 312 (noting that whether a foreign nation is entitled to initiate a private action in U.S. court depends on whether it is a “person” as defined in section 4 of the Clayton Act).

22. *Id.* at 315. In a dissenting opinion, Justice Burger criticized this focus on the deterrent function of civil actions. *See id.* at 329 (Burger, J., dissenting) (arguing that the goal of treble damages is primarily remedial, and that “[t]o allow foreign sovereigns who were clearly not the intended beneficiaries of this remedy to nevertheless invoke it” reverses the priority of remedial and deterrent functions).

effective regulation, from the perspective of U.S. consumers, of cross-border cartels.<sup>23</sup>

The recent generation of global cartel claims builds upon this foundation, expanding the question of deterrence to consider not just its benefit to U.S. consumers, but its benefit to consumers in all markets. The global aim of the proposed regulatory strategy emerged particularly clearly in some of the amicus briefs submitted to the Supreme Court in the vitamin litigation. These suggested that the cartel's cross-border arrangements required cross-border regulatory solutions—that where the economic markets for particular products are not separable along geographic lines, regulatory efforts too must be directed at a more broadly defined market.<sup>24</sup> They then proposed that permitting foreign plaintiffs to sue in the United States, not only for harm suffered in U.S.-based transactions, but also for harm suffered in foreign purchase transactions, would achieve optimal deterrence levels.<sup>25</sup> This conclusion rested on the argument that the treble damages awardable in the United States would raise the total damages payable by cartels to an amount sufficient to achieve deterrence.<sup>26</sup>

This argument of course draws on the argument articulated in *Pfizer*—that underenforcement in the country on whose market a particular transaction occurs can lead to underdeterrence of cartel behavior overall, creating a regulatory gap. However, it expands *Pfizer*'s focus on the benefit to U.S. consumers, considering more consciously the benefit to other markets as well. For example, the

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23. See generally Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 298–99 (2002) (discussing the deterrence argument forwarded in *Pfizer*, and describing legislative history echoing that regulatory goal).

24. See, e.g., Brief of Amici Curiae Legal Scholars in Support of Respondents at \*12, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724).

25. The court below had endorsed this conclusion. See *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 315 F.3d 338, 356 (D.C. Cir. 2003):

We are persuaded that, if foreign plaintiffs could not enforce the antitrust laws with respect to the foreign effects of anticompetitive behavior, global conspiracy would be underdeterred, since the perpetrator might well retain the benefits that the conspiracy accrued abroad. There would be an incentive to engage in global conspiracies, because, even if the conspirator has to disgorge his U.S. profits in suits by domestic plaintiffs, he would very possibly retain his foreign profits, which may make up for his U.S. liability.

26. See Brief of Amici Curiae Legal Scholars, *supra* note 24, at \*12 n.11; Brief Amici Curiae of Professors Darren Bush et al. in Support of Respondents, *F. Hoffmann-La Roche*, 542 U.S. 155 (No. 03-724) (outlining economic data showing that making treble damages available to foreign purchasers would help approach an optimal level of deterrence); Brief of Amici Curiae Economists Joseph E. Stiglitz & Peter R. Orszag in Support of Respondents, *F. Hoffmann-La Roche*, 542 U.S. 155 (No. 03-724) (accord).

economic data supporting the plaintiffs' argument related in part to the regulatory gaps created by the situation in developing countries, where insufficient antitrust regimes may leave anti-competitive conduct entirely unregulated.<sup>27</sup> This observation, while made to support the notion of global underdeterrence, implies that access to U.S. courts would be of particular benefit to plaintiffs in developing countries.<sup>28</sup> Moreover, the arguments specifically noted that the benefits of enhanced deterrence would ensure better regulation of markets everywhere—in other words, they perceived the proposed regulatory solution as one that would enhance the enforcement of a shared standard of conduct for the benefit of consumers worldwide.

In sum, then, these cases suggest that there is a global regulatory interest in permitting private actions based on foreign purchase transactions to proceed in domestic courts. As in the public law context, such actions would utilize national judicial resources to improve global compliance with a shared regulatory norm.

## 2. *Regulation of Global Securities Offerings*

A second class of transnational regulatory cases arises out of cross-border securities fraud. Like the global cartel cases, these involve claims by foreign purchasers for damage incurred in transactions occurring outside the United States—here, purchases of securities, on foreign exchanges, at prices artificially inflated by fraudulent misrepresentations.<sup>29</sup> Like the cartel cases, they indicate that linked global markets require new solutions to economic misconduct.

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27. See, e.g., Brief Amici Curiae of Professor Darren Bush et al., *supra* note 26 (discussing the impact of the vitamins cartel on less developed countries as well as on the United States and other developed markets); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 923 (2003) (noting that many developing countries lack either antitrust laws or the resources to enforce existing laws); John M. Connor, *Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels* (Purdue Univ. Dep't of Agric. Econ., Staff Paper 04-08, 2004), available at [http://agecon.lib.umn.edu/cgi-bin/pdf\\_view.pl?paperid=14761&ftype=.pdf](http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=14761&ftype=.pdf) (arguing that jurisdiction in the United States over such cases is necessary to increase global deterrence to an acceptable level).

28. For a discussion of regulatory impact on developing countries, see Margaret Levenstein and Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801 (2004).

29. In other words, they do not present the more typical factual scenario in which a foreign plaintiff purchases securities directly on a U.S. exchange.

One representative case, *In re Baan Co. Securities Litigation*,<sup>30</sup> involved a Netherlands corporation with securities listed on both U.S. and foreign exchanges. Plaintiffs alleged that officers of the company made misrepresentations in filings with the U.S. Securities and Exchange Commission (SEC) and also in a variety of press releases, public statements and news articles published both in the United States and elsewhere.<sup>31</sup> The plaintiff group, which included purchasers who had bought their shares on foreign exchanges as well as some who had purchased on the U.S. market,<sup>32</sup> argued that these misrepresentations had inflated the price at which they purchased their shares.<sup>33</sup> The plaintiffs noted specifically the interconnected nature of the different financial markets on which the issuer's securities traded, stating that "Baan shares trade in tandem on the world's markets."<sup>34</sup> In their view, then, harm and effect in the different jurisdictions were intertwined, with two particular implications. First, fraudulent statements made outside the United States would affect prices on U.S. exchanges as well, causing harm within the United States.<sup>35</sup> Second, misstatements included in filings with the SEC would affect prices on foreign exchanges, causing harm to those who purchased the issuer's securities abroad. On the latter basis, plaintiffs drew on the "fraud on the market" theory, under which plaintiffs can establish a presumption of reliance on misstatements made in public filings.<sup>36</sup> They suggested a sort of "fraud on the global market" theory: even if they did not rely directly on the fraudulent SEC filings (for instance, by reading an SEC filing that induced them to purchase securities abroad), the statements in those filings would necessarily have affected the price of shares in the foreign markets.<sup>37</sup>

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30. *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1 (D.D.C. 2000).

31. *Id.* at 6.

32. Shares had been purchased on NASDAQ, the Amsterdam stock exchange, and the Frankfurt and other German stock exchanges. *Id.* at 4.

33. *Id.* at 9.

34. *Id.* at 10.

35. *Id.* ("[T]he defendants' [foreign] acts had an effect in the United States because Baan shares trade in tandem on the world's markets, and therefore the value of Baan's shares owned by United States residents was affected.")

36. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 241 (1988) ("[I]n an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.")

37. See *In re Baan*, 103 F. Supp. 2d at 10 (citing *Basic v. Levinson*). As I discuss in Part II, the artificial separation of these two implications is necessitated by current jurisdictional rules applicable in securities cases.

The interconnectedness of the financial markets that the plaintiffs described in *In re Baan* is widely recognized. In many other cases, foreign purchasers of securities have noted the “‘seamless, worldwide market’ for [issuers’] securities,”<sup>38</sup> or the “unitary nature” of foreign and U.S. markets.<sup>39</sup> It seems likely that some issuers will take deliberate advantage of that interconnectedness.<sup>40</sup> In one recent complaint, a mixed group of foreign and U.S. plaintiffs described the efforts of a Hong Kong issuer to coordinate its public offering on the Hong Kong and New York markets, alleging that the issuer had used misstatements in the latter to increase demand for its securities in the former.<sup>41</sup> More often, strategies pursued in one jurisdiction will simply have overflow effects in other markets. In a case involving a German pharmaceuticals company, foreign purchasers of securities joined a class action alleging fraudulent misrepresentations regarding the potential of a particular drug.<sup>42</sup> They noted that “defendants considered the success of [the drug in the United States] important,”<sup>43</sup> explaining the benefit the defendants

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38. *Tri Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567, 579 (W.D. Pa. 2002).

39. *Kaufman v. Campeau Corp.*, 744 F. Supp. 808 (S.D. Ohio 1990); see also *In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 75 (S.D.N.Y. 1999) (“Due to the efficiencies of market pricing and the ever-present possibility of arbitrage, the price of [defendant’s] stock on the [Toronto Stock Exchange] and the NASDAQ unsurprisingly moved in tandem during the class period.”); *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 123 (2d Cir. 1995) (“Inevitably, there was a direct linkage between the prices of the ADRs representing five ordinary shares and the prices of the single ordinary shares themselves. If the ordinary share price fell on the London Exchange, the market price of an ADR would decrease in similar manner, and vice versa.”). The linkage is particularly clear in the case of American Depository Receipts, since each ADR represents a certain number of foreign shares, but exists with respect to any securities trading on multiple efficient markets. In both cases, misstatements made in one market will inevitably affect the other(s) as well.

40. On the economic benefits that issuers seek from cross-listing, see Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT’L L. 195, 200–202 (2004); see also John C. Coffee, Jr., *Racing Towards the Top? The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1780–82 (2002) (noting that issuers also use cross-listing as a bonding mechanism: by signaling their willingness to subject themselves to U.S. enforcement standards, they can achieve a higher market valuation).

41. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss the Amended Complaint, *In re China Life Ins. Co. Ltd. Sec. Litig.*, No. 04-CV-02112 (S.D.N.Y. 2006), 2006 WL 551381 (describing the way in which the issuer “intentionally entangled its American conduct with its listing on a foreign exchange”). The merits of this allegation have not been determined.

42. *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546 WHP, 2004 WL 2190357 (S.D.N.Y. 2004). The misstatements alleged related to early assurances regarding the drug’s prospects, later statements regarding the risk of product liability litigation, and the failure to set aside reserves for possible losses.

43. *Id.* at \*17.

derived from the misrepresentations made in the United States. Because these statements affected all of the trading markets in the issuer's securities,<sup>44</sup> however, the conduct in question led to a global harm. This type of securities case, then, suggests precisely the same underdeterrence argument that the antitrust cases raise explicitly: even if shareholders who purchase in U.S. markets can bring private actions under U.S. law, the total damages recoverable might be insufficient adequately to deter the conduct in question.

One difference between this category of cases and the antitrust cases is that there are fewer shared norms in the area of securities regulation.<sup>45</sup> To the extent there are such norms, however, these cases present the same argument for recognizing jurisdiction in domestic courts. Some cases have involved conduct that violates both U.S. and the relevant foreign country's securities rules<sup>46</sup>—but substantive agreement in the two (or few) countries involved in a particular case does not necessarily signal broader international acceptance of the norms involved. A few cases, however, have involved conduct that violates a rule reflecting a higher level of convergence across disparate systems.<sup>47</sup> In the *Bayer* case discussed above, for example, plaintiffs alleged that the company had failed to establish reserves as required not only by U.S. generally accepted accounting principles but also by International Accounting Standards.<sup>48</sup> These constitute a core set of standards for application in cross-border transactions, and have been adopted not only by Germany, Bayer's home jurisdiction and the location of the foreign purchase transactions, but by many other countries as well.<sup>49</sup> Where the

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44. *Id.* at \*18.

45. See further discussion *infra* notes 203-206 and accompanying text.

46. See, e.g., *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 345 (D. Md. 2004) (noting that the defendant's accounting of promotional allowances violated U.S. and also Dutch (the issuer's home-country) GAAP).

47. See *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 372 (3d Cir. 2002) (noting, in the course of a personal jurisdiction analysis, that fraudulent affirmative misrepresentations "would violate the disclosure requirements of *any* securities regulatory regime") (emphasis added).

48. *In re Bayer*, 2004 WL 2190357, at \*6. For another case alleging violation of International Accounting Standards, see *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 661 (6th Cir. 2005) (alleging that defendants had failed to record loss contingencies as required under an International Accounting Standard applicable in Japan).

49. The International Accounting Standards Committee, formed by the accounting standards-setters of ten countries in 1973, adopted international accounting standards (now International Financial Reporting Standards) in 1999. They were subsequently endorsed by the International Organisation of Securities Commissioners in 2000 and recommended for use in all cross-border offerings. See Commission Regulation 1606/2002 on the Application of International Accounting

substantive norm to be applied is indeed accepted this broadly across systems, securities cases too fall into the category of transnational regulatory actions serving the global economic welfare.<sup>50</sup>

### 3. *Private Claims to Recover Lost Tax Revenue*

In a series of cases addressing the financial consequences of cigarette smuggling, foreign governments sought civil damages in suits under the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>51</sup> The plaintiffs were Canada, the European Community,<sup>52</sup> Honduras, Ecuador, Belize and political subdivisions of the Republic of Colombia.<sup>53</sup> In each case, the defendants were tobacco companies alleged to have participated in the smuggling of cigarettes into the respective jurisdictions. While these cases differ from antitrust and securities litigation in that they are brought by states rather than by private plaintiffs, they raise similar questions regarding the utilization of civil actions in domestic courts to serve international regulatory purposes.

In the Canadian case, which was the first to reach the federal courts of appeals, the Canadian government argued that the defendants had established a cross-border smuggling scheme whose purpose and effect was to deprive the government of duties and taxes that otherwise would

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Standards, 2002 O.J. (L 243) 1, 1–4 (adopting international accounting standards within Europe); Stephen J. Choi & Kon Sik Kim, *Establishing a New Stock Market for Shareholder Value Oriented Firms in Korea*, 3 CHI. J. INT'L L. 277, 283 (2002) (describing the changes made to Korean market regulation, including a revision of accounting standards “to bring them into substantial compliance with International Accounting Standards”); Bernhard Grossfeld, *Global Accounting: Where Internet Meets Geography*, 48 AM. J. COMP. L. 261, 275–76 (2000).

50. See Edward F. Greene & Linda C. Quinn, *International Securities Markets 2003: Emerging Best Practices for a Rapidly Evolving Regulatory Scheme*, 1372 PRACTISING L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 561, 564–65 (2003) (discussing the increasing convergence of both accounting and disclosure standards related to securities offerings).

51. *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004), *vacated by* 544 U.S. 1012 (2005), *reinstated by* 424 F.3d 175 (2d Cir. 2005); *European Community v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231 (E.D.N.Y. 2002), *vacated and remanded by* 544 U.S. 1012 (2005), *reinstated by* 424 F.3d 175 (2d Cir. 2005), *cert. denied* 126 S. Ct. 1045 (2006); *Republic of Honduras v. Philip Morris Cos., Inc.*, 341 F.3d 1253 (11th Cir. 2003); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001); *Republic of Ecuador v. Philip Morris Cos., Inc.*, 188 F. Supp. 2d 1359 (S.D. Fla. 2002).

52. The European Community’s cases against Japan Tobacco, RJR Nabisco, and Philip Morris were consolidated and decided in *Japan Tobacco*, 186 F. Supp. 2d 231.

53. State-analogous departments within the country, not the Republic of Colombia itself, joined the European Community in its complaint.

have been payable upon the sale of the cigarettes.<sup>54</sup> (The government also argued that the scheme had caused additional damages by requiring it to expend funds on enforcement activity intended to end the unlawful behavior.)<sup>55</sup> The Canadian action therefore linked the government's claim for civil damages under RICO directly to the nonpayment of applicable taxes in Canada. Although the governments in the later cases argued that their claims were not solely revenue-based,<sup>56</sup> the respective courts characterized them similarly as cases seeking lost revenue. In the Honduras litigation, for instance, the Eleventh Circuit Court concluded that the action "fundamentally deal[t] with the adjudication of foreign tax claims."<sup>57</sup>

Like the other cases described above, these deal with cross-border misconduct. In the Canadian case, plaintiffs alleged that the smuggling scheme originated in Canada<sup>58</sup> and involved first the export of cigarettes into the United States and later the export of raw tobacco to Puerto Rico, in both cases for eventual smuggling back into Canada.<sup>59</sup> Plaintiffs also alleged that a U.S. company within the defendant's corporate group participated in the distribution of the cigarettes, and that the defendants used the U.S. mail and wire system in implementing their scheme.<sup>60</sup> The European Community case involved similar cross-border activity: the plaintiffs alleged a "massive...global scheme"<sup>61</sup> that included the use of smuggling channels "by way of countries such as Panama and Cyprus" as well as "secret corporations and/or bank accounts located in money-laundering havens such as Panama and Switzerland."<sup>62</sup> Again, the

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54. *R.J. Reynolds*, 268 F.3d at 108; *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134, 138 (N.D.N.Y. 2000). Certain individual participants in the smuggling scheme had already pled guilty to related criminal violations.

55. *R.J. Reynolds*, 268 F.3d at 108.

56. See, e.g., Brief for Plaintiffs-Appellants at 76–79, *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Nos. 02-7330, 02-7325).

57. *Republic of Honduras v. Philip Morris Cos., Inc.*, 341 F.3d 1253, 1257 (11th Cir. 2003); see also *RJR Nabisco*, 355 F.3d at 132 (describing the EC's claims as "markedly similar" to Canada's and stating that they arose "exclusively from tax-related laws and costs").

58. See Brief for Plaintiff-Appellant the Attorney General of Canada at 5–6, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972) (stating that following a substantial tax increase in Canada, the CEO of R.J. Reynolds' Canadian subsidiary "demanded that his staff devise a way to sell more Canadian cigarettes").

59. *Id.* at 8–10.

60. *Id.*

61. See Brief for Plaintiffs-Appellants at 8, *RJR Nabisco*, 355 F.3d 123 (2004) (Nos. 02-7330, 02-7325).

62. *Id.* at 12.

plaintiffs alleged that defendants had used the mails and wires of the United States, and that the illegal conduct taking place within the United States was “the root of a global problem.”<sup>63</sup> The remaining cases in this group, brought by the governments of Ecuador and Honduras, alleged the use of various free trade zones to bring the goods to the respective markets.<sup>64</sup>

As with the antitrust cases, the point is not merely that the conduct in question crossed borders, but that the global nature of the money transfer system created a regulatory gap. Some of the corporations and individuals involved in the scheme were prosecuted, under criminal RICO as well as wire fraud and money laundering statutes; however, the plaintiffs in these cases argued that civil litigation in U.S. courts was necessary in order successfully to combat the misconduct involved. The European Community stated in its brief, for instance, that “only the U.S. courts are situated, equipped, and empowered to enjoin” the conduct in question.<sup>65</sup> In the view of the plaintiffs, the shared interest in preventing cross-border tax evasion justified this assistance.

The revenue claims of foreign governments, while different from claims of private plaintiffs under antitrust and securities laws, therefore make analogous arguments for the involvement of domestic courts. In particular, they focus on the role of U.S. civil litigation as part of the global regulatory system. The brief for the European Community in the consolidated cases before the Second Circuit presented this argument particularly clearly. The brief discussed explicitly the role of civil actions in U.S. courts as one of a larger set of transnational enforcement strategies. It suggested that RICO—and, more particularly, its private attorney general mechanism—was intended to be used not only purely domestically but also “to pursue transnational organized crime directed against foreign allies.”<sup>66</sup> In support of this suggestion, the brief cited at length the legislative history of the more recent PATRIOT Act, including a statement assuring that “our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism.”<sup>67</sup> This argument points to the

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63. *Id.* at 9.

64. *Republic of Honduras v. Philip Morris Cos., Inc.*, 341 F.3d 1253, 1255 (11th Cir. 2003); *Republic of Ecuador v. Philip Morris Cos., Inc.*, 188 F. Supp. 2d 1359, 1360 (S.D. Fla. 2002).

65. Brief for Plaintiffs-Appellants at 9, *RJR Nabisco*, 355 F.3d 123 (Nos. 02-7330, 02-7325).

66. *Id.* at 46.

67. *Id.* at 30–32 (citing statement of Senator Kerry); *see also id.* at 43 (citing a related statement noting that: “Since some of the money-laundering in the world today also defrauds

willingness of U.S. legislators to leverage the deterrent function of private actions under U.S. law for the benefit of the global community.<sup>68</sup>

*B. Situating Regulatory Cases Within the Tradition of Transnational Litigation*

Because they concern transactions occurring outside the United States, the global antitrust and securities cases fit within the rubric of extraterritorial regulation—that is, they raise the question whether the legislative acts of the United States were intended to reach conduct or transactions taking place outside U.S. borders. And, as Part III describes in more detail, the courts have indeed treated them as classic extraterritoriality cases, invoking traditional extraterritoriality analysis. The cases I describe as transnational regulatory litigation nevertheless differ from classic extraterritoriality litigation in two regards: first, the shared nature of the norm they seek to apply, and second, the global nature of the regulatory benefit they promise.

*1. Extraterritoriality and Conflict of Regulatory Laws*

Traditional extraterritoriality analysis flows from a principle of international law: because all sovereign nations enjoy exclusive authority to regulate within their territorial borders, no nation will apply its laws to conduct that occurs in another.<sup>69</sup> Historically, in accordance with this principle, regulation of extraterritorial conduct was viewed as illegitimate. Thus, U.S. courts applied domestic regulatory law only to conduct occurring within the United States.<sup>70</sup> Over time, this strict construction eroded as nations recognized the validity under international law of regulating foreign conduct when that conduct had

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foreign governments, it would be hostile to the intent of [the PATRIOT Act] for us to interject into the statute any rule of construction of legislative language which would in any way limit our foreign allies' access to our courts to battle against money laundering.”).

68. Congress has expressed a similar intention in connection with human rights litigation. The Torture Victims Protection Act enacted in 1994 authorizes suits in U.S. courts by foreign as well as U.S. victims of torture, reflecting the legislative belief that in certain circumstances the use of domestic courts is appropriate in service of a global good. 28 U.S.C. § 1350 (2000).

69. See F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 30–31 (describing the roots of jurisdictional law in territorial sovereignty).

70. The classic articulation of this principle is found in Justice Holmes' opinion in an early antitrust case: “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.” *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

substantial domestic effects.<sup>71</sup> In U.S. courts, the focus in defining the reach of regulatory law shifted from analyzing international law limits on prescriptive jurisdiction to determining whether Congress had in fact intended domestic regulatory law to reach particular foreign conduct.<sup>72</sup> While courts begin with a presumption against extraterritorial effect when applying regulatory law,<sup>73</sup> that presumption can be overcome where Congressional intent to reach foreign conduct is inferred. The determination of whether regulatory law was intended to reach particular conduct therefore requires a fact-based analysis. In a typical case involving the application of domestic rules to conduct touching multiple jurisdictions, this analysis begins by establishing the various links that the conduct and the actors have to the different countries involved.<sup>74</sup> While some courts have held that U.S. legislative jurisdiction extends to all conduct causing the requisite level of effects in the United States, others have added to the jurisdictional analysis one form or another of balancing test. These tests are intended to account for the competing interests of other nations and ensure deference to those nations when the conduct's effect on the United States is insufficient, in light of those interests, to justify regulation.<sup>75</sup>

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71. See *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945) (adopting an effects test in the United States); *Case 89/85 Osakeyhtiö v. Commission of the European Communities*, 1988 E.C.R. 5193 (*In re Wood Pulp*) (adopting an effects test in the European Union). While the precise scope of effects jurisdiction remains the subject of debate, it is widely recognized. See generally IAN BROWNLIE, *INTERNATIONAL LAW* 309 (5th ed. 2002) (discussing the conditions under which effects-based jurisdiction may be exercised consistent with international law).

72. As one commentator has noted: "What began...as a prohibition against the perceived violation of international law through extraterritorial regulation became simply a legal test for subject matter jurisdiction." Jonathan Turley, "*When in Rome*": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 607 (1990); see also Gary B. Born, *A Reappraisal of the Extraterritorial Reach of United States Law*, 24 LAW & POL'Y INT'L BUS. 1, 10 (1992) (noting the link between the international law principle and the process of statutory construction, reflected in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804): "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.").

73. See *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244 (1991) (reaffirming the presumption against extraterritoriality); see also William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998); Turley, *supra* note 72.

74. See David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 HOUS. J. INT'L L. 287, 290-91 (2004).

75. See, e.g., *Timberlane Lumber Co. v. Bank of America N.T.*, 549 F.2d 597 (9th Cir. 1976). *But see Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (rejecting such interest-balancing unless a foreign state compelled the conduct in question).

As these efforts to restrain the reach of regulatory law reflect, the extraterritorial application of domestic law creates substantial conflict between nations. However, the primary source of that conflict is differences in *substance* between the law applied and the law of the other country or countries involved, particularly when conduct permitted where it occurred is prohibited where it has effect. Major conflicts resulted when the United States attempted to regulate competition-related arrangements that were lawful in other countries, for instance, or to prosecute cross-border insider trading at a time when other countries did not regulate such conduct.<sup>76</sup> The balancing tests proposed for use in extraterritoriality analysis reflect this focus as well: the Restatement (Third) of the Foreign Relations Law of the United States, for instance, includes a section designed to avoid the substantive conflicts that often attend overlapping exercises of jurisdiction.<sup>77</sup> In the cases I describe as transnational regulatory litigation, however, the regulatory community shares the rule applied; thus, the cases do not present the situation where conduct would be permitted in a foreign jurisdiction but forbidden under U.S. law.<sup>78</sup> (While it is true that differences in the procedural law to be applied can cause conflict as well,<sup>79</sup> that is a second-order conflict that I address separately in Part III.) Transnational regulatory cases therefore do not present the core concern raised by traditional extraterritoriality cases.<sup>80</sup>

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76. See, e.g., Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 RECUEIL DES COURS 9, 54–55 (1994-1) (discussing past controversies over the exercise of U.S. jurisdiction in some such cases).

77. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3) (1987); see also *id.* § 403(3) cmt. e.

78. Early discussions in fact suggested that the exercise of effects-based jurisdiction would be consistent with international law if the substance of the claim was recognized by the broader community of states. See Lowenfeld, *supra* note 76, at 65.

79. *But see id.* at 192 (noting that objections based on procedural conflict are sometimes surrogates for objections to expansive application of substantive law).

80. Cf. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 77 (1994) (discussing shared values such as standards against certain criminal behavior, and comparing to extraterritorial regulation of restrictive trade practices: “[T]he key to the issue lies in the protection of common values rather than the invocation of sovereignty for its own sake. The fight against restrictive practices, which harm the consumer and keep prices high, in my view deserves international solidarity, along with the fight against common criminality. The exercise of extraterritorial jurisdiction to that end seems to me as acceptable as its exercise in the other non-territorial bases of jurisdiction.”).

## 2. *The Global Benefits of Transnational Regulatory Cases*

As I have described above, transnational regulatory cases seek access to U.S. courts specifically as a means of addressing global harms. Significant arguments support this use of civil litigation. In an era in which unchecked corporate power often results in economic misconduct on a global scale, civil proceedings in U.S. courts could help provide meaningful regulation of economically harmful behavior.<sup>81</sup> Particularly in developing countries, where the challenges of global economic harm have not yet been adequately addressed, such assistance would be significant.<sup>82</sup> In this regard, the litigation promises to mobilize available resources to address a problem that concerns the international community at large.

Furthermore, certain types of transnational regulatory cases promote procedural efficiency as well. Most of the antitrust and securities cases described above involved plaintiff groups that were, due to the jurisdictional challenges presented by the foreign claims, ultimately split into one U.S. and one foreign group. When the foreign group includes plaintiffs from jurisdictions that permit private claims, this fragmentation of the class means that the same transactions and conduct are litigated in more than one proceeding. The vitamins cartel, for example, gave rise to private damages claims in the United Kingdom as

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81. See First, *supra* note 14 (noting that many of the participants in the vitamin cartel were repeat offenders and detailing the economic damage the cartel caused); Philip J. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257 (1999) (discussing economic harm caused by corporate bribery); Robert A. Prentice, *The Internet and Its Challenges For the Future of Insider Trading Regulation*, 12 HARV. J.L. & TECH. 263 (1999) (discussing economic harm caused by securities fraud); see also Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 973 (2004) (speaking of human rights violations rather than economic misconduct, but noting that "corporations now are scouring the far corners of the earth in search of profits and entering into business arrangements as they never have before"); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 750–52 (2002) (noting how transnational litigation has played a role in checking the human-rights abuses of corporations).

82. See Eleanor M. Fox, *Global Problems in a World of National Law*, 34 NEW ENG. L. REV. 11 (1999) (identifying improvements in the enforcement regimes of less developed and developing countries as a benefit of a more cosmopolitan approach to international antitrust); Pamela Sittenfeld, *International Cooperation Between Developed and Developing Countries*, in 2003 INTERNATIONAL ANTITRUST LAW AND POLICY 685, 692 (Barry Hawk ed., 2003) (noting that competition agencies in developing countries often lack the "credibility and independence" necessary to impose penalties with a sufficiently deterrent effect on companies). See generally GUNNAR MYRDAL, AN INTERNATIONAL ECONOMY (1956).

well as the United States.<sup>83</sup> As other countries increasingly allow private actions under regulatory law,<sup>84</sup> the result could be the dispersal in various national courts of cases that all address one single instance of conduct. The consolidation of such litigation would improve global procedural efficiency.<sup>85</sup>

## II. THE APPLICATION OF JURISDICTIONAL RULES IN TRANSNATIONAL REGULATORY CASES

Transnational regulatory cases have met the same criticism leveled at transnational public law litigation—that they arrogate power to the courts of particular countries in a way that violates the international jurisdictional framework, and therefore infringe the sovereignty of other countries. Because the regulatory cases apply domestic rather than international law, they are also criticized as vehicles for the illegitimate application of national law to foreign conduct. This Part addresses these jurisdictional challenges to transnational regulatory litigation. It considers first the judicial disposition of the cases, examining the jurisdictional rules the courts apply to resolve the international conflicts presented. While the specific jurisdictional rules vary with the subject matter of the cases, they have in common a view of global regulation as compartmentalized along lines of territorial sovereignty. It then critiques the jurisdictional analysis on the basis that it fails to consider the substantive regulatory benefits that transnational litigation can confer.

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83. See *Provimi Ltd. v. Aventis Animal Nutrition SA*, [2003] EWHC 961 (Comm) (Eng.).

84. See discussion *infra* Part III.A.2 (noting that private actions under regulatory law are becoming more common outside the United States).

85. See, e.g., Brief of Amici Curiae Economists Joseph P. Stiglitz and Peter R. Orszag, *supra* note 26, at 11–12:

High fixed costs of bringing antitrust actions mean that even if a developing country had the administrative and legal framework with which to bring antitrust actions, were recovery limited to damages within the country, it would not be economically practicable to bring antitrust actions. Efficient deterrence requires the concentration of antitrust actions in the economies most affected.

U.S. courts need not be the only situs for such litigation. See Ralf Michaels, *Territorial Jurisdiction After Territoriality*, in *GLOBALISATION AND JURISDICTION* 105, 126 (Piet Jan Slot & Mielle Bulterman eds., 2004). Currently, however, the U.S. courts have the most substantial experience in addressing private attorney general claims. Moreover, as long as remedies and procedural rules differ across legal systems, plaintiffs may seek U.S. fora in preference to others in order to obtain treble damages, more flexible procedural rules, or both. I discuss problems related to this situation in Part III.A.3.

A. *Jurisdictional Law Applied to Transnational Regulatory Cases*

1. *Antitrust Litigation*

The global cartel cases presented a question of statutory interpretation: whether the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA),<sup>86</sup> a statute intended to clarify the reach of U.S. antitrust law to export commerce, barred jurisdiction over the claims of purchasers harmed in foreign transactions. The relevant provision of the FTAIA confers jurisdiction over foreign conduct involving foreign commerce only if that conduct has a “direct, substantial and reasonably foreseeable effect” on U.S. markets, and that effect gives rise to a claim under the Sherman Act.<sup>87</sup> Because the cartels in question had harmed U.S. markets, the first part of this test was satisfied in each case; as to the second part, however, the appellate courts hearing the cases were divided. Some held that the foreign purchasers had suffered harm arising from the cartel’s foreign effects alone, and that their claims therefore had not satisfied the jurisdictional test.<sup>88</sup> Others held that as long as the same conduct that harmed the foreign purchasers had caused effects within the United States, the claims of foreign purchasers fell within U.S. jurisdiction.<sup>89</sup> In the vitamins litigation, the Supreme Court largely resolved this question of interpretation.<sup>90</sup> It predicated its opinion on the assumption that the effects caused by the cartel in U.S. markets were independent of those caused in foreign markets.<sup>91</sup> It then held that because the harm suffered by foreign purchasers arose from

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86. 15 U.S.C. § 6(a) (1982).

87. *Id.* I analyze this provision in more detail in Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOYOLA CONS. L. REV. 365 (2004), and Hannah L. Buxbaum, *National Courts, Global Cartels*, 5 GERMAN L.J. 1095 (2004). See also Salil K. Mehra, “A” is For Anachronism: The FTAIA Meets the World Trading System, 107 DICK. L. REV. 763 (2003) (analyzing competing constructions of the FTAIA).

88. See, e.g., *Den Norske Stats Oljeselskap A.S. v. HeereMac V.O.F.*, 241 F.3d 420 (5th Cir. 2001).

89. See, e.g., *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002).

90. I co-authored an amicus brief in that litigation. See Brief of Amici Curiae Law Professors Ralf Michaels, Hannah Buxbaum and Horatia Muir Watt in Support of Respondents, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), available at 2004 WL 542780.

91. *F. Hoffmann-La Roche*, 542 U.S. at 158 (2004). The D.C. Circuit Court of Appeals validated this assumption on remand. *Empagran S.A. v. F. Hoffmann-La Roche Ltd. (Empagran II)*, 417 F.3d 1267 (D.C. Cir. 2005) (viewing the harm suffered in each purchase transaction as stemming from price increases in the particular market in which that transaction took place).

the conduct's foreign effects, and not from its domestic effects, the claims did not meet the FTAIA's jurisdictional requirements.<sup>92</sup>

The Court examined closely the question of jurisdiction in cross-border cases, evaluating the competing interests of other nations in antitrust regulation. In particular, it took seriously the briefs filed by a number of foreign governments, in which they asserted their authority to establish their own regulatory schemes without interference from the United States.<sup>93</sup> The Court noted that domestic statutes should, whenever possible, be construed to avoid interference with foreign sovereign authority, and expressed its desire to "help[] the potentially conflicting laws of different nations work together in harmony."<sup>94</sup> Its decision therefore rested on a view of jurisdictional authority as flowing from the territorial allocation of power to sovereign states.

On remand, the D.C. Circuit Court of Appeals tested the assumption of the Supreme Court that the effects of the cartel in the United States were in fact independent of the effects felt in foreign markets.<sup>95</sup> This decision reflects even more clearly the territorial basis of the jurisdictional analysis. The court agreed that the plaintiffs had presented a "plausible scenario" under which maintenance of artificial prices in the United States "might well have been a 'but-for' cause" of the foreign purchasers' injury.<sup>96</sup> However, it then concluded that the FTAIA requires not merely but-for causation, but "a direct causal relationship" between anti-competitive effects in the United States and the foreign harm.<sup>97</sup> While seemingly accepting that the vitamin market was a "single, global market," it held that plaintiffs had established only an indirect connection between the U.S. prices and the harm they suffered in overseas transactions, insufficient to support U.S. jurisdiction over

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92. *F. Hoffmann-La Roche*, 542 U.S. at 159.

93. Amicus briefs to this effect were filed by the governments of Belgium, Canada, Germany, Ireland, Japan, the Netherlands, and the United Kingdom.

94. *F. Hoffmann-La Roche*, 542 U.S. at 164.

95. In *Empagran II*, the court addressed the plaintiffs' argument that "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." *Empagran II*, 417 F.3d at 1269.

96. *Id.* at 1270.

97. *Id.* at 1270-71; see also *Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 705 (E.D. Pa. 2001) (holding that sixteen of the plaintiffs could not show that higher prices paid in U.S. graphite electrodes market "gives rise to their claims that they paid higher prices for graphite electrodes in foreign markets"), *vacated and remanded on other grounds*.

their claims.<sup>98</sup> This decision therefore maintains an allocation of regulatory authority according to territorial boundaries even over what is apparently conceded to be a global market.<sup>99</sup>

## 2. *Securities Litigation*

The courts addressing the transnational securities cases engaged in a similar territory-driven analysis. They began with the two jurisdictional tests traditionally applied in securities cases with international elements, designed to assess whether the events in question are sufficiently connected to the United States to warrant the exercise of regulatory jurisdiction.<sup>100</sup> The first is the “conduct” test, which establishes regulatory jurisdiction based on the location of the fraudulent conduct itself;<sup>101</sup> the second, the “effects” test, which establishes jurisdiction based on the location of that conduct’s effects.<sup>102</sup> Cases in which jurisdiction is based on conduct trigger the U.S. regulatory interest in preventing the country from becoming a haven for fraudulent behavior that harms investors and markets elsewhere; thus, courts look for conduct that is more than merely preparatory to the fraud. Effects cases trigger the U.S. regulatory interest in protecting domestic markets and

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98. *Empagran II*, 417 F.3d at 1271 (“Although the appellants argue that the vitamin market is a single, global market facilitated by market division agreements so that their injuries arose from the higher prices charged by the global conspiracy (rather than from super-competitive prices in one particular market), they still must satisfy the FTAIA’s requirement that the U.S. effects of the conduct give rise to their claims.”).

99. See Spencer Weber Waller, *The United States as Antitrust Courtroom to the World*, 14 LOY. CONSUMER L. REV. 523, 531–32 (2002) (discussing the *HeereMac* case in terms of the world market presented and the clear harm in the United States). For cases outside the hard-core cartel context, see also *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D. Md. 2001) (case brought by foreign purchasers of operating systems alleging monopolistic pricing); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875 (W.D. Wisc. 2000) (case brought by purchasers of copper contracts on a London market at artificially inflated prices).

100. While some courts have adopted a sort of mixture of the two, even these nevertheless begin analysis with a review of these doctrines.

101. A classic articulation of this standard is found in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972). See also *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1045 (2d Cir. 1983); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975).

102. The classic articulation of this test is found in *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968). See also *Consol. Gold Fields PLC v. Minorco S.A.*, 871 F.2d 252, 261–62 (2d Cir. 1989).

investors from harm caused by foreign conduct; thus, courts look for substantial and intentional domestic effects.<sup>103</sup>

Purchasers seeking damages for harm flowing from foreign securities transactions generally tailor their claims to the conduct test. They argue that conduct taking place in the United States, in the form of misrepresentations made there, materially advanced the frauds in question.<sup>104</sup> (As discussed in Part I.A.2, these claims are often based on a “fraud on the global market” theory, drawing on the fact that, given efficient markets, misrepresentations made in the United States will affect trading prices abroad as well as domestically.) Such an argument might be sufficient to satisfy the general standards of the conduct test, according to which U.S. prescriptive jurisdiction exists as long as substantial activities occurred within the United States.<sup>105</sup> Some courts, however, have adopted a stricter test, requiring that the U.S.-based conduct lead directly to the losses suffered by the foreign investors.<sup>106</sup> On this view, the plaintiffs must show specific reliance on misstatements made within the United States in order to establish reliance. Arguing that statements made in the United States necessarily affect prices on the interconnected financial markets, in other words, is insufficient.<sup>107</sup> This approach separates the U.S. and foreign markets:

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103. This is a somewhat simplified statement of the jurisdictional tests. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 416 (1987).

104. *See, e.g., In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546 WHP, 2004 WL 2190357, at \*17 (S.D.N.Y. 2004) (noting that the plaintiffs had conceded that the effects test would not support jurisdiction); *see also* *Tri Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567, 572 (W.D. Pa. 2002) (action involving claims by foreign plaintiffs arising out of purchases of securities on the London Stock Exchange, in which plaintiffs argued that misstatements in SEC filings constituted conduct that “significantly advanced defendants’ fraudulent scheme to mislead investors”).

105. *See, e.g., SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977) (requiring merely that “at least some activity designed to further a fraudulent scheme” must occur within the United States).

106. *See, e.g., McNamara v. Bre-X Minerals Ltd.*, 32 F. Supp. 2d 920, 923–25 (E.D. Tex. 1999) (“In order to satisfy the conduct test, the Canadian Plaintiffs must demonstrate that domestic conduct *directly caused* the alleged fraud.... Even if [misrepresentations made in the United States] were indeed a substantial part of a fraudulent scheme, the Canadian Plaintiffs still have failed to show how their losses were *directly caused* by these activities. Not a single Canadian Plaintiff has alleged that he or she relied on (or was even aware of) any statements, reports or filings which emanated from the United States.”); *see also In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1, 9 (D.D.C. 2000); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665–66 (7th Cir. 1998) (comparing the various approaches to the conduct test).

107. *See, e.g., In re Bayer*, 2004 WL 2190357, at \*18 (citing *In re Baan*, 103 F. Supp. 2d at 10). *But see In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 362 (D. Md. 2004) (where, although the court does not specifically discuss the interconnectedness of securities markets, it notes that “[i]t is well recognized that ‘SEC filings generally are the type of ‘devices’ that a reasonable investor would rely on in purchasing securities of the filing corporation”)

plaintiffs purchasing on the U.S. markets can use the fraud on the market theory to establish their reliance on misrepresentations, but plaintiffs purchasing on foreign markets cannot.<sup>108</sup> Courts adopting this approach have expressed the fear that if fraud on the market satisfied the conduct test, then U.S. law would extend extraterritorially to transactions around the world whenever fraudulent misrepresentations were made involving jointly traded securities.<sup>109</sup>

In some cases, where the fraud in question occurred overseas, foreign investors have sought the application of U.S. law on the basis of the effects test. These claims suggest that if the same conduct that harmed foreign markets also harms U.S. markets, then the effects felt in the United States should be sufficient to confer jurisdiction over all claims, including those brought by foreign purchasers. Such claims generally founder because the courts believe that they can view effects caused within the United States as independent of effects caused abroad. In *In re Baan*, for instance, the court recognized that global trading might cause foreign-based fraud to create “greater and more pervasive generalized effects” in the United States, but held that no link had been established between those effects and the claims of the foreign plaintiffs.<sup>110</sup> These holdings separate the effects on U.S. markets from those on foreign markets, treating the resulting harm to U.S. and foreign investors as independent.<sup>111</sup> This approach is identical to that adopted in the global cartel cases, as noted recently by one court:

While the Supreme Court has not commented on the conduct and effects test in the securities law arena, it recently ruled that under

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(citing *Itoba, Ltd. v. LEP Group PLC*, 54 F.3d 118, 123 (2d Cir. 1995)). In *In re Royal Ahold*, however, U.S.-based accounting fraud was a material part of the alleged fraud. 351 F. Supp. 2d at 362.

108. See *In re Bayer*, 2004 WL 2190357, at \*18, noting that fraud on the market is sufficient to establish reliance, but “cannot be used to satisfy the conduct test.”

109. See *Tri-Star Farms*, 225 F. Supp. 2d at 579. I argue below that this concern is less relevant when the norm to be applied is shared by other jurisdictions.

110. *In re Baan*, 103 F. Supp. 2d at 11. This conclusion echoes the reasoning of the appellate court in the *Empagran* litigation; see *supra* notes 95–98 and accompanying text.

111. See *McNamara*, 32 F. Supp. 2d at 924 (describing the foreign plaintiffs’ argument as an attempt to “bootstrap” their losses to independent American losses); see also *Kaufman v. Campeau Corp.*, 744 F. Supp. 808, 810 (S.D. Ohio 1990) (considering the “unitary nature” of the Canadian and U.S. markets as an effects question—that is, as an argument that jurisdiction over the foreign purchasers’ claims was based on the effects of the misrepresentation on U.S. investors). The court simply held that, although the defendants’ actions in Canada may indeed have affected U.S. investors, that effect was separate from the effect on foreign purchasers and therefore not sufficient to meet that jurisdictional test.

the antitrust laws, federal courts lack subject matter jurisdiction over foreign plaintiffs' claims that are based solely on the foreign effect of the defendant's conduct and independent from any domestic effect caused by the defendant's conduct.<sup>112</sup>

It also, as in the global cartel cases, territorially segregates effects that flow from integrated global misconduct.

### 3. *Tax Revenue Litigation*

The RICO claims in the tobacco revenue cases were based on violations of U.S. fraud and money laundering statutes, committed in connection with cross-border smuggling schemes. On their face, then, the cases present the same issues as the antitrust and securities cases: whether U.S. federal law, in this case RICO, applies to conduct with cross-border elements. However, the "injury to business or property" necessary to obtain civil damages for those violations stemmed from the foreign governments' loss of duties and taxes that would otherwise have been payable on the smuggled goods. For this reason, the courts hearing the cases characterized the governments' claims as claims, albeit indirect, for the payment of taxes allegedly due.<sup>113</sup> Seen in this light, the cases present a different issue: whether foreign tax law should be given effect within the United States. In answering that question, the courts turned to another traditional jurisdictional rule—the revenue rule, which provides that the courts of one country will not enforce tax claims, or judgments for the payment of taxes, of another sovereign.<sup>114</sup>

The decisions traced the history of the revenue rule, noting its roots in classic conceptions of territorial sovereignty.<sup>115</sup> In the case brought by

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112. *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d at 356 (citing *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), but distinguishing it from the case at bar).

113. *See Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 130–32 (2d Cir. 2001) (discussing the indirect enforcement of foreign tax law and concluding that the object of Canada's suit was to recover taxes due and compensation for additional enforcement costs incurred in attempting to secure those taxes).

114. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987) ("Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."); *see also* William S. Dodge, *Breaking The Public Law Taboo*, 43 HARV. INT'L L.J. 161 (2002); William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265 (2000).

115. *See, e.g., Republic of Honduras v. Philip Morris Cos., Inc.*, 341 F.3d 1253, 1257–58 (11th Cir. 2003) (discussing the rule's aim "to promote harmony between sovereigns by preventing one sovereign from asserting its political will in another sovereign through actions to

the Canadian government, for instance, the court cites as a justification for the rule the general notion that nations can not assert their own sovereignty within the territory of another country, and the concomitant principle that one country need not further the governmental interests of another.<sup>116</sup> The courts recognized the discretionary nature of the rule, acknowledging that U.S. courts can choose, in light of the need for international comity and cooperation between countries, to give effect to a foreign claim.<sup>117</sup> While conceding that in these particular cases the foreign taxes in question (intended to deter smoking, particularly among youth) would not likely offend U.S. policies,<sup>118</sup> they nevertheless concluded that inquiries into the consistency of foreign tax laws with local policy were too “sensitive and difficult” for courts to undertake.<sup>119</sup> Thus, in holding that the revenue rule barred the foreign governments from recovering civil damages in U.S. court, the courts privileged a view based on the territorial sovereignty of individual nations.<sup>120</sup>

In sum, while the jurisdictional framework has stretched to accommodate the increasingly cross-border nature of most economic activity, it remains anchored in territoriality.<sup>121</sup> While the particular

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enforce its revenue laws.”). *But see* Republic of Ecuador v. Philip Morris Cos. Inc., 188 F. Supp. 2d 1359, 1368 (S.D. Fla. 2002) (framing the question almost exclusively as one of separation of powers: “To reiterate, this Court is less concerned about ‘embarrassing’ Ecuador and is more concerned with encroaching on Legislative and Executive functions.”).

116. *See R.J. Reynolds*, 268 F.3d at 111–12; *accord* European Cmty. v. RJR Nabisco, Inc., 355 F.3d 123, 131 (2d Cir. 2004).

117. The revenue rule is a discretionary doctrine, limited by the public policy of the forum state. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987) (U.S. courts “are not required” to recognize foreign tax claims).

118. *R.J. Reynolds*, 268 F.3d at 113.

119. *Id.* at 112; *see RJR Nabisco*, 355 F.3d at 131 (noting that “claims by foreign sovereigns invoking their tax statutes may embroil the courts in an evaluation of the foreign nation’s social policies, an inquiry that can be embarrassing to that nation and damaging to the forum state”); *cf.* Koh, *Transnational Public Law Litigation*, *supra* note 4, at 2354–55 (pointing out that U.S. courts had historically decided “public, state-to-state issues” that today might be deemed unsuitable for adjudication). The decisions do also recognize that the rule has taken on “constitutional significance” through the separation of powers doctrine.

120. While the courts hearing these cases acknowledged that Congress had recognized RICO’s potential as a means of combating global crime, they held that neither RICO itself nor subsequent legislation had preempted the revenue rule. *See* Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 129–30 (2d Cir. 2001) (discussing possible preemption by RICO); *RJR Nabisco*, 355 F.3d at 132–34 (discussing possible preemption by the PATRIOT Act).

121. *See generally* Michaels, *supra* note 85 (describing the way in which concepts of territoriality remain but have been “made flexible”); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) (challenging the continued viability of territory-based jurisdictional rules).

rationales underlying these cases vary with the different substantive fields regulated, each is rooted in a traditional understanding of sovereignty as power over a geographical area. In this respect, as I argue below, they fail to take account of valid arguments for a more global regulatory role for domestic courts.

*B. Criticism of the Jurisdictional Rules*

As discussions of transnational public law litigation make clear, traditional jurisdictional rules are in many ways ill suited to deal with global cases. Indeed, proponents of an expanded role for domestic courts embrace litigation in national courts precisely for its transcendence of static norms of territorialism and jurisdiction. Consider the following, from an academic proponent of transnational human rights litigation:

Ultimately, the torture cases give us a glimpse into the imperatives of a future in which law—including private law—is increasingly cosmopolitan. Here, as the torture cases and the surrounding debates reveal, the limitations of the traditional conception of binding law come to seem pressing to judges and others faced with a world where legal problems are profoundly multi-jurisdictional in nature. The task of the advocate, the judge, and the law-maker no longer seems adequately captured—if it ever was—by the notion of discrete mutually exclusive spheres of binding law, conjoined through a set of rules premised on conflict and choice. And indeed, what the torture cases show is a subtle, yet distinct, move away from this model and towards a more multi-faceted integrative understanding of sources and a broader persuasive approach to authority.<sup>122</sup>

One can observe similar trends in the context of economic regulation. The extraterritoriality jurisprudence that courts apply today in cross-border cases was itself a jurisdictional innovation, reacting to the divergence of conduct and effect in the era of international transactions.<sup>123</sup> But because it remains rooted in notions of territorial sovereignty, it is simply not well suited to cases that involve forms of

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122. Mayo Moran, *An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law*, in *TORTURE AS TORT* 661, 683 (Craig Scott ed., 2001).

123. See Turley, *supra* note 72, at 650–51 (noting that the rise in extraterritorial regulation itself followed an appreciation of the increasingly global nature of business transactions).

global harm in which both the conduct and its effects are felt simultaneously in many jurisdictions—harm that, in a sense, does not merely cross borders but transcends them. This is why cases involving Internet-based activity, for instance, have proved problematic for traditional jurisdictional law.<sup>124</sup> For similar reasons, cases involving economic misconduct that leverages the global nature of markets, and relies on the linkage of effects across jurisdictions, fall outside the class of cases that extraterritoriality doctrine best addresses.

1. *Critique of the Conduct and Effects Tests Used in Antitrust and Securities Cases*

The jurisdictional analysis applied in the transnational regulatory cases is in some respects commendable. Particularly in the global cartel cases, the courts—most notably the Supreme Court—focused clearly on the international law backdrop to the task of statutory interpretation.<sup>125</sup> At the same time, however, the reliance on principles of territorial sovereignty prevented a fair assessment of the arguments for using adjudication in the United States as a tool of global regulation. In the vitamins case, for instance, the courts adopted an artificial view of the cartel's activity. The defendants had implemented a single, global strategy, violating a shared norm against hard-core cartelization, and had thereby harmed competitive conditions worldwide. Moreover, the plaintiffs had presented a plausible argument that this type of harm would be insufficiently deterred if foreign purchasers could not litigate their claims in U.S. courts.<sup>126</sup> In using territory-based categories to address that conduct, the Court failed to consider fully the questions about global regulation that the plaintiffs' arguments presented.<sup>127</sup> While its analysis was sensitive to the foreign relations issues raised in the

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124. See *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 716–17 (D. Md. 2001) (discussing the status of foreign purchasers who bought directly from defendant over the Internet, and noting that in that context “the drawing of a distinction for jurisdictional purposes on the basis of geographical boundaries seems somewhat archaic”). See generally David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951 (2005).

125. See Buxbaum, *National Courts, Global Cartels*, *supra* note 87, at 1099–1100 (noting the improvement in this regard over such decisions as *Hartford Fire Insurance v. California*, 509 U.S. 764 (1993)).

126. See *supra* Part I.A.1.

127. Indeed, the Court dispensed with those arguments in a quite cursory way. See Buxbaum, *National Courts, Global Cartels*, *supra* note 87, at 1106.

case, it left no room for consideration of the substantive regulatory goals that a broader role for domestic actions might further.

In the securities context too, the jurisdictional analysis based on territorial links respects the sovereignty of other countries, but fails to account fairly for the global arguments made in favor of U.S. jurisdiction. Given that publicly available information does, in an efficient market, affect trading prices, and given that such information is disseminated efficiently on a worldwide basis through the interconnected financial markets, it makes little sense to suggest that the effects of fraud can be territorially segregated.<sup>128</sup> Such an approach bars courts from even considering arguments that a patchwork of local remedies might insufficiently deter issuers from taking advantage of linked markets to manipulate the prices at which their securities trade.<sup>129</sup> The traditional rules encourage courts to consider markets separately, and view their role as protecting conditions only within U.S. markets,<sup>130</sup> whereas the cases brought by foreign purchasers might be seen differently—as indicating that global market conditions permit fraudulent behavior to affect global markets with immediacy, and therefore require additional resources, perhaps in the form of domestic actions, to counter that behavior.

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128. The complaint filed in the *China Life Insurance* case makes this argument: “Indeed, it would be impossible for the fraud-on-the-market theory to apply within the U.S. but not outside of it, because if securities reacted to information only within the U.S., global traders would take advantage of the price differential and buy on one exchange to sell on another.” Amended Complaint, *In Re China Life Ins. Co. Ltd. Sec. Litig.*, No. 04-CV-02112 (S.D.N.Y. Jan. 19, 2005); see also Brian P. Murray and Maurice Pessa, *The Accident of Efficiency: Foreign Exchanges, American Depository Receipts, and Space Arbitrage*, 51 BUFF. L. REV. 383 (2003) (arguing that the linkage between U.S. and foreign markets creates efficient trading with respect at least to dual-listed securities, therefore supporting broader application of U.S. law in cross-border securities cases).

129. See Michaels, *supra* note 85, at 123 (arguing that judicial focus on territorial concepts prevents courts from dealing properly with global market cases). For a more globally oriented argument, see *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 372 (3d Cir. 2002) (holding that sponsoring an ADR program in the United States constituted purposeful availment of U.S. markets, and noting the consequence of linked trading: “Although [plaintiff] does not allege that the fraudulent media releases and annual reports were specifically directed to American investors, a foreign corporation that has created an American market for its securities can fairly expect that that market will rely on reports and media releases issued by the corporation.”).

130. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 295 (1982) (criticizing the territory-based jurisdictional provisions of the Restatement (Second) of the Foreign Relations Law of the United States (1965) for their inability to guide courts in considering systemic values of the international community).

Where consensus exists on certain regulatory standards,<sup>131</sup> an expanded role for domestic courts in litigating global harm flowing from violation of those standards might bring important regulatory benefits. The rigid application of territory-based rules forecloses consideration of those benefits.<sup>132</sup>

## 2. *Critique of the Revenue Rule*

The application of the revenue rule in the tobacco cases further illustrates the danger that overly rigid jurisdictional rules may preclude valid arguments for transnational judicial cooperation. The courts in these cases acknowledged the substantial uncertainty surrounding the origins of the rule as well as abundant and long-standing criticism of the rule from both courts and commentators;<sup>133</sup> some expressed clear doubts about its continued vitality.<sup>134</sup> They nevertheless went on to apply the rule in a rather formulaic fashion, thereby failing to address adequately the dilemma posed by the civil RICO claims: the foreign nations that lodge them seek to transcend traditional jurisdictional rules—rules intended to safeguard order within the international community—in order to achieve, in the name of that international community, substantive regulatory goals. In considering this failure, it is important to analyze the revenue cases in light of two major justifications for the revenue rule. The first is avoiding the embarrassment of foreign nations; the second, alleviating separation of powers concerns relevant to U.S. foreign policy in the tax area.

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131. See Introduction, *supra* (defining transnational regulatory litigation to encompass cases in which the applicable domestic law embodies a substantive norm that is shared in the international community, and not the more common cases in which substantive regulatory provisions conflict).

132. Discretionary doctrines such as *forum non conveniens* would remain available to confine the exercise of jurisdiction when necessary. See K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 7 (2004) (analyzing various substantive and procedural mechanisms “that act as structural and political checks on universal jurisdiction in [U.S.] civil litigation”).

133. See, e.g., *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 124–25 (2d Cir. 2001) (citing criticism of the rule reaching back to the 19th century); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 Reporters’ Note 2 (1987), (suggesting that the rule is obsolete).

134. See particularly *Attorney Gen. of Can. v. R.J. Reynolds*, 103 F. Supp. 2d 134, 140 n.3 (N.D.N.Y. 2000), *aff’d* 268 F.3d 103 (2d Cir. 2001), in which the district court noted that “[w]ere [it] writing on a clean slate...it would be inclined to find the Revenue Rule to be outdated...and the rationale for the rule to be largely unpersuasive.”

a. Concerns Related to the Embarrassment of Foreign Nations

The courts in revenue rule cases have characterized as the most cogent rationale for the rule the principle that enforcing the tax laws of a foreign sovereign would require inquiries into the purposes behind those laws, and would therefore involve policy decisions that might embarrass foreign governments.<sup>135</sup> This argument makes sense particularly when courts apply the revenue rule in the traditional context: a suit brought in the United States to enforce a foreign judgment for unpaid taxes. Whenever a U.S. court is asked to recognize and enforce a foreign judgment, it inspects the judgment to ensure that its enforcement will not contravene U.S. public policy—a task that involves some investigation of the substantive law underlying the judgment.<sup>136</sup> In the tax context, such an investigation might embarrass the foreign sovereign, or lead to uncomfortable distinctions among the tax policies of different countries. However, in the tobacco revenue cases, as the foreign governments pointed out, the question was whether the defendants had violated U.S. law. Determining liability under civil RICO required merely the recognition of the tax laws in question.<sup>137</sup>

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135. The Supreme Court recently characterized this as the “principal evil” addressed by the revenue rule. *Pasquantino v. United States*, 544 U.S. 349, 368 (2005). This rationale is drawn from Learned Hand’s concurring opinion in a domestic tax recognition case. *Moore v. Mitchell*, 30 F.2d 600, 603 (2d Cir. 1929) (Hand, J., concurring), *aff’d*, 281 U.S. 18 (1930).

136. *See Moore*, 30 F.2d at 604 (Hand, J., concurring) (“Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the ‘settled public policy’ of its own.”). *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(d) (1987) (addressing the public policy exception in enforcement of foreign judgments).

137. *See* Brief for Plaintiff-Appellant the Attorney General of Canada at 3, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972) (“[A]ll parties agree that when a U.S. court enforces U.S. law, it may recognize the existence and applicability of foreign law, including revenue law, factually relevant to the U.S. claim.”) In discussing a welfare fraud case, F.A. Mann provides an interesting illustration of this distinction:

A person had fraudulently obtained unemployment benefits from the Dutch State and subsequently emigrated to Germany. The Dutch State sued in Germany for their return on the ground of unjustified enrichment and tortious liability. The court expressly “classified” or “characterized” the claim according to German public law, which allows the recovery of unjustifiably obtained unemployment benefits. Consequently, the Dutch State’s claim was found to arise from public law, and, therefore, to be inadmissible. The true question should have been whether the Dutch claim involved the assertion of Dutch sovereign power within Germany as a matter of international law. It is submitted that it did not. In substance, the plaintiff asserted a right in unjustified enrichment and tort even if the claim had been founded on a provision in a Dutch social security statute. In an international sense, the right existed independently of the special provision relating to social security in either the Dutch or the German legislation.

While the courts might need to examine the tax laws to determine damages, the tobacco cases did not turn on whether the foreign tax laws themselves were valid; therefore, no substantive examination was necessary.<sup>138</sup>

As the courts hearing the tobacco revenue cases recognized,<sup>139</sup> there is substantial overlap between this argument and arguments made with respect to the act of state doctrine.<sup>140</sup> That doctrine, which maintains that U.S. courts will not sit in judgment of the acts of a foreign sovereign taken within its own borders,<sup>141</sup> is intended to preserve harmonious foreign relations by avoiding sensitive inquiries into a sovereign's domestic conduct.<sup>142</sup> In the act of state context, however, a less rigid and more functional analysis has emerged, as courts have been more willing to distinguish between claims that only tangentially raise foreign acts and claims that turn on an assessment of their validity. In an oft-cited passage of its decision in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,<sup>143</sup> the Supreme Court stated:

The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be

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F.A. Mann, *The International Enforcement of Public Rights*, 19 N.Y.U. J. INT'L L. & POL. 603, 613–14 (1987) (internal citations omitted).

138. The court would not “risk having to declare [the foreign tax law] contrary to public policy,” to cite the primary concern underlying the revenue rule. Dodge, *supra* note 114, at 173; see also *R.J. Reynolds*, 268 F.3d at 137–39 (Calabresi, J., dissenting) (noting that U.S. criminal proceedings involving evasion of foreign taxes similarly call upon U.S. courts to accept and interpret foreign revenue law for sentencing purposes).

139. See, e.g., *R.J. Reynolds*, 268 F.3d at 125–26.

140. The single U.S. case involving the application of the revenue rule in the traditional context (a claim seeking direct enforcement of a Canadian tax judgment) relied heavily on the Supreme Court's act of state jurisprudence and the possibility of embarrassing the foreign sovereign by inspecting its taxation regime. Her Majesty the Queen *ex rel.* B.C. v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979).

141. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987).

142. Canada in fact turned this argument the other way in its complaint, stating that the U.S. courts, if they rejected jurisdiction in these cases, would in effect be violating the act of state doctrine by refusing to recognize the validity of Canadian tax law. Brief for Plaintiff-Appellant the Attorney General of Canada, *R.J. Reynolds*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972), 2000 WL 33988832, at \*30–31.

143. 493 U.S. 400 (1990) (determining whether a corporation's acts in procuring a foreign government contract violated U.S. anti-bribery law).

deemed valid. That doctrine has no application [in cases in which] the validity of no foreign sovereign act is at issue.<sup>144</sup>

A similarly flexible analysis was applied in one act of state case that bears striking similarities to the tobacco revenue cases. In the late 1980s, the Republic of the Philippines brought civil RICO claims against Ferdinand Marcos, seeking damages flowing from his theft of money from the national fisc.<sup>145</sup> As the Ninth Circuit recognized, “the gravamen of the Republic’s entire case is the allegation that the Marcoses stole public money.”<sup>146</sup> In an opinion addressing the foreign relations implications of the case, the court held that the exercise of jurisdiction was appropriate. It acknowledged that it might need to investigate Philippine law to answer whether various substantive criminal violations had in fact been established, but held that doing so would not create the sort of foreign relations problems the act of state doctrine guarded against.<sup>147</sup> As the concurring opinion noted most directly, act of state was acknowledged as a “prudential decision to refrain from adjudicating the legality of a foreign sovereign’s public acts that were committed within its own territory,”<sup>148</sup> but not as a doctrine that would bar every adjudication affecting a foreign sovereign.

The case invoked certain specific limitations of the act of state doctrine: for instance, it was relevant to the outcome that the act of state doctrine was not designed to protect a deposed leader from adjudication of earlier acts, but to protect a sitting government.<sup>149</sup> Additionally, the court concluded that an act of theft could not be considered a public, sovereign act and therefore was entitled to no presumption of validity. Nevertheless, viewed more broadly, this case resembles the tobacco revenue cases in that it involves a foreign nation seeking access to U.S. court, and application of U.S. law, to assist it in dealing with cross-border conduct. (In an interesting bit of dictum, a recent Supreme Court

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144. *Id.* at 409–10.

145. *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988).

146. *Id.* at 1359. Harold Koh briefly notes this case, suggesting that it can be read to fall within his definition of transnational public-law litigation. *See Koh, Transnational Public Law Litigation, supra* note 4, at 2371 n.128 (noting that “though the current Philippine government undeniably seeks retrospective redress, its actions appear strongly motivated by the prospective political aim of solidifying its own standing”).

147. *Marcos*, 862 F.2d at 1361 (considering these also under the heading of political questions).

148. *Id.* at 1369 (Schroder, J., concurring in part, dissenting in part).

149. *See id.* at 1360–61 (majority opinion).

decision, discussed in more detail below, lends weight to this comparison.<sup>150</sup> Addressing the effects of cross-border smuggling, in the context of a criminal prosecution,<sup>151</sup> it notes that “tax evasion deprived Canada of that money, inflicting an economic injury no less than had [defendants] embezzled funds from the Canadian treasury.”<sup>152</sup> This statement indicates that the type of conduct complained of by the Philippine government in the Marcos case is analogous to that complained of by the Canadian and other governments in the tobacco revenue cases.)

When another government itself weighs potential foreign relations issues and decides actively to seek the intercession of a U.S. court, there is little possibility of embarrassment.<sup>153</sup> A more flexible analysis, such as that developed in the act of state context, would be more appropriate in revenue claims cases than the outright bar established by the revenue rule.

#### b. Separation of Powers Concerns

Some of the smuggling operations that gave rise to the civil tobacco revenue cases also led to criminal prosecutions. In these cases, the United States initiated proceedings, under federal wire fraud and money laundering statutes, against individuals involved in the smuggling.<sup>154</sup> It was clear in each of the cases that the underlying goal of the activity was to defraud the Canadian government by depriving it of tax revenue; thus, as in the civil cases, the defendants invoked the revenue rule. They argued that the U.S. courts would be called upon to review the foreign tax legislation in question, and that the rule therefore barred their

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150. *Pasquantino v. United States*, 544 U.S. 349 (2005).

151. The opinion expressly reserved the question whether the same result would obtain in civil RICO actions brought by foreign governments, but is nevertheless instructive. *Id.* at 355 n.1.

152. *Id.* at 356.

153. *Cf. Dodge, supra* note 114, at 212–15 (characterizing concerns about the embarrassment of foreign nations in this context as overstated).

154. *See United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) (discussing defendants’ participation in financial transactions, intended to defraud the Canadian government of tax revenue, in violation of wire fraud and money laundering statutes); *United States v. Miller*, 26 F. Supp. 2d 415 (N.D.N.Y. 1998) (same); *Fountain v. United States*, 357 F.3d 250 (2d Cir. 2004) (discussing a conspiracy to launder the proceeds of a wire fraud scheme, intended to defraud both the United States and Canada); *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000) (discussing conspiracy to launder money); *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996) (discussing wire fraud counts, but affirming conviction for violation of anti-bribery statute).

prosecution. The courts disagreed.<sup>155</sup> While they recognized that the substance of the allegations included depriving a foreign sovereign of tax revenue, they characterized the cases as ordinary domestic criminal proceedings. One court stated that “[a]t the heart of this indictment is the *misuse of the wires* in furtherance of a scheme to defraud the Canadian government of tax revenue, not the validity of a foreign sovereign’s revenue laws,”<sup>156</sup> further noting that “whether our decision today indirectly assists our Canadian neighbors...in the collection of taxes, is not our Court’s concern.”<sup>157</sup> In its recent decision in *Pasquantino v. United States*, another case involving a domestic criminal prosecution related to foreign tax evasion, the Supreme Court affirmed this reasoning.<sup>158</sup> It stressed that the object of the action was the enforcement of domestic criminal law, under a wire fraud statute “advanc[ing] the Federal Government’s independent interest in punishing fraudulent domestic criminal conduct.”<sup>159</sup> It held that the revenue rule did not bar such criminal prosecutions, siding with the majority of the appellate courts that had considered the question.<sup>160</sup>

The argument that the heart of the relevant claims was a violation of domestic law was precisely the argument made by the foreign sovereigns in the tobacco revenue cases. As Canada’s brief stated, “[The] claim is that defendants violated U.S. laws RICO and predicate crimes thereunder. No legal principle bars the District Court from recognizing, as a factual element of a RICO claim, that Canada imposes taxes on cigarettes.”<sup>161</sup> In a dissenting opinion in the Canadian case, Judge Calabresi put it this way: “we are bound to entertain suits brought under federal statutes, and to award the damages that such statutes establish.... [B]y enacting RICO, our government has determined that this suit advances *our own* interests, and any collateral effect furthering the governmental interests of a foreign sovereign is, therefore, necessarily incidental.”<sup>162</sup>

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155. The decision in *United States v. Boots* was the exception, but its holding has essentially been overruled by the Supreme Court’s decision in *Pasquantino*.

156. *Trapilo*, 130 F.3d at 552 (emphasis added).

157. *Id.* at 553.

158. *Pasquantino v. United States*, 544 U.S. 349, 359–69 (2005).

159. *Id.* at 365.

160. The decision thus implicitly overruled *Boots*, the outlier in this group of criminal cases.

161. Brief for the Attorney General of Canada at 20, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972).

162. *R.J. Reynolds*, 268 F.3d at 136 (Calabresi, J., dissenting) (rejecting the civil-criminal distinction made by the majority).

In considering the role of private actions under U.S. law as part of the larger set of mechanisms used to combat global harm, it is noteworthy that both the civil and the criminal cases, with differing emphasis, involve the same goals: restitution of unpaid tax revenue to the defrauded sovereign, and deterrence of criminal misconduct. This fact was recognized, although not fully analyzed, by the Supreme Court in *Pasquantino*. The Court noted that the criminal proceeding would likely involve direct restitution to Canada of the tax revenue lost to smuggling.<sup>163</sup> In other words, a successful prosecution by the United States in that case would achieve essentially what Canada sought directly in its civil claim against R.J. Reynolds—financial compensation for foregone tax revenue.<sup>164</sup> In its conclusion, however, the Court notes that “it may seem an odd use of the Federal Government’s resources to prosecute a U.S. citizen for smuggling cheap liquor into Canada.”<sup>165</sup> This comment implies the Court’s awareness that the U.S. government may indeed have initiated the action in order to assist Canada in coping with the consequences of cross-border smuggling. Justice Ginsburg states this more straightforwardly in her dissenting opinion, noting that the prosecution “is primarily about enforcing Canadian law.”<sup>166</sup>

The only viable explanation for the differentiated application of the revenue rule seems to be that the criminal prosecutions were initiated by the U.S. government, whereas the civil claims were not. This distinction is based on the separation of powers justification for the rule: these cases might implicate foreign policy goals of the United States, and the

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163. *Pasquantino*, 544 U.S. at 365 (citing the Mandatory Victims Restitution Act of 1996, 18 U.S.C. §§ 3663A-3664 (2000 & Supp. III 2003)). The Court nevertheless attempted to distinguish the criminal case at issue from the civil cases: “The main object of [civil cases in which the revenue rule had been applied] was the collection of money that would pay foreign tax claims.... The absence of such an object in this action means that the link between this prosecution and foreign tax collection is incidental and attenuated at best.” *Id.*

164. RICO claims of course seek multiple damages, not merely simple compensation. The plaintiff governments in the civil cases argued further that civil and criminal proceedings would have an identical deterrent effect. The Supreme Court, in contrast, maintained that criminal proceedings would advance the independent interest of the U.S. federal government in punishing domestic fraud, an interest that would not be served in the civil RICO cases. *Id.* at 365.

165. *Id.* at 372.

166. *Id.* at 377 (Ginsburg, J., dissenting) (quoting *United States v. Pasquantino*, 336 F.3d 321, 342–43 (4th Cir. 2003) (en banc) (Gregory, J., dissenting)). While Justice Ginsburg correctly observed this connection between the outcomes of the civil and criminal cases, she then used it as the basis of her conclusion that the revenue rule should apply to the criminal cases as well. *Id.* at 375–83.

judiciary should avoid entanglement in that policy.<sup>167</sup> This argument was indeed critical to the revenue rule analysis in the criminal cases. The courts, noting that the rule is discretionary, opined that by initiating prosecution the executive branch had indicated that the need for litigation outweighed any potential foreign relations problems, thus avoiding the harm the revenue rule was designed to prevent.<sup>168</sup> Similarly, the courts in the civil cases drew on this analysis in distinguishing the precedent set by the criminal cases.<sup>169</sup> On this view, because the executive branch has signaled its conclusion that prosecution of the claims will not lead to foreign affairs problems, the criminal cases do not implicate the concerns addressed by the revenue rule.

Separation of powers concerns are relevant in the taxation context because the United States has entered into a variety of cooperative tax treaties with other countries, which together reflect a foreign policy on cross-border tax matters. Some of the courts in the civil cases stressed the existence of treaties for cooperative assistance in tax matters, and the associated implication that such assistance would be rendered only within the framework of those instruments.<sup>170</sup> As commentators have suggested, applying the revenue rule to bar enforcement efforts by sovereigns outside the treaty framework may encourage other nations to enter into more comprehensive mutual assistance instruments with the United States.<sup>171</sup> Yet the criminal proceedings indicate that the

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167. See Dodge, *supra* note 114, at 226–31 (describing the rationale behind the distinction between private and governmental plaintiffs).

168. See, e.g., *Pasquantino*, 544 U.S. at 369 (“[B]y electing to bring this prosecution, the Executive has assessed this prosecution’s impact on this Nation’s relationship with Canada, and concluded that it poses little danger of causing international friction.”).

169. See *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d at 123:

When the United States prosecutes a criminal action, the United States Attorney acts in the interest of the United States, and his or her conduct is subject to the oversight of the executive branch. Thus, the foreign relations interests of the United States may be accommodated throughout the litigation. In contrast, a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interest, may be, but is not necessarily, consistent with the policies and interests of the United States.

170. See, e.g., *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d at 119 (“It seems to us that the usual absence in our negotiated tax conventions of any provision for the extraterritorial enforcement of a sovereign’s tax judgments or claims cannot be accidental, but instead must reflect the considered policy of the political branches of our government.”). Justice Ginsburg echoed this finding in her dissent in *Pasquantino*, 544 U.S. at 381 (Ginsburg, J., dissenting).

171. See, e.g., Dodge, *supra* note 114, at 234–35; see also Dodge, *supra* note 73, at 121–22 (making a similar argument that the strong extraterritorial application of domestic antitrust laws prompts other nations to negotiate cooperation instruments).

government is indeed willing, at least in individual cases, to use its resources to prosecute conduct for the benefit of a foreign government.<sup>172</sup> If that is true, then our courts are simply giving with one hand what they withhold in the other, namely assistance outside the treaty framework. In an era during which we seek more, rather than less, coordination and cooperation among sovereigns in battling economic misconduct, it is difficult to see how such an ad hoc approach, coupled with refusals to assist other states in civil cases like the tax revenue litigation, will facilitate further negotiation.<sup>173</sup> The rejection of a claim initiated directly by a foreign government might appear an even more pointed insult than an assertion of jurisdiction in claims against a foreign private company over the objections of that government.<sup>174</sup> A better approach would be to abandon the revenue rule, while recognizing that when a particular complaint presents a concrete conflict with foreign policy, the executive branch can so indicate and therefore seek judicial deference in light of that policy.<sup>175</sup>

In sum, the analysis applied in the civil revenue cases discounts the extent to which different strategies may be pursued to reach the same substantive result. In effectuating the revenue rule, the courts missed an

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172. Even if foreign governments enjoyed no direct financial gain from such prosecutions (see *Pasquantino*, 544 U.S. at 365, suggesting that the Mandatory Victims Restitution Act should perhaps be construed to prohibit compensatory awards to foreign governments in such cases), they would benefit from the additional deterrence value those prosecutions provide.

173. See Koh, *Transnational Public Law Litigation*, *supra* note 4, at 2395 (“Although judges seek to avoid playing roles in international politics, they inevitably do so both by deciding cases and by not deciding them.”); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 321–23 (2004) (warning that while some conflict might be “positive” conflict, promoting additional cooperation, other conflict is quite plainly negative conflict that “can destroy social and political relationships”).

174. The Supreme Court addressed this point in a slightly different context in the *Pfizer* case, in which it held that foreign sovereigns were entitled to initiate private actions under the Clayton Act. 434 U.S. at 318–19.

This Court has long recognized the rule that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. “To deny him this privilege would manifest a want of comity and friendly feeling.”

*Id.* (citations omitted).

From a U.S. perspective, it may seem hypocritical that countries long opposed to private actions for multiple damages under U.S. law will initiate such lawsuits themselves when doing so serves their purposes. From the perspective of these countries, however, it may seem equally hypocritical that our courts appear ready to adjudicate such claims except when those countries stand to benefit.

175. This approach would reserve judicial abstention for the circumstances in which it was required, rather than bar legitimate claims in a manner undermining international cooperation.

opportunity to enhance the international cooperation necessary to combat cross-border misconduct. (While two of the tobacco revenue decisions were vacated and remanded for reconsideration in light of *Pasquantino*,<sup>176</sup> the Second Circuit, in that reconsideration, has invoked again the distinction between civil and criminal enforcement.)<sup>177</sup> It would be more satisfactory to view these cases as variations on the same theme: the need to develop cooperative mechanisms by which states can address global misconduct.<sup>178</sup> The revenue rule as currently applied often leads to decisions that, in the name of foreign relations, run counter to the wishes of our allies regarding cross-border issues. One might instead see litigation like the tobacco revenue cases as an opportunity for additional cooperation—a form of cooperation to be layered upon, and not viewed as inconsistent with, cooperation involving nonjudicial actors. On that view, courts could begin to play a more integral role in the process of transgovernmental regulation.

### III. MAINTAINING THE INTERNATIONAL COMMUNITY: BEHIND THE JURISDICTIONAL RULES

Thus far, this Article has demonstrated that the application of territory-based jurisdictional rules prevents U.S. courts from fully considering arguments made for the use of transnational regulatory actions as a mechanism of global regulation. This Part turns to a different question: identifying the concerns that underlie traditional jurisdictional law, and that motivate criticism of transnational litigation. Richard Falk's cogent warning of over forty years ago serves as a starting point for this discussion:

No service is rendered to international law when officials act upon the pretense that a shared community of policy, interest, and value underlies the contemporary network of global relations and is hence available for implementation by each national actor.

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176. *See* *European Cmty. v. RJR Nabisco*, 544 U.S. 1012 (2005) (vacating and remanding the cases brought by the European Commission against RJR Nabisco and Japan Tobacco).

177. *European Cmty. v. RJR Nabisco*, 424 F.3d 175, 181 (2d Cir. 2005) (reinstating its earlier holding and noting that in a suit not brought or otherwise endorsed by the U.S. government, “the factors that led the *Pasquantino* Court to hold the revenue rule inapplicable to § 1343 smuggling prosecutions are missing...”), *cert. denied*, 126 S. Ct. 1045 (2006).

178. For a similar argument in the human rights context, see *Stephens*, *supra* note 11, at 37–39 (discussing the broad range of civil, criminal, and administrative proceedings that together constitute a network of enforcement mechanisms).

This pretension supports the treatment of national policy, interest, and value as if they were universal. Such behavior invites retaliation, engenders distrust, and undermines those actual and potential claims of international law to make stable the relations among the entire community of states.<sup>179</sup>

This Part inspects the claims made for transnational regulatory litigation with this warning in mind. It notes that foreign countries, through the invocation of traditional jurisdictional rules, sometimes resist regulatory litigation in U.S. courts in order to preserve specific local practices or policies that the case at hand implicates. Sometimes, though, their resistance makes a more general statement—not necessarily related to the particular substantive rule at issue—about power and order within the international community. An assessment of the role of domestic courts in transnational litigation must address both categories of concerns.

#### A. *Specific Functional Concerns*

##### 1. *Interference with Other Solutions to Cross-border Misconduct*

One basis for resisting litigation in U.S. courts is that it might interfere with other measures developed to address the specific harm in question. This point has been made often in the context of public law litigation. Germany objected to lawsuits in U.S. courts based on Holocaust-era claims because they were inconsistent with its objectives in negotiating an international settlement regarding those claims; Japan objected to claims brought by former “comfort women” because they were inconsistent with understandings reached in the post-war peace negotiations; South Africa objected to cases arising out of apartheid-era policies because they were inconsistent with domestic reparations programs, including the work of the Truth and Reconciliation Commission.<sup>180</sup> While the validity of these objections in each particular

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179. RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 6 (1964).

180. See *infra* Part IV.B for additional discussion of these cases. In his concurring opinion in *Tel-Oren*, Judge Bork noted generally that “the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations.” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring); see also Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2343–44 (2004) (noting that litigation before U.S. courts potentially interferes with other strategies for social change).

case is the subject of debate, they raise the legitimate question whether transnational litigation is appropriate when it conflicts with other, local, mechanisms to address various harms.<sup>181</sup> Such conflicts between competing solutions to global problems arise in the economic cases as well. In the vitamin cartel litigation, for instance, several governments argued that the availability of private actions in U.S. courts would undermine the effectiveness of local amnesty programs used to enhance domestic regulatory efforts.<sup>182</sup>

As some commentators have argued in the public law context, the substantive benefit to be gained through domestic transnational litigation (there, for instance, increased security of fundamental human rights) is important enough to require a careful approach to concerns regarding conflict with other mechanisms. In the economic context too, where transnational cases promise the possibility of increased economic welfare, a differentiated analysis of the particular objections raised is necessary. While conflict with amnesty programs might arise in some countries, for instance, other countries might not have such programs and therefore might not share the same objection.<sup>183</sup> Thus, it is important not to extrapolate global statements about the inappropriateness of transnational litigation from specific conflicts experienced in particular jurisdictions. There is a danger that using the rhetoric of territorial sovereignty in articulating these concerns invests them with the false appearance of universality, and suggests general limits to transnational litigation. While specific instances of interference must be taken seriously, that rhetoric should be resisted, with the focus remaining

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181. See Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1119 (“The deliberations surrounding a society’s program of transitional justice are not the sort that should be displaced by the paternalistic judgment of international law.”); cf. Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 200–202 (2004) (advocating a more critical stance toward claims that domestic litigation would interfere with local programs).

182. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004) (noting the argument that prospective liability in U.S. courts would reduce the incentive for corporations to take advantage of amnesty programs).

183. It is noteworthy that in *F. Hoffmann-La Roche*, the governments on whose markets the purchase transactions in question had taken place—Ecuador, the Ukraine, Panama and Australia—did not themselves file amicus briefs. The countries that did file such briefs may therefore have been generalizing from their own programs.

instead on defining the functional role of transnational litigation in particular settings.<sup>184</sup>

## 2. *Discomfort with the Use of Private Litigation as a Regulatory Mechanism*

A second concern reflected in the insistence on traditional jurisdictional principles is that private lawsuits may be inappropriate means to pursue public regulatory goals. The foreign government briefs filed in the vitamins cartel litigation focused on this point, stating the preference of certain national systems for administrative and criminal regulation.<sup>185</sup> In this light, the traditional territorial allocation of jurisdictional power preserves disparate local regulatory cultures.<sup>186</sup> Like the concerns regarding conflict with specific regulatory mechanisms, however, these should be seen as limited to particular countries and issues rather than as a global objection to transnational litigation. Furthermore, the weight of this concern is diminishing as other systems move toward adoption of private attorney general-type mechanisms. Developments in the European Union, many of whose member states have historically opposed private actions in regulatory matters, provide one illustration of a shift in favor of civil regulatory enforcement.<sup>187</sup> While private rights of action under EU competition law, for instance, have been used only infrequently to date,<sup>188</sup> it is currently a priority of the Commission to enhance those rights.<sup>189</sup> More

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184. Thus, the possibility of a specific conflict with some legal systems should not bar the availability of transnational litigation to plaintiffs from other systems. Part IV discusses a means of achieving this differentiation.

185. See, e.g., Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 13, *F. Hoffmann-La Roche*, 542 U.S. 155 (2004) (No. 03-724) (noting that “Germany’s focus in obtaining the desired deterrent effect of illegal restraints of trade is on prosecution through its competition authorities”).

186. See Hannah L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23 BERK. J. INT’L L. 474 (2005).

187. See Andre Fiebig, *Modernization of European Competition Law as a Form of Convergence*, 19 TEMP. INT’L & COMP. L.J. 63, 64 (2005) (describing the Commission’s plans in this regard and noting that “[a]lthough the European Commission has not formally recognized convergence with U.S. antitrust law as one of the objectives of the modernization process, it will be one of the unintended results”).

188. See, e.g., Case 127/73 (No. 1), *Belgische Radio en Televisie v. SV Sabam*, 1974 E.C.R. 51.

189. See *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 [hereinafter *Commission Green Paper*] (presenting various policy options intended to strengthen private enforcement of competition law); see also Donncaadh Woods, *The*

generally, partly in connection with the adoption of a group claim mechanism in the consumer protection area, Europeans have begun to consider whether various forms of group actions might be useful in other fields.<sup>190</sup> It is also worth noting that Canada and the European states, in initiating private actions under the civil provisions of RICO, showed some willingness to use private actions when they would create local regulatory benefit.

### 3. *Concern with Using the Vehicle of Domestic Law to Serve Global Goals*

Finally, the application of traditional jurisdictional rules responds to a “delivery system” problem: even if a transnational case involves a shared substantive norm, using domestic law as the vehicle for its application carries with it associated norms that are not shared. Some of these are procedural. For instance, litigation before a U.S. court will involve processes for the discovery of evidence, or the examination of witnesses, that might differ substantially from such processes in other countries.<sup>191</sup> This problem surfaces in all U.S. civil litigation involving international elements, including public law cases brought under the ATCA. In the economic context, this problem is magnified due to the availability under U.S. law of supercompensatory relief. The treble damages available in civil actions under both antitrust law and RICO are unavailable in many other jurisdictions, and in some are viewed as incompatible with public policy.<sup>192</sup> Their availability was one of the major objections of the defendants and their home governments in the global cartel cases.<sup>193</sup>

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*Growth of Private Rights of Action Outside the United States: Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004) (discussing reasons for the low rate of private enforcements to date, and describing the effect of the recent modernization program).

190. See generally DIE BÜNDELUNG GLEICHGERICHTETER INTERESSEN IM PROZESS: VERBANDSKLAGE UND GRUPPENKLAGE (J. Basedow et al. eds., 1999).

191. See Waller, *supra* note 99, at 532 (noting that private antitrust claims in U.S. courts involve not only substantive law but “all the other things that make U.S. litigation so controversial around the world”).

192. See Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT’L L. 219, 251–52 (2001) (discussing this problem in the antitrust context).

193. See, e.g., Brief of the Government of Japan as Amicus Curiae in Support of Petitioners at 8, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724).

Elsewhere in this article I have referred to this problem as an issue of secondary importance next to differences in substantive standards.<sup>194</sup> This characterization is not meant to diminish the magnitude of the concern, which today remains a significant and valid objection to the use of U.S. courts in transnational economic cases.<sup>195</sup> As standards here converge, however, the force of this objection will diminish. With respect to procedural rules, ongoing efforts to adopt rules of civil procedure for use in transnational cases create some hope of future agreement.<sup>196</sup> With respect to the substantive issue of remedies, there are already signs of convergence at least with European Union member states. As part of its push to strengthen private rights of action in antitrust, the European Commission is advocating the award of double damages in certain categories of private antitrust claims, which would be a step toward eliminating one of the major current points of contention.<sup>197</sup> These are long-term projects, however, and in the meantime transnational regulatory law must account for objections based on the differences between civil litigation systems.

#### B. *General Concerns About Community*

While traditional jurisdictional principles serve as the framework for resolving specific conflicts of the sort described above, they also shape, and reflect, the views of states about the organization of the international community.<sup>198</sup> Grappling with the challenges of regulating global activity therefore requires more than simply finding a way to expand, alter or abandon particular jurisdictional rules. It requires an inquiry into the worldview that those rules represent, and into shared

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194. See *supra* note 79 and accompanying text.

195. See Peter Schlosser, *Jurisdiction and International Judicial and Administrative Cooperation*, 284 RECUEIL DES COURS 9 (2000), for an overview of some of these issues.

196. See AMERICAN LAW INSTITUTE/UNIDROIT, PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (2004).

197. See *Commission Green Paper*, *supra* note 189, at 7; Woods, *supra* note 189; Jürgen Basedow, *Private Enforcement of Article 81 EC: A German View*, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 143 (2003) (“If the [European] Commission wants to use private initiative for the purposes of enforcing competition laws in the public interest, it should consider the US model of a private attorney general who is spurred to enforce the law by the expectation of treble damages.”).

198. See Rudolf Dolzer, *Extraterritoriale Anwendung von nationalem Recht aus der Sicht des Völkerrechts*, BITBURGER GESPRÄCHE 2003 71, 71 (referring to the link between national jurisdictional rules and the “international balance of sovereignty, state, law and power”; see also F.A. Mann, *The Doctrine of International Law Revisited*, 186 RECUEIL DES COURS 9 (1984).

understandings about the role that particular nations or national actors play in institutionalizing substantive norms. In this sense, the concerns behind the invocation of jurisdictional law are more general: that is, unlike the functional concerns, they transcend particular country-specific conflicts. Whichever foreign government might raise them, they aim to articulate a shared vision of international community.

Such concerns prompt much of the criticism of expansive use of the ATCA as well as expansive jurisdiction in economic litigation. In its brief in the *Sosa* case, for instance, the European Commission stated that:

[I]n order to respect the authority of States and organizations, like the European Community, exercising their authority to regulate activities occurring on their own territory, and hence to preserve harmonious international relations, States must respect the limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory.<sup>199</sup>

Here, then, other countries contest not so much the overriding of specific local policies, but rather the manner in which expansive jurisdiction in U.S. courts seemingly breaks the international compact. For a number of reasons, concerns regarding this consequence of domestic actions have even greater salience in transnational economic litigation than in public law litigation. They must be addressed in order to establish whether such litigation can be reconciled with the concerns regarding international community.

*1. Concern That a Norm Applied in Domestic Litigation Is Not a Shared Norm*

The first concern regarding domestic litigation in transnational cases stems from the most significant difference between public law litigation and economic litigation: the latter seeks to apply not international law but domestic regulatory law. This raises the possibility that the forum's regulatory law does not in fact reflect a shared norm, but merely the forum state's unique regulatory policies. If that is the case, then a civil action applying that law is not an instance of transnational litigation, but rather a typical extraterritoriality case—an attempt to apply to foreign-linked transactions a rule of law that differs from the rule in other

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199. Brief of Amicus Curiae the European Commission in Support of Neither Party, at 2, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036.

jurisdictions affected.<sup>200</sup> It is therefore critical in these cases, particularly because regulatory norms lack the claim to universality that can be made for fundamental human rights in the transnational public law context,<sup>201</sup> to establish that the regulatory norm in question is indeed shared.

I do not mean to suggest that there is a large group of shared regulatory norms today, or that assessing the functional equivalence of disparate standards in order to identify those that are shared is a simple task. There is wide divergence in regulatory law and policy internationally, and even countries that agree on basic regulatory principles adopt laws of substantial variety in their detail.<sup>202</sup> Nevertheless, one can identify some starting points. In the area of securities regulation, for instance, there is substantial diversity across jurisdictions. Different systems have different approaches to basic issues such as the appropriate level of disclosure, let alone more specific questions such as the definition of market manipulation or the establishment of appropriate sanctions for misconduct. Yet in the past decade much progress has been made toward the adoption of International Disclosure Standards<sup>203</sup> and International Accounting Standards.<sup>204</sup> As countries integrate these standards into their domestic regulatory regimes, such common principles will form a set of shared norms. Though not as clearly defined, consensus also seems to be

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200. See *supra* Part I.B.2, discussing the categorical distinction between classic extraterritorial jurisdiction cases and transnational regulatory litigation.

201. Public law litigation recognizes this problem of shared norms as well. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (noting that the requirement of general assent is critical; otherwise “the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law”). Nevertheless, the quality of international consensus is different in the public law context. While it is true that even the universality of human rights norms is contested in some quarters, agreement on the basics is largely assumed. See HIGGINS, *supra* note 80, at 96–97 (recognizing the suggestion “that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world,” but defending the universality of essential human rights).

202. See Gerber, *supra* note 74, at 302 n.19 (noting that “even where there has been convergence in substantive principles, differences in the actual operation and application of norms often remain”).

203. See International Organization of Securities Commissions (IOSCO), *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers* (Sept. 1998), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf>.

204. See Technical Committee of IOSCO, *Statement on the Development and Use of International Financial Reporting Standards in 2005* (Feb. 2005), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD182.pdf> (applauding the progress made toward convergence on accounting standards).

emerging on certain categories of egregious misconduct, including some forms of insider trading.<sup>205</sup> Again, while there is distance to travel between general agreement and specific rules, the trend is toward consensus. Regional developments also may contribute to the ultimate development of shared norms: the EU Prospectus, Transparency, and Market Abuse Directives, for instance, establish uniform standards on various issues for all member states and, in their similarity to U.S. standards, take a step toward further consensus.<sup>206</sup>

In the antitrust context too, national laws reflect a wide variety of regulatory approaches and there are many issues on which there is no discernible consensus. However, a shared view emerges on the question of hard-core price-fixing. It is reflected in the Organisation for Economic Co-operation and Development's platform against hard-core cartels,<sup>207</sup> for instance, and in the nearly universal prohibition against

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205. See, e.g., Harvey L. Pitt & David B. Hardison, *Games Without Frontiers: Trends in the International Response to Insider Trading*, 55 LAW & CONTEMP. PROBS. 199 (1992) (discussing the increased adoption of insider trading statutes in various jurisdictions); see also IOSCO, Objectives and Principles of Securities Regulation, International Organisation of Securities Commissioners (Sept. 1998), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD82.pdf> (identifying the prohibition of insider trading as one goal of harmonized securities laws).

206. Directive 2003/71/EC of the European Parliament and of the Council on the Prospectus to be Published When Securities Are Offered to the Public or Admitted to Trading and Amending Directive 2001/34 (Prospectus Directive) (implemented by Commission Regulation 809/2004, 2004 O.J. (L 149) 1 (EC)); Directive 2004/109/EC of the European Parliament and of the Council on the Harmonisation of Transparency Requirements in Relation to Information About Issuers Whose Securities Are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC, 2004 O.J. (L 390) 38 (EC) (Transparency Directive); Directive 2004/72/EC of 29 April 2004 Implementing Directive 2003/6/EC of the European Parliament and of the Council as Regards Accepted Market Practices, the Definition of Inside Information in relation to derivatives on Commodities, the Drawing Up of Lists of Insiders, the Notification of Managers' Transactions and the Notification of Suspicious Transactions (Market Abuse Directive); see also Roberta S. Karmel, *Reform of Public Company Disclosure in Europe*, 26 U. PA. J. INT'L ECON. L. 379 (2005) (describing these instruments and assessing both progress toward eventual convergence and various obstacles that remain); Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61, 91-92 (1999) (discussing steps taken within the European Union toward a "quasi-uniform" disclosure system).

207. Organisation for Economic Co-operation and Development (OECD), C(98)35/FINAL, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (Mar. 25, 1998), available at <http://www.oecd.org/dataoecd/39/4/2350130.pdf> (recommending convergence of legal standards to halt and deter hard-core cartels); see also OECD, Hard Core Cartels 5 (2000), available at <http://www.oecd.org/dataoecd/36/24/2367816.pdf> (recognizing the "multi-billion dollar drain on the global economy" caused by hard-core cartels and encouraging implementation of legal standards by non-member states as well).

such conduct across national systems.<sup>208</sup> Thus, while it is unlikely that every jurisdiction will share a regulatory approach to the letter, it is fair to conclude that some basics have the agreement of all regulating jurisdictions.<sup>209</sup> It is worth noting that some courts have already addressed arguments that antitrust rules rise to the level of customary international law, in the form of attempts to bring competition law-based tort claims under the ATCA.<sup>210</sup> In relatively cursory statements, these courts have rejected such claims, concluding that customary international law requires a level of consistent state practice that does not exist in the antitrust field today.<sup>211</sup> However, the courts approached the question not with respect to individual norms but with respect to antitrust systems more broadly, where, as noted above, there is no general consensus.<sup>212</sup> Their conclusions therefore do not undermine the possibility that national systems share *particular* individual norms, including a prohibition of hard-core price-fixing.

In the area of criminal behavior that gives rise to RICO claims, broad consensus on some issues can be identified. Every state collects taxes and prohibits nonpayment,<sup>213</sup> and there are shared policies on the

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208. See International Competition Network, Cartel Working Group Mandate, available at <http://www.internationalcompetitionnetwork.org/cartelworkplan2004.pdf>; see also First, *supra* note 14, at 727 (noting that “we have already achieved a de facto international competition law in the area of cartel behavior”). It was on this basis that the plaintiffs in the *Empagran* case emphasized the fact that hard-core price-fixing is “universally condemned.” See *supra* note 17 and accompanying text.

209. It does not necessarily follow that consensus will spread to other issues. See Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 640 n.37 (2001) (referring to agreement on price fixing as “low-hanging fruit”).

210. See, e.g., *Kruman v. Christie’s Int’l PLC*, 129 F. Supp. 2d 620, 627 (S.D.N.Y. 2001); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 717 (D. Md. 2001). Such arguments have now been precluded by the Supreme Court’s opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which narrowed the category of claims that could be brought under ATCA.

211. *But see* Waller, *supra* note 99, at 535 (suggesting that such claims are nevertheless not frivolous, noting the development of antitrust regimes worldwide and the growing network of private rights of action used by plaintiffs); see also Spencer Weber Waller, *An International Common Law of Antitrust*, 34 NEW ENG. L. REV. 163 (1999) (investigating whether any current principles meet the standard for custom, using a general nondiscrimination principle as an example); Swaine, *supra* note 209 (discussing the possibility of more localized custom).

212. See, e.g., *Kruman*, 129 F. Supp. 2d at 627 (referring in its citations to divergence in antitrust law generally and not specifically to hard-core price-fixing). In addition, the court in the *Microsoft* case seemed to seek evidence not of customary international law but of treaties or other formal international agreements, or “enforceable international antitrust law.” *In re Microsoft*, 127 F. Supp. 2d at 717.

213. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 Reporters’ Note 2 (1987) (noting that “virtually all states impose and collect taxes”).

deterrence of particular crimes, including money laundering,<sup>214</sup> bribery,<sup>215</sup> and smuggling, that constitute predicate violations under RICO.<sup>216</sup> There is therefore enough evidence of consensus on particular rules to indicate some shared regulatory norms in this area. Furthermore, as in other areas of cross-border regulation, that category is likely to expand, not contract, as the process of regulatory harmonization continues.<sup>217</sup>

## 2. *Concern That a Norm Applied in Domestic Litigation Lacks International Legitimacy*

Even when a shared norm is applied, the processes by which the norm was developed may engender challenges to its legitimacy. This concern arises even with respect to the international human rights norms applied in ATCA cases, as critics have questioned both the source and the universality of those norms. Some commentators have argued simply for a more careful consideration of the rules applied, in light of the unique problems raised by their application in national courts.<sup>218</sup> Others have more broadly challenged substantive human rights law as an imposition of Western values on other cultures.<sup>219</sup> Such challenges reflect uneasiness with the use of domestic tribunals to promote the

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214. See Financial Action Task Force, *The Forty Recommendations* (2003), available at [http://www.fatf-gafi.org/document/28/0,2340,en\\_32250379\\_32236930\\_33658140\\_1\\_1\\_1\\_1.html](http://www.fatf-gafi.org/document/28/0,2340,en_32250379_32236930_33658140_1_1_1_1.html) (the FATF was established in 1989 by the G-7 heads of state); see also W. Clifton Holmes, *Comment: Strengthening Available Evidence-Gathering Tools in the Fight Against Transnational Money Laundering*, 24 *NW. J. INT'L L. & BUS.* 199, 217–18 (2003) (cataloging the tools currently used to combat money laundering and suggesting that a customary international norm exists on that issue); Financial Action Task Force, *55 Jurisdictions Agree to Fight Money Laundering* (June 2005), available at <http://www.fatf-gafi.org/dataoecd/41/27/34988026.pdf>.

215. See Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 *CORNELL INT'L L.J.* 731, 763 (2000) (describing the evolution of a “multilateral normative regime” against bribery).

216. See Dodge, *supra* note 114, at 214 (noting convergence in the content of such laws).

217. In the competition arena, for instance, the Doha round called for increasing harmonization across national systems. See World Trade Organization, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001), reprinted in 41 *I.L.M.* 746 (2001).

218. See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 *N.Y.U. J. INT'L L. & POL.* 501, 505 (2000) (calling for closer analysis of “the engagement of domestic law with international law in [each] particular setting,” and therefore resisting the proposition that “[i]f the domestic application of international law is equated with the recognition of a global standard of good, then any and every domestic application is desirable”).

219. See, e.g., M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 *VA. J. INT'L L.* 1069, 1137–40 (1998).

norms in question worldwide, even where one could fairly assume consensus.

These legitimacy concerns are even more substantial in the case of economic laws, as the development of international consensus on regulatory policy plays out against the backdrop of disparate economic power. Many of the accounts describing the process of regulatory harmonization reflect skepticism as to the true nature of that consensus.<sup>220</sup> The political realities of the negotiating process lead to convergence around the policies of the more powerful states,<sup>221</sup> with the result that one may question the international legitimacy of the norms adopted.<sup>222</sup> The soft-law aspects of harmonization, including the use of bilateral regulatory agreements and the technical assistance that regulators in developed countries offer to those in emerging systems, raise similar concerns.<sup>223</sup> These objections are necessarily limited in that the consent by a sovereign state to accept a particular norm must have consequences—that is, once states subscribe to a particular norm through the political process, they should not themselves protest the subsequent application of those norms. But the concerns of observers on this point do speak to continued reservations regarding the appropriateness of applying international regulatory norms in domestic

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220. See generally JARROD WIENER, GLOBALIZATION AND THE HARMONIZATION OF LAW 134–59 (1999) (discussing the mechanisms that “pressure other states to conform to the standards emerging” in the United States); Part VII (Transatlantic Regulatory Cooperation, Democracy, and Accountability), TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann et al. eds., 2000).

221. See James D. Cox, *Regulatory Competition in Securities Markets: An Approach for Reconciling Japanese and United States Disclosure Philosophies*, 16 HASTINGS INT’L & COMP. L. REV. 149, 150 (1993) (stating that in the context of securities regulation, the goal of U.S. policymakers is to have other countries adopt U.S. disclosure standards); David J. Gerber, *The U.S.-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 NEW ENG. L. REV. 123, 133 (1999) (making a similar observation in the antitrust context).

222. See SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 18 (1996) (“The new transnational regimes...are assuming a specific form, one wherein the states of the highly developed countries play a strategic geopolitical role. The hegemony of neoliberal concepts of economic relations...has contributed to the formation of transnational legal regimes that are centered in Western economic concepts.”).

223. The cause of these concerns is apparent on the surface of many accounts of transnational networks, which generally focus on the spread outward of liberal/capitalist systems. See, e.g., Slaughter, *supra* note 6, at 193 (noting that transgovernmental networks are concentrated among liberal democracies, and can help “build democratic institutions” in other states).

courts—particularly, as discussed in the next Section, if both the source of the norms and their enforcement are centralized in one country.<sup>224</sup>

### 3. *Concern That Transnational Litigation Is an Instrument of U.S. Hegemony*

Although set into motion by individuals, it is nevertheless the machinery of a state that transnational litigation uses to achieve a regulatory end. Because to date it is the American state, in particular, whose courts conduct such litigation,<sup>225</sup> this raises concerns about the role of the United States in the global arena.<sup>226</sup> The expansion of jurisdictional rules that necessarily accompanies the use of national courts in the way above described disturbs the order that jurisdictional law brings to the international community—in ways that, to foreign states and many observers, appear as violations of the international law whose very purpose is to safeguard the international community against overreaching by individual nations. Thus, as one commentator has noted, this kind of litigation says something “about the social distribution of power within the international community.”<sup>227</sup> The most pointed criticism of this type casts transnational litigation as the product of intentional hegemonic behavior of the United States.<sup>228</sup> More moderate criticism suggests a degree of judicial imperialism at work in

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224. See Saskia Sassen, *The State and Economic Globalization: Any Implications for International Law?*, 1 CHI. J. INT'L L. 109, 116 (2000) (noting that “some states are more sovereign than others” in designing the global system); Serge Sur, *The State Between Fragmentation and Globalization*, 3 EUR. J. INT'L L. 421 (1997) (arguing that “the new rules of the game, or simply the erasing of the old rules, flow from the will of a state, that of the United States”).

225. There are some exceptions: in the public-law context, see *supra* note 11; in the private-law context, see the Provimi cartel litigation, *supra* note 83, and the decision of a French court, the Tribunal de Grande Instance de Paris, in cross-border litigation against Yahoo! (discussed in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1183–85 (9th Cir. 2004) (subsequent proceedings in U.S. court related to the French order enjoining Yahoo! from permitting web access in France to certain Nazi-related materials)).

226. See Gerber, *supra* note 74, at 298 (referring to the “geo-political context” of cross-border regulation by the United States); see also Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005) (examining the relationship between dominant states and international law); *id.* at 403–04 (discussing the role of U.S. extraterritoriality in this context).

227. Chibundu, *supra* note 219, at 1147.

228. See, e.g., *id.* at 1100 (describing “the interests of the various outsiders upon whom United States judicial power is hegemonically enforced”); Sur, *supra* note 224, at 428–29; Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003).

these cases.<sup>229</sup> Some U.S. judges worry about overreaching,<sup>230</sup> and some foreign governments seek to confine the power of the United States.<sup>231</sup> Against this backdrop, expanding the use of civil litigation in U.S. courts to serve global regulatory goals is highly problematic from an international relations point of view.

Even if the functional concerns outlined in Part III.A can be adequately addressed, the concerns about the international community are too much to override. Ultimately, the question is whether the case for enhanced substantive regulation is strong enough to convince other states that the jurisdictional framework should make room for transnational regulatory litigation.<sup>232</sup>

#### IV. THE FUTURE OF TRANSNATIONAL REGULATORY LITIGATION: INTEGRATION INTO THE INSTITUTIONAL FRAMEWORK

As the preceding Parts demonstrate, transnational litigation creates a tension between two goals: increased effectiveness in regulating economic misconduct and maintenance of order within the international community. The question, then, is whether there is a way to reconcile the substantive regulatory benefits of such cases with concerns regarding their foreign policy implications. The answer to that question will depend on whether transnational litigation can be successfully integrated into the broader spectrum of global regulatory mechanisms that states have already developed. These solutions reflect a shift in the conceptualization of sovereign regulatory power—a shift that, in departing from a territory-driven view of regulatory authority,

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229. See, e.g., Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381 (2001) (in the context of Holocaust-era claims brought in U.S. courts); Van Schaack, *supra* note 180, at 2347 (recognizing arguments addressing the possible hegemonic implications of these claims).

230. See, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532, 568–69 (9th Cir. 2005) (Trott, J., dissenting in part) (“What the majority has unintentionally accomplished in embracing this case is nothing less than the wholesale creation of a World Court, an international tribunal with breathtaking and limitless jurisdiction to entertain the World’s failures, no matter where they happen, when they happen, to whom they happen, the identity of the wrongdoer, and the sovereignty of one of the parties.”).

231. See Buxbaum, *supra* note 186 (discussing the resistance of the German government to such litigation).

232. See FALK, *supra* note 179, at 32 (“[The] horizontal order, with its emphasis upon reciprocity, depends heavily upon states’ convincing one another that they are acting reasonably in regard to the delimitation of legal competence.”)

accommodates the more flexible application of jurisdictional rules that transnational litigation requires. However, an examination of regulatory developments in this broader context also reveals the continued importance of statehood and particularly of state consent. This Part addresses first the international regulatory context within which transnational cases must be situated, and then turns to the question of consent.

*A. The De-territorialization of Sovereign Authority*

Developments in economic regulation over the past few decades have changed our perception of what sovereign authority means. They include the widespread utilization of sub-state level agreements (for example, bilateral memoranda of understanding executed between regulatory agencies) that ensure mutual assistance in pursuing cross-border violations. They also include, in some geographic areas, the re-allocation of regulatory authority to the regional level. These developments have reconfigured regulatory authority to address the globalized economy, retreating from a model in which sovereign power is power over discrete territory. It does not follow, however, that they have eliminated statehood from the equation. Some accounts of these changes do incorporate them into larger arguments about the development of a non-state based global order.<sup>233</sup> But other accounts, which seem more accurately to capture developments at least in the regulatory arena, point not to the disappearance of the state but to the disaggregation of its elements into transgovernmental networks.<sup>234</sup> As constituted in this way, sovereignty is about participation in an institutional framework that maximizes the achievement of strategic policy goals. Drawing on the work of Chayes and Chayes, Anne-Marie Slaughter defines the “new sovereignty” as “the capacity to participate in the international and transgovernmental regimes, networks, and institutions that are now necessary to allow governments to accomplish through cooperation with one another what they could once only hope

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233. See, e.g., KENICHI OHMAE, *THE BORDERLESS WORLD* (1991) (discussing the shift away from a system in which nation-states guard purely national interests); SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996) (discussing the “hollowing out” of the state).

234. See Slaughter, *supra* note 6.

to accomplish acting alone within a defined territory.”<sup>235</sup> What is taking place, then, is a reconceptualization of sovereignty that deemphasizes the notion of absolute control over particular territory, but nevertheless maintains the importance of statehood and of an international community of states.<sup>236</sup>

In emphasizing the notion of *participation* in the evolving transnational regime, this account preserves a role for state consent. When states develop the various regulatory mechanisms used to address the global economy, they choose to accept a diminishment of their territorial authority in exchange for a perceived gain in regulatory power. The transition from a state-based system of competition regulation to the current regional architecture, for instance, certainly cost European states some of the incidents of classical sovereignty—exclusive control over competitive conditions within their respective territories, and the right to act autonomously in external relations. But this was arguably no diminishment of regulatory power or authority. The rationalization of economic policy within the EU was necessary to free trade, and the regionalization of economic regulatory power gave the EU leverage in external relations that the individual states would

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235. Slaughter, *supra* note 173, at 285; see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

236. See STEVEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 13–14 (1999) (noting the relationship between “interdependence sovereignty” and sovereignty conceived as internal domestic control); WOLFGANG H. REINICKE, *GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT?* 54–58 (1998) (discussing the impact of economic interdependence on external and internal sovereignty); Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 *IND. J. GLOBAL LEG. STUD.* 425 (1999). The continued importance of state mechanisms is evident in the regulatory arena. National regulatory agencies continue to review mergers, national courts continue to adjudicate commercial claims, and countries continue to negotiate cooperation treaties. The fluidity with which regulatory competence is allocated also belies the notion of the disappearing state. In 2003, for instance, a significant revision of European competition law reallocated power over some forms of conduct. It moved authority back to the member states to deal with exemptions for certain types of agreements, thereby reversing the long-standing position of the Commission that it had a monopoly on such decisions. See Claus-Dieter Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 *COMMON MKT. L. REV.* 537 (2000). This illustrates the continued importance of the state as a site of regulatory authority even within the regional framework. See Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 *J. INT’L ECON. L.* 841, 846–47 (discussing the contingency of revocable delegations of sovereignty).

separately not have enjoyed.<sup>237</sup> Thus, if one theorizes sovereignty as status within the international community,<sup>238</sup> then it was a sovereignty-enhancing move by individual European states to collectivize their territorial authority.<sup>239</sup> Similar observations can be made about the layer of bilateral cooperation instruments that promote shared regulation in cross-border cases.<sup>240</sup> These too involve a choice by state agencies to cede exclusive power over territory in order to gain instrumental power over the forms of conduct subject to regulation. Thus, the tools of the “new sovereignty” are deployed within the international community with the consent of the relevant states to the new mechanisms.<sup>241</sup> In that sense, while these mechanisms cannot ensure a true balance of power among all nations, they can at least retain the formal equality that sovereignty promises.<sup>242</sup>

In de-emphasizing territory and encouraging participation in global processes at all levels of the state architecture, the transgovernmental framework suggests a role for national courts in the regulatory process. The development of that role, however, must address the question of state consent. For transnational litigation to become an effective element in global economic regulation, the consent of the other countries involved—some level of agreement that they also favor the leveraging

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237. See generally Fiebig, *supra* note 187, at 79 (discussing the initial communitarization of European competition law and the regulatory objectives it served). In the area of merger control, for instance, the European Union now engages with U.S. regulators very much as an equal.

238. See Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195, 198 (2004) (“Territorial sovereignty was the source of empowerment and authority for rulers of competing states to negotiate with one another and to agree upon a course of conduct between and among the states they controlled and ruled.”).

239. See Raustiala, *supra* note 234, at 843 (sketching the “sovereignty-strengthening” dimensions of the new global system).

240. See generally Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1035–45 (1997); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998) (all examining the development and operation of sub-state-level networks in areas including securities, antitrust, banking, and environmental law).

241. See T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1994 (2004) (noting that such tools reflect the choice of states to limit their own freedom of action).

242. See Nico Krisch, *More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135 (Michael Byers & Georg Nolte eds., 2004).

of additional regulatory resources through U.S. courts—is necessary.<sup>243</sup> In private actions initiated by foreign states themselves, consent is not an issue. There, as suggested above, what is required is a broader view of the U.S. jurisdictional principles applied in such cases. Transnational litigation initiated by private claimants, however, requires a procedural mechanism to obtain the consent of foreign states.

*B. State Consent to Participation in Global Class Actions*

*1. Foreign Government Intercession in U.S. Litigation*

Intercession by foreign governments, in various forms, is a common feature in cross-border litigation. Sometimes it is formalized through agreements negotiated by the executive branches of governments and then referred to in individual cases. For instance, the settlement reached in 2000 between Germany and the United States affected slave labor cases brought in U.S. courts arising out of Holocaust-era activity in Germany.<sup>244</sup> In that agreement, the United States agreed to file a statement of interest in any further private litigation, indicating that it frowned on such cases as inconsistent with its foreign policy aims.<sup>245</sup> Germany filed similar statements in some of the cases, stating its own understanding that U.S. courts would not hear private claims.<sup>246</sup> The litigation involving Japanese “comfort women” used a similar technique.<sup>247</sup> In these cases, the statements of foreign governments have particular force because they relate to matters that were negotiated with the U.S. government, raising the question of judicial deference in matters of foreign affairs.<sup>248</sup>

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243. Otherwise, as Paul Stephan has pointed out, noncooperation and retaliation may well result. See Stephan, *supra* note 7, at 655–58.

244. Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.G.R., July 17, 2000, 39 I.L.M. 1298, 1300.

245. See discussion in Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT’L L.J. 503 (2002). This procedure has been observed, resulting in the dismissal of subsequent claims in U.S. courts. See, e.g., *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004).

246. See *Ungaro-Benages*, 379 F.3d at 1232 n.6.

247. *Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (addressing sovereign immunity and a similar political question objection raised by the U.S. government as well as the Japanese).

248. See generally *Republic of Austria v. Altmann*, 541 U.S. 677, 701–02 (2004) (discussing the tradition of executive branch intervention in sovereign immunity cases). Such intervention is generally intended to protect the United States’ own foreign policies, however, and not to voice specific objections on behalf of foreign nations. See Ingrid Brunk Wurth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1, 50–51 (2003)

In other cases, foreign governments have simply described their interest in the form of a statement to the court or an amicus brief. This has been the case in some ATCA litigation. In one claim based on environmental harm, for instance, the Republic of Ecuador filed a motion to intervene on behalf of the plaintiffs, its citizens, supporting their claim in U.S. court as a means of protecting Ecuadorians from environmental contamination and noting specifically that litigation in the United States “does not under any concept damage the sovereignty of the Republic of Ecuador.”<sup>249</sup> To the opposite effect, in cases involving reparations for the policies of apartheid, the Republic of South Africa stated that litigation before U.S. courts would be antithetical to its own internal political and economic policies.<sup>250</sup> In some economic litigation too, foreign governments have submitted amicus briefs stating their objections to U.S. jurisdiction.<sup>251</sup>

In these cases, where the statements do not reflect an official policy position of the United States, the appropriate level of deference is debatable.<sup>252</sup> Some such expressions, while they do not point to specific actions by or policy of the U.S. executive branch, receive a certain degree of support in amicus briefs filed by the U.S. government.<sup>253</sup> Others receive no such support, direct or indirect. In either case, statements of this kind do not present the same level of foreign affairs concerns as statements that relate to specific, negotiated policy of the

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(criticizing the reliance of U.S. courts on statements by the German government as a basis for dismissing otherwise cognizable claims).

249. *Jota v. Texaco, Inc.*, 157 F.3d 153, 158 (2d Cir. 1998) (quoting an affidavit submitted by Ecuador’s Attorney General in support of a motion to intervene which was ultimately rejected as insufficient to waive sovereign immunity). *But see id.* at 157 (discussing a competing filing contesting jurisdiction). *See also* *Aguinda v. Texaco, Inc.*, 1994 WL 142006, at \*9 (S.D.N.Y. Apr. 11, 1994) (discussing a subsequent brief in which Ecuador stated an expectation that “disputes relating to the development of Ecuador’s natural resources are to be adjudicated by the courts of Ecuador”).

250. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 553 (S.D.N.Y. 2004). South Africa’s position is also discussed in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 754 n.21 (2004).

251. *See* the *Empagran* briefs, discussed *supra* Part II.A.1. *See also* the briefs filed, for example, in *Hartford Fire Insurance v. California*, 509 U.S. 764 (1993) (No. 91-1111), the last case prior to *Empagran* to reach the Supreme Court on the question of extraterritorial jurisdiction.

252. *See* *Wurth*, *supra* note 248, at 50–51 (arguing the need for further distinctions based on “constitutional text and historical practice” to prevent over-deference by the judicial branch).

253. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 21, *F. Hoffmann La-Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 234125 (acknowledging the view of other countries that assertion of jurisdiction over the claims of foreign purchasers would infringe their sovereignty, and recognizing the potential strain on international cooperation that would follow).

United States. Nevertheless, they do serve to signal potential foreign relations problems that would attend an assertion of jurisdiction. In the economic regulatory arena, where the use of U.S. courts and the concomitant application of U.S. law raise special concerns, they must therefore be taken seriously. Because reading them as blanket objections to all transnational regulatory litigation in U.S. courts would entirely foreclose the advantages of such litigation, however, a more differentiated mechanism is required.

## 2. *Class Actions and Government Consent*

The potential of class actions in transnational litigation is evident outside the regulatory arena. Although most ATCA claims are brought on behalf of named individuals, for instance, many have been initiated as class actions;<sup>254</sup> in addition, some commentators have proposed expanding this device in addressing human rights violations.<sup>255</sup> There are substantial limitations on the development of the global class action in public law litigation, however. First, there are high procedural barriers to class certification.<sup>256</sup> Second, the ATCA, which has been the most important vehicle for public law litigation to date, underwrites the claims only of foreign plaintiffs;<sup>257</sup> thus, class actions under the ATCA do not involve parallel groups of foreign and U.S. claimants. As a consequence, absent the involvement of U.S. plaintiffs, the courts will

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254. Successful class actions include *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995) (group claim seeking damages for human rights violations of the Marcos regime), and *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (group claim brought against Swiss banks for Holocaust-era taking of assets). See Van Schaack, *supra* note 180, at 2314–15 (describing how the ATCA “was ‘discovered’ by plaintiff-side lawyers more accustomed to bringing shareholder derivative actions and mass tort litigation through the class action mechanism,” leading to an increase in group claims under the statute).

255. See, e.g., William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353 (2003) (discussing the possibility of human-rights class actions before international, not domestic, tribunals); Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643 (2004).

256. Assembling class actions that meet the requirements of Federal Rule of Civil Procedure 23 is no easy matter, as there is often insufficient typicality and/or commonality of claims. See discussion in Vagts & Murray, *supra* note 245, at 518–26. For a more optimistic account of class actions in this context, see *Alperin v. Vatican Bank*, 410 F.3d 532, 554–55 (9th Cir. 2005).

257. While the Torture Victims Protection Act contemplates claims by U.S. as well as foreign plaintiffs, the claims must be against individuals who act under the authority of, or under color of law of, a foreign nation. This renders claims by U.S. plaintiffs unlikely. 28 U.S.C. § 1350 (2000).

more willingly dismiss claims on a discretionary basis pursuant to the doctrine of *forum non conveniens*.<sup>258</sup>

Virtually all transnational antitrust and securities cases, by contrast, are class actions.<sup>259</sup> Because in these cases the claim to U.S. legislative jurisdiction rests on effects within the United States, the typical case involves a mixed group of plaintiffs—purchasers who suffered harm in U.S.-market and in foreign-market transactions, respectively. These plaintiffs use the class-action procedures whose application is commonplace in economic regulatory cases, and some of which explicitly contemplate the inclusion of foreign plaintiffs.<sup>260</sup> In the typical transnational regulatory case, then, courts have considered whether jurisdictional principles require them to split the proposed class into two groups, dismissing the claims brought by foreign purchasers on jurisdictional grounds, while permitting the litigation involving U.S. plaintiffs to proceed.<sup>261</sup> These characteristics of regulatory class actions

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258. See Boyd, *supra* note 132, at 16–17.

259. There are exceptions, including *Den Norske Stats Oljeselskap AS v. HeereMac V.O.F.*, 241 F.3d 420 (5th Cir. 2001). See Salil K. Mehra, *Foreign-Injured Antitrust Plaintiffs in U.S. Courts: Ends and Means*, 16 LOY. CONSUMER L. REV. 347, 358 (2004).

260. Under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.), for example, which enacted certain procedures to be used in securities class actions, there are no restrictions on foreign plaintiffs serving as lead plaintiffs or as class representatives. See *Takeda v. Turbodyne Technologies, Inc.*, 67 F. Supp. 2d 1129, 1139 (C.D. Cal. 1999) (“It is evident there is no per se rule against the certification of a class whose members are both foreign and American investors. Nor is there a prohibition against having a mix of foreign and American investors serve as class representatives.”). See generally Stuart M. Grant and Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, 1442 PLI/Corp. 91 (2004) for a description of the mechanics involved in such claims.

261. See, e.g., *Tri Star Farms v. Marconi, PLC*, 225 F. Supp. 2d 567 (W.D. Pa. 2002); *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1 (D.D.C. 2000) (both allowing securities litigation to go forward in the United States only with respect to the purchasers of securities on U.S. markets); *Ferromin Int’l Trade Corp. v. UCAR Int’l, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001) (antitrust case splitting the plaintiff group based on where the transactions in question had been invoiced). Sometimes the issue of prescriptive jurisdiction arises directly, in the context of motions to dismiss the foreign claims for lack of subject-matter jurisdiction. See, e.g., *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546 WHP, 2004 WL 2190357 (S.D.N.Y. 2004), *aff’d after rehearing*, 2005 WL 2222273 (S.D.N.Y. 2005) (granting defendants’ motion to dismiss the foreign claims included in the proposed class). It can also arise indirectly, in the context of procedural motions relating to the certification of a class or the selection of a lead plaintiff. Some courts, for instance, have rejected the motion of a foreign purchaser to be named lead plaintiff on the ground that its claims were subject to unique jurisdictional defenses not shared by U.S. claimants. See, e.g., *In re Royal Ahold N.V. Sec. and ERISA Litig.*, 219 F.R.D. 343, 348 (D. Md. 2003); *cf. In re Cable & Wireless, PLC Sec. Litig.*, 217 F.R.D. 372, 377 (E.D. Va. 2003) (exercising its discretion in similar circumstances to appoint one U.S. and one foreign claimant as co-lead plaintiffs). Other

have two consequences. First, unlike in the human rights context, where there is no U.S. action independent of the action brought by foreign plaintiffs, here judicial efficiencies may be realized through the coordinated adjudication of transnational cases in a single forum.<sup>262</sup> Second, the class action procedure creates an opportunity for foreign governments to signal their consent, or lack thereof, to transnational regulatory litigation that involves their nationals as plaintiffs.

In transnational securities and antitrust cases of the kind here described,<sup>263</sup> U.S. courts should not automatically dismiss the claims of foreign purchasers on the basis of traditional territory-based jurisdictional rules. Nor, however, as I argued in Part III, can they legitimately override the objections of other nations involved in asserting prescriptive jurisdiction over all such claims. Instead, the courts should require as part of the class certification process that such claims be supported by a statement of the government in whose markets the relevant transactions occurred, to the effect that it would not object to the litigation of those claims in U.S. court.<sup>264</sup> The submission of such a statement would not alone guarantee the exercise of U.S. jurisdiction over such claims—for instance, a court might determine that the plaintiffs had failed to establish other factors necessary for the certification of a global class,<sup>265</sup> or that the misconduct in question had

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courts have refused to certify classes including foreign plaintiffs on the ground that jurisdictional difficulties frustrate the typicality requirement, or defeat the superiority of class litigation to other forms of litigation. See Fed. R. Civ. P. 23(a)(3) (typicality requirement for class actions); Fed. R. Civ. P. 23(b)(3) (providing that the “class action [must be] superior to other available methods for the fair and efficient adjudication of the controversy”).

262. This conclusion assumes—as appears increasingly likely—that the foreign claims would proceed in a foreign court if dismissed in U.S. litigation. See *supra* Part III.A.2 (discussing the spread of private enforcement mechanisms in other countries). At the least, the assertion of jurisdiction over the foreign claims would create substantially less marginal cost for U.S. courts than the assertion of jurisdiction over foreign public law claims, which would not otherwise be litigated in the United States at all.

263. That is, cases involving intertwined cross-border harm and effect and also the application of a shared regulatory norm.

264. Counsel for the lead plaintiffs could obtain such statements following initial certification of a class otherwise meeting procedural requirements.

265. See Ilona T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Plaintiffs to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1582–84 (2005) (discussing whether the notification requirements would cause due process concerns with regard to foreign claimants); cf. *In re Lloyd’s Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1998 WL 50211, at \*16 (S.D.N.Y. Feb. 6, 1998) (concluding that “given the capabilities of modern international law firms and the comparative complexities of class action notice procedures, the issue of foreign notice is not sufficiently grave to defeat class certification”).

caused effects within the United States insufficient to trigger applicability of U.S. regulatory law even to U.S.-based claims. But it would permit courts to consider in a more balanced way the arguments presented for and against U.S. jurisdiction in transnational regulatory cases. This device would have several important benefits.

a. The Preclusive Effect of Settlement or Judgment in Class Actions

As a threshold matter, such an approval would address one of the procedural concerns that often arises in class actions involving foreign claimants: that any settlement or judgment would lack preclusive effect in foreign jurisdictions.<sup>266</sup> Courts in other nations might decline to recognize the outcome of a U.S. class action, and might permit class members to relitigate their claims locally, depriving the class action mechanism of its primary benefit.<sup>267</sup> Some courts have refused to certify classes including foreign plaintiffs for this reason.<sup>268</sup> Advance approval by the relevant foreign government, however, would signal the absence of any disagreement with U.S. procedural rules on which basis its courts might refuse to recognize the resulting settlement or judgment.<sup>269</sup>

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266. See Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41 (2003); Janet Walker, *Crossborder Class Actions: A View From Across the Border*, 2004 *MICH. ST. L. REV.* 755 (2004).

267. Cf. Gordon A. Christensen, *Federal Courts and World Civil Society*, 6 *J. TRANSNAT'L L. & POL'Y* 405, 514 (1997) (discussing this risk in connection with human rights litigation: "Even if American due process were satisfied in constituting the class, might another government interested in protecting its own citizens claim that the federal court did not proceed fairly under international standards? Members of the class...might mount a collateral attack though their own government."); Walker, *supra* note 266, at 764 ("[I]n cases involving multinational plaintiff classes it is arguable that fairness, and possibly due process, require jurisdictional standards to be informed by the likelihood that the certification order will be recognized by the courts in other potential fora as binding on class members who might choose to sue there. The question that arises from this is how courts in the United States might be able to anticipate whether a certification order will be recognized by a foreign court.").

268. See, e.g., *In re Daimler-Chrysler AG Sec. Litig.*, 216 *F.R.D.* 291, 301 (D. Del. 2003) (upon motion to certify a mixed class, excluding foreign claimants partly due to "the likelihood that foreign courts will not recognize and enforce a U.S. judgment, and therefore, defendants may be subject to multiple and potentially inconsistent adjudications in foreign countries"); cf. *In re Lloyd's Am.*, 1998 WL 50211 (recognizing the objection but concluding that certification was nevertheless appropriate).

269. A foreign government could also signal its assent to the litigation while noting that, should a resulting judgment be brought before its courts, enforcement would be limited to compensatory damages according to local public policy. The right to deny preclusive effect to a settlement or judgment that violated U.S. standards of due process would in any event remain.

b. Case-Specific Consideration

Most importantly, requiring such a statement would permit a more particularized approach to balancing the substantive benefits of regulation through U.S. courts and the possible foreign objections in any given case. U.S. courts would neither bar all claims of foreign purchasers on the assumption that asserting jurisdiction over them would pose foreign relations problems, nor permit claims where doing so would raise legitimate objections of the sort outlined in Part III. Nations amenable to the use of U.S. judicial resources in the regulatory process could benefit from their exercise, while still preserving the right of other nations to pursue preferred local remedies for cross-border misconduct.<sup>270</sup> No single state, then, would speak for another.<sup>271</sup>

c. Reducing the Risks of Broad Deference by the Judicial Branch

Using foreign government approval as the basis for separating permissible from nonpermissible claims would eliminate the need for U.S. courts to scrutinize other countries' antitrust enforcement mechanisms in order to determine whether litigation in the United States would indeed conflict with local regulation, a case-by-case approach that the Supreme Court and some commentators have characterized as unworkable.<sup>272</sup> U.S. courts would no longer need to rely on tenuous presumptions based on action or inaction by foreign governments,<sup>273</sup> or

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270. Such an approach might be criticized with respect to human rights cases, where one might expect offending nations to resist actions that might bring them to account. It is better suited to the economic context, where the potential application of U.S. domestic law, rather than international law, gives additional force to foreign concerns about undue trespass on foreign sovereignty.

271. This is one of the difficulties with foreign objections that condemn all transnational litigation: they might prevent U.S. litigation in situations in which other nations, particularly developing nations, might favor it. *But see* Mattei & Lena, *supra* note 229, at 396–98 (arguing that the class action mechanism is inescapably a tool of American hegemony, as its use facilitates the spread of U.S. legal culture and procedural standards).

272. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004); Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 220–24 (2005).

273. For an illustration of this problem in the public law context, see *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1378 (11th Cir. 1998) (comparing one case in which the foreign government in question had spoken to the pending litigation with another in which the government had not, concluding that: “[W]e think it significant...that the Venezuelan government has taken no position on whether this lawsuit proceeds in the United States or in Venezuela. Without such an indication from the foreign nation, we are reluctant to find that the plaintiffs’ private cause of action sounding in Georgia tort law implicates important foreign policy on the

on the assumption that only the U.S. executive branch could properly consider the question of potential conflict with other countries. However, the filing of such a statement would not foreclose the right of the U.S. executive branch to submit its own statement of interest in a particular case, signaling a stronger case for judicial deference in litigation implicating specific and compelling foreign policy concerns.

#### d. Optimizing Local Regulation

Finally, if a state in whose markets purchasers suffered harm chose not to submit such an authorization, it might then feel prompted to regulate the conduct locally to the best of its ability.<sup>274</sup> Having objected to U.S. litigation on the basis of conflicts with its own regulatory scheme, in other words, a foreign country might be less willing later to leave the conduct unregulated. Thus, even if the claims of certain foreign purchasers were not ultimately litigated in U.S. court, their filing could potentially highlight the local enforcement of internationally shared standards of conduct and thereby improve global regulation overall.

### CONCLUSION

This Article has argued that transnational regulatory litigation can, under proper circumstances, enable national courts to participate in implementing effective regulatory strategies for global markets. Developing this role for the courts requires an approach that integrates substantive regulatory values with community-shaping values, rather than placing them at odds with each other. International jurisdictional principles should not be seen as barriers that prevent the development of necessary solutions to evolving forms of economic misconduct. Such an approach not only sacrifices potentially valuable regulatory benefits, but ignores the many changes that have already altered our understanding of

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face of the plaintiffs' pleadings." See also *Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001) (noting the risk of asking foreign governments to state their interests in amicus briefs and then ignoring their objections).

274. A risk would remain that some governments would file an objection simply to protect their own defendant corporations. See Clifford A. Jones, *Foreign Plaintiffs, Vitamins, and the Sherman Antitrust Act After Empagran*, 7-8 EUR. L. REP. 270, 274 (2004) (speculating that Germany's motivation in filing its brief in *Empagran* related to its defense of German corporation BASF, one of the defendants). Given the shared nature of the regulatory norms in transnational litigation, however, such an action might create ill will in the regulatory community.

what sovereignty means in the global context. Nor, however, can jurisdictional law devolve into yet another articulation of political and economic power in the international community. A judicial role that is accepted as legitimate only in the country whose courts adopt it does little to advance the coordination and cooperation necessary for effective global regulation. This Article has attempted to sketch the conditions under which transnational regulatory litigation can fit into the more expansive set of regulatory mechanisms accepted by the international community. If that can be achieved, then, in the economic arena as in other fields, national courts can realize their potential as actors in the transgovernmental process.