DEVELOPMENTS IN THE LAW

# EXTRATERRITORIALITY

*"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."*

Alien Tort Statute, 28 U.S.C. § 1350 (2006).

*"We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."*

EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

*"[T]he number of U.S. lawsuits where American laws are applied extraterritorially to solve global problems has grown. This trend, however, is not peculiar to the United States. Increasingly other countries are also applying their laws extraterritorially to exert international influence and solve transboundary challenges."*

Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 818 (2009) (footnote omitted).

*"The Organization is based on the principle of the sovereign equality of all its Members. . . . All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."*

U.N. Charter art. 2, paras. 1, 4.

# TABLE OF CONTENTS

## I. INTRODUCTION

American courts have long presumed that federal statutes apply only within the territory of the United States.[1] International law also recognizes a norm against state exercise of power in other states' sovereign territory.[2] The exceptionalism of extraterritoriality reflects the foundational ideals of the international state system. In the centuries since the Treaty of Westphalia, the tenets of state sovereignty and territorial integrity have largely defined the international legal system[3] and provided the backdrop for its diplomatic standoffs, military confrontations, and legal disputes. Even the most important organ of twentieth-century internationalism — the United Nations — aims to bolster, rather than erode, the order of sovereign states.[4]

The supremacy of state sovereignty as a framework for international relations suggests that extraterritorial application of a state's law undermines other states and the international system as a whole. Yet this Development presents a more complex picture. The Parts below show that a state's extraterritorial application of its law can serve a range of state and non-state interests, and also suggest that extraterritoriality may support the core values of the international order as often as it harms them. To be sure, there are serious legal, diplomatic, and moral tensions inherent in the extraterritorial application of law. But this Development shows that extraterritoriality and the norm against it have no consistent valence, or at least that the valence is not always so clear in an age of terrorism, international business, and globalization.

Part II examines the power of U.S. courts to adjudicate aliens' claims of human rights violations committed abroad through the Alien Tort Statute[5] (ATS). The ATS grants federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[6] Al-

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[1] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949))).

[2] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 1, subch. A, intro. note (1987). International law nonetheless recognizes a state's prescriptive jurisdiction over its own nationals and conduct that threatens its national security or is intended to have an effect within its territory. *See id.* § 402.

[3] *See* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 121 (2010).

[4] *Id.* at 122; *see also* U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

[5] 28 U.S.C. § 1350 (2006).

[6] *Id.*

though enacted in 1789, the ATS lay largely dormant until 1980, when the Second Circuit's decision in *Filartiga v. Peña-Irala*[7] transformed the ATS into a means of domestically remedying human rights violations abroad.[8] After almost two decades of progressive international human rights litigation in the United States, the Supreme Court held in its 2004 decision *Sosa v. Alvarez-Machain*[9] that such jurisdiction is limited to causes of action that are specific, obligatory, and universally accepted by international law.[10] Recent, post-*Sosa* cases demonstrate how federal courts have construed both international and U.S. law to narrow the ATS's scope, thus inherently affecting its potential extraterritorial reach. Courts have imposed limitations like the state action requirement,[11] international law restrictions on classes of defendants,[12] the act of state doctrine,[13] statutory preemption,[14] and exhaustion[15] to preclude or limit ATS claims. Notably, pre-*Sosa* debates regarding the breadth of customary international law suggest that *Sosa* alone does not explain these developments. It does seem, however, that at least with regard to exhaustion, *Sosa* may have made a difference that implicates concerns of extraterritorial reach.[16] The Part concludes by suggesting that courts' recent antipathy to ATS claims may reflect anxiety about the statute's extraterritorial reach. This observation is consistent with federal courts' general presumption against applying statutes beyond American borders absent a clear directive from the political branches.[17]

Part III documents the uneasy tension between international law — which generally prohibits extraterritorial legal authority — and the political imperatives of the international system. For example, though the European Union has frequently opposed efforts to extend U.S. jurisdictional reach across the Atlantic,[18] it has also harmonized its own laws to accord with recent U.S. actions prohibiting non-

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[7] 630 F.2d 876 (2d Cir. 1980).

[8] *Id.* at 880, 886–87.

[9] 542 U.S. 692 (2004).

[10] *Id.* at 732–33.

[11] *See, e.g.*, Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247–48 (11th Cir. 2005).

[12] *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).

[13] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).

[14] *See* Bowoto v. Chevron Corp., 621 F.3d 1116, 1121 (9th Cir. 2010).

[15] *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008) (en banc).

[16] *See id.* at 841 (Reinhardt, J., dissenting).

[17] *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[18] For example, the European Community (the European Union's political precursor) claimed that U.S. export regulations designed to stop construction of a Soviet gas pipeline were "unacceptable under international law because of their extraterritorial aspects." Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Regulations 4 (Aug. 12, 1982), *available at* http://aei.pitt.edu/1768/01/US_dispute_comments_1982.pdf.

American economic engagement with Iran.[19] The explanation may lie in an alignment of European Union and U.S. interests. Unlike previous instances of European opposition to American extraterritoriality, in this case the European Union regards the target of U.S. action — Iran's nuclear weapons program — as a serious threat.[20] Moreover, the United States implemented its extraterritorial sanctions regime with serious regard for European political and economic concerns. The European Union's action may also reflect the region's growing capacity for collective action and the potential for extraterritorial exertion of its own laws. This example suggests that international law's powerful norm against extraterritoriality sometimes yields to consensual political objectives.

Like Part II, Part IV illustrates U.S. judicial discomfort with the extraterritorial reach of U.S. law. This Part examines the extraterritoriality implications of the Supreme Court's Guantánamo Bay detainee cases, particularly *Boumediene v. Bush*,[21] and lower courts' subsequent application of that decision. In *Boumediene*, the Supreme Court held that alien detainees at Guantánamo Bay are constitutionally entitled to petition for the writ of habeas corpus.[22] The Court's reliance on functional American control rather than formal political boundaries to determine the reach of the Constitution suggested that the rights of detainees held overseas would expand. But subsequent cases give reason to think otherwise. In *Al Maqaleh v. Gates*,[23] for example, the D.C. Circuit declined to extend *Boumediene*'s rationale to detainees held at Bagram Airfield in Afghanistan.[24] Though detainees held there were similarly situated to those held at Guantánamo, a combination of formal and practical factors — including the absence of de facto U.S. sovereignty over Bagram and Bagram's location in a war zone — distinguished the case.[25] Moreover, recent cases implicating other detainee rights show that habeas may be a sui generis category. In *Al-Zahrani v. Rumsfeld*,[26] the U.S. District Court for the District of Columbia dismissed the claims of deceased detainees' survivors under the Federal Tort Claims Act[27] (FTCA). The court rejected the argument that *Boumediene* rendered the FTCA applicable to Guantánamo

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19 *See* Council Decision 2010/413, art. 4(1), 2010 O.J. (L 195) 39, 43 (EU).

20 *See* Tom Sauer, *Struggling on the World Scene: An Over-Ambitious EU Versus a Committed Iran*, 17 EUR. SECURITY 273, 282 (2008).

21 128 S. Ct. 2229 (2008).

22 *Id.* at 2240.

23 605 F.3d 84 (D.C. Cir. 2010).

24 *Id.* at 87.

25 *See id.* at 97–98.

26 684 F. Supp. 2d 103 (D.D.C. 2010).

27 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

and instead endorsed a bright-line de jure sovereignty test.[28] Part IV continues with a discussion of *Arar v. Ashcroft*,[29] a case of extraordinary rendition, and concludes that the lower courts' inattentiveness to some of the concerns motivating the *Boumediene* decision has opened the door for the political branches to evade statutory and constitutional limits by manipulating territorial boundaries.

Part V discusses the extraterritorial application of U.S. antitrust law. The growth of international commerce and free trade agreements has paralleled an increase in anticompetitive behavior of international firms.[30] The result has been fierce debate over the jurisdictional limits of states' various antitrust regimes. This Part compares the civil and criminal aspects of the extraterritorial application of U.S. antitrust law. On the civil side, courts have limited the extraterritorial use of antitrust statutes' private rights of action on the basis of comity,[31] which prescribes deference to foreign jurisdictions based on a balance of U.S. and foreign interests. In contrast, criminal enforcement of U.S. antitrust law overseas has expanded,[32] and the comity-driven restrictions on civil suits seem not to apply. This Part concludes that the trends are complementary and, given the diplomatic dimension of extraterritorial antitrust enforcement, may in part reflect judicial deference to executive enforcement decisions.

Part VI shows how the extraterritorial application of laws may in fact advance values central to the international state system. For example, commentators,[33] international institutions,[34] and foreign governments[35] have criticized the ATS for impinging upon states' sovereignty by extending American civil jurisdiction overseas. But the ATS has provided an enforcement mechanism for international human rights laws and forced U.S. courts to address developments in international law. Similarly, the Foreign Corrupt Practices Act of 1977[36]

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[28] *Al-Zahrani*, 684 F. Supp. 2d at 117–18.

[29] 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

[30] *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 3–4 (1997).

[31] *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004).

[32] *See* Travis J. Hill & Stephanie B. Lezell, *Antitrust Violations*, 47 AM. CRIM. L. REV. 245, 276 (2010) (explaining the decline in criminal cases filed against American corporations and concurrent increase in overall criminal sanctions as a result of an increasingly "aggressive prosecution of international cartels").

[33] *See, e.g.*, M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1131–33 (1999).

[34] *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 48 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

[35] *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Petitioners at app. C at 7a–8a, Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008) (mem.) (No. 07-919) (reproducing a letter from the Swiss government opposing U.S. ATS litigation).

[36] Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

(FCPA), which provides civil and criminal liability for bribery of foreign officials, has promoted state signatories' compliance with anticorruption treaties despite widespread criticism of the statute's extraterritorial reach. But where extraterritorial statutes push too hard on jurisdictional limits in order to supplement other norms, outrage has undermined the statutes' aims. The United States declined to enforce the Iran and Libya Sanctions Act of 1996[37] against foreign firms doing business with Libya in response to the European Union's objections to the statute's extraterritorial application.[38] In this example, the U.S. effort to protect the interests of the international state system by using means offensive to international law failed. This example stands in stark contrast to the European Union's response to the U.S. secondary sanctions on trade with Iran discussed in Part III.

Part VII evaluates the extraterritorial dimensions of international bankruptcy proceedings. In 2005, Congress partially addressed the bankruptcy implications of the rapid growth of multinational corporations, but its solution has so far fallen short. Chapter 15, based on the United Nations Model Law on Cross-Border Insolvency[39] and incorporated into the Bankruptcy Code via the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[40] (BAPCPA), has not instituted a legal framework strong enough to suit complex international bankruptcy proceedings. For one, recent evidence suggests that Chapter 15 has not promoted international cooperation as Congress intended. That is, U.S. bankruptcy courts have not become noticeably more willing to recognize and cooperate with foreign proceedings. Instead, in what is likely a positive development, U.S. bankruptcy courts appear more reluctant to recognize proceedings in "haven" jurisdictions[41] and, in what is likely a negative development, perhaps more eager to protect American creditors.[42] A key reason for the latter behavior may be that few countries beyond the United States have

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[37] Pub. L. No. 104-172, 110 Stat. 1541 (codified as amended at 50 U.S.C.A. § 1701 note (West 2010)).

[38] *See* Charles Tait Graves, *Extraterritoriality and Its Limits: The Iran and Libya Sanctions Act of 1996*, 21 HASTINGS INT'L & COMP. L. REV. 715, 722 (1998).

[39] The United Nations Commission on International Trade Law adopted the Model Law on May 30, 1997, to promote international cooperation in cross-border insolvency proceedings. *See* Rep. of the U.N. Comm'n on Int'l Trade Law on Its 30th Sess., May 12–30, 1997, U.N. Doc. A/52/17; GAOR, 52d Sess., Supp. No. 17, Annex I pmbl. (July 4, 1997) (Annex I to the report is the Model Law on Cross-Border Insolvency). The United Nations General Assembly approved the law for transmission to interested governments shortly thereafter. *See* G.A. Res. 52/158, pmbl., U.N. Doc. A/RES/52/158 (Jan. 30, 1998).

[40] Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

[41] Andrew B. Dawson, *Offshore Bankruptcies*, 88 NEB. L. REV. 317, 340 (2009).

[42] *See* Jeremy Leong, Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases 13–15 (2010) (unpublished manuscript) (on file with the Harvard Law School Library), *available at* http://works.bepress.com/jeremy_leong/1.

adopted legislation based on the Model Law — because mutual cooperation is not assured, U.S. courts have an incentive to act uncooperatively themselves.[43] No less significantly, the Chapter 15 framework intentionally does not address the ability of U.S. courts to apply the Bankruptcy Code abroad, and they may be increasingly willing to do so. In the face of these developments, large multinational corporations have turned away from public law solutions to cross-border bankruptcies toward privately negotiated protocols.[44] Yet, as revealed by the ongoing Lehman Brothers bankruptcy discussed in Part VII's concluding sections, this private approach is an insufficient solution; more must be done at the public level to harmonize cross-border bankruptcy proceedings.

This Development highlights a variety of examples, perspectives, and substantive contexts that suggest there is no simple descriptive theory of the patterns of American extraterritorial exertion and the international community's response. Congress eagerly legislates beyond American borders — at least in cases of protecting competitive markets and curbing state-sponsored terrorism. Courts have restrained that legislative impulse. But these institutional roles are curiously inconsistent in cases of individual rights. Courts have narrowed statutory remedies for foreign human rights violations but serve as guardians of constitutional protections that Congress has sought to limit beyond U.S. borders. The European Union's posture toward American extraterritorial law is equally inconsistent. Together, these aspects of extraterritoriality do not point to one clear path for global politics and legal theory. Rather, they reflect a continuing search for solutions to a common problem: how to reconcile the premises underlying the Westphalian, state-based order with an increasingly integrated world.

## II. IMPLICATIONS OF EXTRATERRITORIALITY IN THE ALIEN TORT STATUTE

### *A. Introduction*

In the past thirty years, the Alien Tort Statute[1] (ATS) has become a lynchpin of international human rights activism. After lying dormant

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[43] *See* Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 62–63 (2001) (discussing the "prisoners' dilemma" of cross-border bankruptcy).

[44] *See* Paul H. Zumbro, *Cross-Border Insolvencies and International Protocols — An Imperfect but Effective Tool*, 11 BUS. L. INT'L 157, 164 (2010).

[1] 28 U.S.C. §1350 (2006). The ATS is also sometimes referred to as the Alien Tort Claims Act (ATCA) or simply the Alien Tort Act (ATA).

for nearly two hundred years[2] following its promulgation in the Judiciary Act of 1789,[3] the statute turned into a crucial tool for human rights litigation with the seminal 1980 case of *Filartiga v. Peña-Irala*,[4] which transformed the ATS into the epitome of "extraterritoriality"[5] in U.S. law. The history of the ATS is well documented.[6] With the exception of a few cases,[7] the use of the ATS after *Filartiga* was generally a story of expansion.[8] Then, in its 2004 decision in *Sosa v. Alvarez-Machain*,[9] the Supreme Court cited *Filartiga* with approval — and thus implicitly approved the application of the ATS to claims arising outside of the United States — but warned lower courts to exercise caution when identifying actionable claims under the statute.[10]

Since 2004, district and circuit courts have often invoked *Sosa* in curbing the statute's reach, which at first glance suggests that *Sosa* has caused a contraction in the ATS. But a closer look tells a different story. The same issues that were debated and litigated before 2004 remain hotly contested after *Sosa*, and for almost all of these issues, it is far from clear that *Sosa* was dispositive in their outcomes. *Sosa* may thus have had a smaller practical effect than might first appear. There are two exceptions, however. First, *Sosa*'s concern that the ATS's application must align with international law norms may have been a factor in limiting the most aggressive extraterritorial uses of the sta-

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[2] Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004) (explaining that from 1789 to 1980, the ATS was used only twenty-one times and only two courts ever based jurisdiction on the ATS).

[3] *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

[4] 630 F.2d 876 (2d Cir. 1980).

[5] Because permissible ATS claims are restricted to those on which there is at least a substantial international consensus, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), they implicate a different type of extraterritoriality than some of the other Developments in the Law contributions, which deal with extensions of U.S. domestic law beyond its territorial borders. For a more extensive treatment of the extraterritoriality of the ATS as related to its universal jurisdiction, see *infra* pp. 1281–85.

[6] *See generally* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Charles F. Marshall, *Re-Framing the Alien Tort Act after* Kadic v. Karadzic, 21 N.C. J. INT'L L. & COM. REG. 591 (1996).

[7] *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 254–55 (2d Cir. 2003) (stating that the rights to life and health are too indeterminate to qualify as customary international law under the ATS).

[8] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (granting ATS jurisdiction over torts committed in former Yugoslavia by an individual actor); *Filartiga*, 630 F.2d at 889 (recognizing ATS claim brought by a Paraguayan national whose brother had been tortured and killed by Paraguayan police); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (recognizing an ATS claim against a corporate defendant), *aff'd in part and rev'd in part*, 395 F.3d 932 (9th Cir. 2002); *see also* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 102 AM. J. INT'L L. 635, 657–62 (2008) (excerpting comments made by State Department Legal Advisor John Bellinger on the expanding use of the ATS).

[9] 542 U.S. 692.

[10] *Id.* at 731–38.

tute. Second, the Ninth Circuit has invoked *Sosa*'s dicta to impose an exhaustion requirement for some claims. If other courts follow the Ninth Circuit's approach, they may limit the ATS far more than *Sosa*'s holding contemplated.

### *B. Overview of ATS History*

From the ATS's enactment[11] in 1789 until 1980, only two courts had ever based jurisdiction on the ATS, and neither case implicated issues of human rights.[12] Then, in 1980, the Second Circuit held in *Filartiga* that, because federal common law incorporates the law of nations, U.S. federal courts had jurisdiction under the ATS to adjudicate claims arising from violations of customary international law.[13] The ATS was thus transformed into a tool for remedying rights violations abroad.[14]

The jurisdictional foundation of ATS litigation is in the statute itself and in Article III, because "the Laws of the United States"[15] include federal common law, which in turn incorporates customary international law.[16] Between 1980 and 2004, two competing schools of thought developed regarding the scope of ATS jurisdiction in the post-*Erie* world, with the debate centering on whether the ATS provided an independent cause of action in addition to the jurisdiction that it clearly conferred upon federal courts or whether some other source of law (such as congressional action) was required to furnish the cause of action.[17] On one side, ATS skeptics argued that the ATS was effectively a dead letter in the post-*Erie* world, since no statutory or constitutional provision incorporates customary international law into federal law and the courts are barred from making federal common law absent

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[11] A number of scholars have posited that the original intent of the First Congress in creating the ATS was to provide a "national security measure . . . to assure European nations that it was safe to conduct business with the new United States" by promising them enforcement of the law of nations in federal courts, rather than in the more biased state courts. *See, e.g.*, Vanessa R. Waldref, *The Alien Tort Statute After* Sosa*: A Viable Tool in the Campaign to End Child Labor?*, 31 BERKELEY J. EMP. & LAB. L. 160, 163 (2010).

[12] *See* Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961) (basing jurisdiction on the ATS in child custody case); Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607) (invoking the ATS to support jurisdiction in case involving capture of persons to be sold as slaves onboard enemy ship).

[13] *Filartiga,* 630 F.2d at 880, 886–87.

[14] *See Filartiga*, 630 F.2d at 885 ("It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction.").

[15] U.S. CONST. art. III, § 2.

[16] *See, e.g.*, *Filartiga*, 630 F.2d at 885 ("The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.").

[17] *See, e.g.*, Pamela J. Stephens, *Spinning* Sosa*: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 7–14 (2007).

such authorization.[18] Such critics characterized the ATS as a purely jurisdictional statute.[19] They also often intimated that improper extraterritorial application of the ATS could interfere with international relations and foreign policy.[20] On the other side, scholars and human rights advocates maintained that causes of action under customary international law remained part of the federal common law after *Erie*.[21] Proponents of this view also argued that because the ATS applies universal norms, adjudication of claims stemming from acts committed abroad are not likely to offend foreign nations' sovereignty.[22]

After twenty years of progressive ATS litigation, the Supreme Court finally addressed the scope of the ATS in 2004. In *Sosa v. Alvarez-Machain*, the plaintiff brought an ATS claim alleging unlawful abduction and detention.[23] Justice Souter, writing for the majority, declared that although the ATS clearly grants jurisdiction over causes of action arising in other countries, the causes of action themselves are limited to those that are as specific, obligatory, and universally accepted as the original causes of action contemplated by the First Congress:[24] piracy, violations of safe conducts, and offenses against ambas-

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[18] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 855–59 (1997).

[19] *Compare* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that § 1350 provided only jurisdiction and no causes of action), *with id.* at 777 (Edwards, J., concurring) (disagreeing with Judge Bork on cause of action analysis). *See also* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 478–80 (1986) (noting that "section 1350 clearly does not create a statutory cause of action," *id.* at 479, but concluding that it may have created a common law cause of action); Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 458 (2007) (noting post-*Filartiga* debate over whether the ATS conferred only jurisdiction or also a cause of action).

[20] *See, e.g.*, Hufbauer & Mitrokostas, *supra* note 2, at 607–08 (discussing the possibility of overexpansive ATS litigation "devastat[ing] global trade and investment," *id.* at 607, by curbing multinational corporations' willingness to invest in countries with imperfect records in human rights); *see also* John G. Ruggie, UN Special Representative for the Sec'y Gen. for Bus. & Human Rights, Keynote Presentation at EU Presidency Conference on the 'Protect, Respect and Remedy' Framework (Nov. 10, 2009) ("Clearly, both home and host states are most apprehensive about direct extra-territorial jurisdiction — often viewing it as inappropriate interference in others' domestic affairs. Business too has concerns — particularly the uncertainty and competitive disadvantage that can result from conflicting requirements.").

[21] *See, e.g.*, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

[22] *Cf.* Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. 177, 177 (2008) ("In the human rights and environment contexts, it is more likely that home state regulation would result in concurrent but not conflicting jurisdiction, particularly where the regulation is designed to further shared international norms.").

[23] 542 U.S. 692, 697 (2004).

[24] *See id.* at 732 ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory." (quoting *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)) (internal quotation marks omitted)).

sadors.[25] Although the Court approved *Filartiga*'s basic approach,[26] it thus advised "vigilant doorkeeping"[27] of the ATS's reach,[28] leaving each side to take its own view of *Sosa* and its implications for future ATS litigation.[29]

### C. Lower Court Decisions on the ATS's Extraterritorial Reach

In light of the continuing debate over *Sosa*'s meaning, the question remains whether *Sosa* has actually affected recent ATS litigation. Unsurprisingly, courts often invoke *Sosa* in limiting which claims may be brought under the ATS, usually by examining a tort to see if it is a permissible type under the *Sosa* norms. They have also invoked *Sosa* when imposing other limitations based on either international law, such as the state action requirement[30] and limits on potential classes of defendants,[31] or domestic law, such as the act of state doctrine,[32] statu-

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[25] *Id.* at 724–25 ("Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized." *Id.* at 725.); *see also* Crook, *supra* note 8, at 658 (presenting Bellinger's view of the Supreme Court's holding in *Sosa* as limiting new claims under the ATS to the original causes of action contemplated in the eighteenth century when the statute was enacted and other causes of action that are similarly specific and universal in the modern world).

[26] *Sosa*, 542 U.S. at 732 (citing with approval Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

[27] *Sosa*, 542 U.S. at 729.

[28] *Id.* at 725–28 (listing a series of reasons for judicial caution when considering the types of claims that merit ATS jurisdiction).

[29] *See, e.g.*, Carolyn A. D'Amore, Note, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 594 (2006) ("The Supreme Court's decision in *Sosa* . . . neither threw the door open nor shut it firmly. Instead, this decision perpetuates the uncertainty surrounding the ATS . . . , suggesting that the issue will be revisited frequently . . . ." (footnotes omitted)). The Bradley-Goldsmith contingent emphasizes *Sosa*'s characterization of the ATS as a purely jurisdictional statute, *see, e.g.*, Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 873 (2007) (stating that *Sosa* is best read to reject the "modern position"); and a number of ATS cases since 2004 have cited *Sosa* for that proposition, s*ee, e.g.*, Bowoto v. Chevron Corp., 621 F.3d 1116, 1125 (9th Cir. 2010); Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 125 (2d Cir. 2010). Meanwhile, adherents of the modern position understand *Sosa* to be the Supreme Court's vindication of ATS-driven human rights litigation, since the Court did not completely close off the possibility of recognizing modern, actionable ATS claims without congressional action. *See, e.g.*, William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 19 (2007).

[30] *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247–50 (11th Cir. 2005).

[31] *See Kiobel*, 621 F.3d at 120 (holding that no corporate liability exists under the ATS); *cf.* Doe v. Nestle, S.A., No. CV 05-5133 SVW (JTLx), 2010 WL 3969615, at *17–21 (C.D. Cal. Sept. 8, 2010) (expressing skepticism regarding aiding and abetting liability extending to ATS defendants).

[32] *See* Doe v. Qi, 349 F. Supp. 2d 1258, 1288–1306 (N.D. Cal. 2004).

tory preemption,[33] and exhaustion.[34] However, a closer look indicates that *Sosa* changed things less than it first appears. These opinions reflect the continuing litigation of the same potential limitations that were at issue even prior to 2004, and *Sosa* has not necessarily resulted in different outcomes. These recent cases do, however, exhibit *Sosa*'s influence in two ways. First, they reflect concern that the ATS be applied so as to align with international law norms, limiting the most potentially aggressive extraterritorial use of the statute. Second, the Ninth Circuit has built on *Sosa*'s endorsement of the use of an additional prudential factor in the analysis. Because the ATS permits "an element of judgment about the practical consequences of making that cause available to litigants in the federal courts,"[35] that court has made use of domestic law limitations, such as an exhaustion requirement, to constrain ATS claims. This interpretation may limit claims under the statute more than *Sosa*'s holding contemplated.

*1. International Law Limits on the ATS.* — Courts have used international law to limit the ATS in at least three ways: narrowing the classes of actionable torts, applying a state action requirement, and limiting the classes of defendants subject to suit.[36] Although the courts in these cases invoke *Sosa* to emphasize the need to conform the ATS to international law norms, similar issues arose before *Sosa*, and it is far from clear that *Sosa* has altered the results.

First, courts have seemingly narrowed the classes of torts actionable under *Sosa*. For example, in 2005, the Eleventh Circuit held in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*[37] that nontorture claims involving cruel, inhuman, or degrading treatment (CIDT) were not actionable under the ATS.[38] In *Aldana*, the plaintiffs alleged that they had been arbitrarily detained and threatened with death by nongovernmental security forces,[39] and brought both nontorture claims under the ATS and torture claims under the ATS and the Torture Victim Protection Act[40] (TVPA).[41] Although the court acknowledged that two district courts had already recognized similar causes of action under the ATS,[42] it held that the CIDT claims did not "create obligations

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[33] *See Bowoto*, 621 F.3d at 1121.

[34] *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008) (en banc).

[35] Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 (2004).

[36] This discussion is not exhaustive, and there are certainly other international law limitations that are not addressed here, including, for example, aiding and abetting theories under the ATS.

[37] 416 F.3d 1242 (11th Cir. 2005).

[38] *Id.* at 1247.

[39] *See id.* at 1245.

[40] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)).

[41] *Aldana*, 416 F.3d at 1246.

[42] *Id.* at 1247 (citing Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1347 (N.D. Ga. 2002) (recognizing cause of action under the ATS for CIDT when dealing with Bosnian war crimes)); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001) (recognizing same

enforceable in the federal courts"[43] and were thus not actionable under the ATS, placing particular emphasis on the Supreme Court's admonition to be cautious in expanding the ATS beyond the specific enumerated torts recognized under international norms.[44] It thus seems that by dismissing the nontorture claims, the Eleventh Circuit halted potential overreaching of the ATS, ensuring that only those claims that fell within the purview of international law as defined under *Sosa* survived as actionable. However, such caution is not new: courts before *Sosa* had also held that CIDT was not actionable because such claims lacked sufficient specificity and universality under customary international law.[45] Moreover, since 2004 other courts have recognized CIDT as actionable.[46] Thus, the debate over whether CIDT is an actionable class of tort under the ATS is still an open one, spanning both pre- and post-*Sosa* eras.

Second, courts have limited the ATS via the state action requirement.[47] There are exceptions to this requirement, however, by which private individuals can be held to have violated international law, such as in the cases of piracy, war crimes, and crimes against humanity.[48] In *Aldana*, the Eleventh Circuit applied the state action requirement as an alternative means of limiting the plaintiffs' torture claims under the ATS. The Eleventh Circuit relied on *Kadic v. Karadzic*[49] for the proposition that only state-sponsored torture, not torture by private actors, "likely violates international law and is therefore actionable under the [ATS]."[50] However, state action analysis has been part of ATS ju-

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cause of action as in *Mehinovic* but dealing with political assassination), *aff'd on different grounds*, 402 F.3d 1148, 1161 (11th Cir. 2005); *see also* Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *7–8 (S.D.N.Y. Feb. 28, 2002) (recognizing CIDT as actionable under the ATS), *aff'd in part and rev'd in part*, 226 F.3d 88 (2d Cir. 2000); Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995) (recognizing same cause of action).

43 *Aldana*, 416 F.3d at 1247 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) (internal quotation marks omitted)).

44 *Id.* (citing *Sosa*, 542 U.S. at 727–28).

45 *See* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987).

46 *See, e.g.*, *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 248–254 (S.D.N.Y. 2009).

47 The state action requirement is an international law norm under which only state actors can traditionally be held accountable for law of nations violations. Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does* Sosa *Matter?*, 21 EMORY INT'L L. REV. 789, 798 (2007); *see also* Doe v. Karadzic, 866 F. Supp. 734, 739 (S.D.N.Y. 1994) (holding that "acts committed by non-state actors do not violate the law of nations"), *rev'd*, Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995).

48 *Kadic*, 70 F.3d at 239–40.

49 70 F.3d 232.

50 Aldana v. Del Monte Fresh Produce, N.A. Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (citing *Kadic*, 70 F.3d at 243–44). The Second Circuit in *Kadic* had ultimately found jurisdiction under the ATS for the defendant's alleged acts of torture despite the defendant's unclear status as either a state or non-state actor. *See Kadic*, 70 F.3d at 237. However, the court reached its conclusion by setting aside the question of whether the defendant was a state actor to instead hold that the defendant's alleged acts of torture within the context of genocide and war crimes, *id.* at 244, fell un-

risprudence since before *Sosa*. The courts in both *Kadic*[51] and *Tel-Oren v. Libyan Arab Republic*[52] underwent the same analysis before *Sosa*, and the district court in *In re South African Apartheid Litigation*[53] similarly considered the state action requirement in its analysis of the racial discrimination-related claims after *Sosa*. The Second Circuit also recently exercised less restraint in its treatment of the state action requirement with regard to ATS claims.[54] Again, it seems that limiting the reach of ATS claims through state action requirements is not a novel analysis derived from *Sosa*, but rather an extension of a longstanding debate on the doctrinal limit.

Third, and perhaps most notably, courts have held that under customary international law, liability under the ATS cannot reach corporate defendants.[55] On September 17, 2010, the Second Circuit ruled in *Kiobel v. Royal Dutch Petroleum*,[56] an ATS case alleging claims against a corporate defendant for aiding and abetting human rights violations. After reiterating that "[t]o attain the status of a rule of customary international law, a norm must be 'specific, universal, and obligatory'" under *Sosa*,[57] the Second Circuit held that "corporate liability has not attained a discernable, much less universal, acceptance

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der the category of "certain forms of conduct [that] violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals," *id.* at 239.

51 *See Kadic*, 70 F.3d at 239–45.

52 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring) (finding insufficient international consensus that torture by private actors violates customary international law and thus cannot support an ATS claim).

53 617 F. Supp. 2d 228, 250–52 (S.D.N.Y. 2009) (ultimately finding that "private racial discrimination alone . . . does not violate customary international law," *id.* at 250).

54 *See* Recent Case, Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009), 123 HARV. L. REV. 768 (2010).

55 *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010); Flomo v. Firestone Natural Rubber Co., No. 1:06-cv-00627-JMS-TAB, 2010 WL 3938312, at *7 (S.D. Ind. Oct. 5, 2010). This debate is separate from the open question of the application of aiding and abetting theories of liability in ATS litigation, *see, e.g.*, Doe v. Nestle, S.A., No. CV 05-5133 SVW (JTLx), 2010 WL 3969615, at *45 (C.D. Cal. Sept. 8, 2010), although the two theories are often found together in litigation against corporate defendants allegedly subject to secondary liability. *See, e.g.*, Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 214–16 (2005) (discussing aiding and abetting theories used in ATS claims against corporate entities). For discussion of an ATS case where an aiding and abetting theory was allowed, see Recent Case, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (per curiam), 121 HARV. L. REV. 1953 (2008). Although aiding and abetting theories are not discussed in detail in this Part, long-standing debate surrounds such theories regarding both 1) whether aiding and abetting exists at all as a theory of liability under the ATS; and 2) what the standard is (drawn from what source of law) for aiding and abetting liability. *See, e.g.*, Virginia Monken Gomez, Note, *The* Sosa *Standard: What Does It Mean for Future ATS Litigation?*, 33 PEPP. L. REV. 469, 495–99 (2006) (discussing how aiding and abetting liability might be treated under *Sosa*).

56 621 F.3d 111.

57 *Id.* at 131 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).

among nations of the world."[58] Accordingly, any ATS complaints against corporations must be dismissed for lack of subject matter jurisdiction.[59] Writing for the majority, Judge Cabranes explained:

> The principle of individual liability for violations of international law has been limited to natural persons — not 'juridical' persons such as corporations — because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an 'international crime' has rested solely with the individual men and women who have perpetrated it.[60]

Judge Leval concurred in the dismissal of the case based on the inadequacy of the pleadings, but expressed grave concern about the scope of the ruling with regard to the liability of corporate defendants. He characterized the holding as a "substantial blow to international law and its undertaking to protect fundamental human rights."[61] The holding in *Kiobel* departed from prior ATS decisions that had upheld jurisdiction for claims against corporate defendants,[62] suggesting that the *Sosa* requirements of universality and specificity undermined corporate liability under the ATS. However, it is unclear whether a meaningful distinction exists between pre-*Sosa* treatment and post-*Sosa* treatment of corporate defendants, since other post-*Sosa* cases have permitted ATS claims against corporate defendants.[63] Moreover, Judge Leval's concurrence in the judgment in *Kiobel* posits that the majority misunderstood *Sosa* and other precedent on the viability of corporate ATS liability.[64] Emphasizing the lack of basis in interna-

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[58] *Id.* at 148.

[59] *Id.* at 149; *see also id.* at 145.

[60] *Id.* at 119. This same court recently affirmed a lower court decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 122 (2010), holding that Sudanese plaintiffs could not bring an ATS action against a Canadian corporation that allegedly aided and abetted the government of Sudan in committing human rights violations, since aiding and abetting complicity required the corporation to act with the *purpose* (not the mere knowledge) of aiding the government's unlawful conduct. *Id.* at 260–63.

[61] *Kiobel*, 621 F.3d at 149–50 (Leval, J., concurring in the judgment) ("According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.").

[62] For example, in 1997, a district court in *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), upheld ATS jurisdiction over a private, corporate defendant (albeit without specifically addressing whether corporate entities could ever be ATS defendants), finding that: 1) the allegations that the corporate defendant "jointly engaged with the state officials in . . . forced labor and other human rights violations," *id.* at 891, sufficed to meet the state action and subject matter jurisdiction requirements of the ATS; and 2) the allegations of forced labor were sufficient to establish subject matter jurisdiction even absent state action because they fell within the "handful of crimes" where the law of nations attributed individual responsibility. *Id.* at 891–92 (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring)).

[63] *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009).

[64] *See Kiobel*, 621 F.3d at 150–54 (Leval, J., concurring in the judgment).

tional law precedent for the majority's rule,[65] Judge Leval then pointed out that both *Sosa* and numerous circuit court cases have recognized a damage remedy under the ATS.[66] He noted that, given other international law precedent that the question of remedy is to be decided by each individual state, the *Kiobel* majority's asserted rule conflicts with the Supreme Court's holding that civil liability lies under the ATS.[67] *Sosa* seems to cut both ways on the question of corporate ATS liability, depending on the interpreter.

*2. U.S. Law Limitations on the ATS.* — Lower courts have also employed a host of domestic legal doctrines to limit ATS remedies. Although courts cite *Sosa* in their analysis and reasoning, the use of domestic law to constrain the ATS is not new, and *Sosa* has not necessarily changed the results. The exception is the Ninth Circuit's aggressive use of an exhaustion requirement, which builds on *Sosa*'s dicta but may limit the ATS more than *Sosa* contemplated.

First, courts have relied on the act of state doctrine, a prudential doctrine on justiciability that can preclude U.S. courts from questioning the validity of public acts that a recognized foreign sovereign power commits within its own territory.[68] For instance, in *Doe v. Qi*,[69] the court rejected the plaintiffs' contention that "under *Sosa*, the act of state doctrine [did] not apply where the claims satisf[ied] the standard of specificity and universality the [Supreme] Court required,"[70] stating that the Court had "in no way intimated" the plaintiffs' proposition.[71] The court emphasized that the doctrine was not rendered inapposite simply because a state violated international law norms.[72] Instead, the court determined that, despite the international consensus on the alleged violations,[73] application of the act of state doctrine was prudent given the State Department's concerns of how the case might interfere with U.S. foreign policy toward China, the ongoing relationship with the accused government, and particularly the defendants' continuing

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[65] *Id.* at 151, 160–63 ("[T]here is no basis for [the majority's conclusion]. No precedent of international law endorses this rule. No court has ever approved it, nor is any international tribunal structured with a jurisdiction that reflects it . . . . No treaty or international convention adopts this principle. And no work of scholarship on international law endorses the majority's rule. Until today, their concept had no existence in international law." (footnote omitted)).

[66] *Id.* at 153.

[67] *Id.* at 174–76.

[68] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964). The *Filartiga* court did not address the act of state doctrine because the argument had not been made at trial and was thus not appealed. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 889 (2d Cir. 1980).

[69] 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

[70] *Id.* at 1290.

[71] *Id.* at 1291.

[72] *Id.* at 1290–91.

[73] *Id.* at 1296.

positions of power in said government.[74] The court then eliminated all claims for damages and injunctive relief under the ATS, leaving only a claim for declaratory relief.[75] Like many other aspects of the ATS, the act of state doctrine has been litigated in numerous ATS cases, including several before *Sosa*.[76]

Second, courts since *Sosa* have on occasion applied a relatively low bar to preemption of ATS claims by federal statute under *Sosa*'s characterization of the ATS as a jurisdictional statute. For example, in *Bowoto v. Chevron Corp.*,[77] the Ninth Circuit ruled that the federal Death on the High Seas Act[78] (DOHSA) preempted the plaintiffs' wrongful death and survival claims under the ATS.[79] Relying on *Sosa* with regard to the DOHSA preemption issue, the court held that the ATS is, at its heart, only a "jurisdictional statute,"[80] whereas DOHSA is notably comprehensive in its scope. This difference suggested that Congress intended that DOHSA preempt certain types of ATS survival claims.[81] However, a number of other post-*Sosa* cases take an opposite stance on federal preemption of the ATS;[82] even in *Bowoto*, the

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[74] *Id.* at 1295–1306. The court considered four factors to determine whether the act of state doctrine barred the suit: 1) the degree of codification or consensus concerning the relevant area of international law; 2) the implications of the issue for foreign relations; 3) the continued existence or current nonexistence of the perpetrating government; and 4) the question of public interest motivating the foreign state's action.

[75] *Id.* at 1306. Moreover, the *Qi* court cited dicta from *Filartiga* evincing the Second Circuit's doubt as to whether "acts of [a] state official . . . wholly unratified by that nation's government could be properly characterized as an act of state." *Id.* at 1293 (quoting Filartiga v. Peña-Irala, 630 F.2d 876, 889 (2d Cir. 1980) (internal quotation mark omitted)). The actions of the defendant in *Filartiga* were markedly different, however, from those of the defendant in *Qi*. The defendant's actions in *Qi*, though violative of the state's domestic law, were arguably not "wholly unratified" by the state's government. *Id.* at 1293. This distinguished *Qi* from *Filartiga* and further supported application of the act of state doctrine in *Qi*.

[76] *See, e.g.*, Bigio v. Coca-Cola Co., 239 F.3d 440, 451 (2d Cir. 2000) (holding that the act of state doctrine did not merit abstention in that case); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000) (finding that act of state doctrine did not definitively support dismissal of case on forum non conveniens grounds), *cert. denied*, 532 U.S. 941 (2001); Trajano v. Marcos, Nos. 86-2448, 86-15039, 1989 WL 76894, at *2 (9th Cir. July 10, 1989) (allowing claims of torture to go forward after consideration and rejection of the act of state doctrine as a defense); *see also* Rosaleen T. O'Gara, *Procedural Dismissals Under the Alien Tort Statute*, 52 ARIZ. L. REV. 797, 815 (2010) (noting ATS defendants' "regular[]" invocation of the act of state doctrine).

[77] 621 F.3d 1116, 1121 (9th Cir. 2010) (dealing with wrongful death and survival claims brought against Chevron by injured protestors and relatives of a protestor killed by Nigerian Government Security Forces called by Chevron Nigeria Limited to end a protest).

[78] 46 U.S.C. § 761 (2006).

[79] *Bowoto*, 621 F.3d at 1124–26.

[80] *Id.* at 1125 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).

[81] *Id.*

[82] *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1250–51 (11th Cir. 2005) (holding that the TVPA does not preempt torture claims under the ATS, since the TVPA has a separate definition for torture distinct from that under the ATS); *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (finding that the TVPA confirmed the court's holding that torture violates the law of nations and is thus actionable under the ATS);

Ninth Circuit acknowledged that under *Sosa*, there could be situations where a plaintiff could simultaneously pursue claims under both DOHSA and the ATS, such as in the case of piracy.[83] Although *Bowoto* did seem to rely on the ATS's jurisdictional status under *Sosa* in finding preemption, the use of federal preemption is hardly consistent enough to show a trend of contraction post-*Sosa*.

That is not to say that *Sosa* has had no impact on the application of domestic law in ATS cases. *Sosa* seems to have made a difference on the issue of exhaustion.[84] In *Sarei v. Rio Tinto, PLC*,[85] the plaintiffs alleged various crimes against humanity and environmental torts arising out of the defendant's mining operations.[86] Although nothing in the statute's plain language indicates Congress's intent to apply an exhaustion requirement,[87] the Ninth Circuit noted that the Supreme Court in *Sosa* had signaled that a judicially imposed exhaustion requirement should be considered in an "appropriate" ATS case.[88] The Ninth Circuit "decline[d] to impose an absolute requirement of exhaustion in ATS cases,"[89] but held that under the principle of comity,[90] certain ATS claims — those where "the 'nexus' to the United States is weak" and those that do not "involve matters of 'universal concern'"[91] — are "appropriately considered for exhaustion under both domestic prudential standards and core principles of international law."[92] The Ninth Circuit remanded the case to the district court to

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Wiwa v. Royal Dutch Petroleum, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *4 (S.D.N.Y. Feb. 28, 2002) ("This Court reads *Kadic I* to hold that the TVPA did not preempt torture and summary execution claims under the ATCA."), *aff'd in part and rev'd in part*, 226 F.3d 88 (2d Cir. 2000).

83 *Bowoto*, 621 F.3d at 1124 (citing *Sosa*, 542 U.S. at 720).

84 For an overview of the arguments for incorporating an exhaustion requirement into the ATS, see generally Note, *The Alien Tort Statute, Forum Shopping, and the Exhaustion of Local Remedies Norm*, 121 HARV. L. REV. 2110 (2008) [hereinafter Note, *Exhaustion*].

85 550 F.3d 822 (9th Cir. 2008) (en banc).

86 *Id.* at 825–26.

87 *See* 28 U.S.C. § 1350 (2006); *see also* Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555, 569 (2010); Note, *Exhaustion*, *supra* note 84, at 2124 ("[T]he text, history, and context of the ATS are ambiguous, and . . . Congress has [not] mandated that ATS complainants exhaust their local remedies . . . .").

88 *Sarei*, 550 F.3d at 824 (quoting *Sosa*, 542 U.S. at 733 n.21).

89 *Id.*

90 *Id.* at 830–31.

91 *Id.* at 824 (quoting Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995)).

92 *Id. But see* Mark W. Wilson, *Why Private Remedies for Environmental Torts Under the Alien Tort Statute Should Not Be Constrained by the Judicially Created Doctrines of* Jus Cogens *and Exhaustion*, 39 ENVTL. L. 451 (2009) (arguing that the line between "judicial prudence" and allowing plaintiffs' ATS claims to proceed can be treaded without applying exhaustion, since other doctrines like forum non conveniens or the act of state and political question doctrines work toward the same end).

determine whether to impose an exhaustion requirement.[93] Through these limitations, particularly the consideration of nexus, the court significantly constrained the most aggressive extraterritorial applications of the ATS. The application of an exhaustion requirement to certain ATS claims was a novel limit post-*Sosa*, as Judge Reinhardt noted in dissent in *Sarei*: "[N]either the Supreme Court nor any circuit court has ever imposed an exhaustion requirement, prudential or otherwise, on a case brought under the [ATS]."[94]

### *D. Conclusion*

*Sosa*'s holding that actionable ATS claims must align with customary international law norms might suggest a contraction of the ATS. However, the post-*Sosa* cases demonstrate that, by and large, the international law and domestic law doctrinal limits invoked post-*Sosa* continue debates from before 2004. *Sosa* appears to have done little to limit the reach of the ATS. Despite this, the Ninth Circuit has imposed an exhaustion requirement for ATS claims where the nexus to the United States is weak, even where not directly implicated by *Sosa*. This decision may reflect ongoing anxiety about the ATS's extraterritorial reach, stemming from fears that the ATS exacts diplomatic costs by infringing on foreign nations' sovereignty and interfering with U.S. foreign policy. Furthermore, ATS litigation may seem to lack democratic accountability because federal courts do not rely on predicate judgments or decisions by the political branches regarding definitions of causes of actions under the ATS.[95] The Supreme Court in *Sosa* did little to address these valid concerns, leaving lower courts to continue longstanding debates on the scope and reach of the ATS.

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[93] *Sarei*, 550 F.3d at 832. On remand, the Central District of California found that the nexus between the plaintiffs' claims and the United States was weak, Sarei v. Rio Tinto PLC, 650 F. Supp. 2d 1004, 1031 (C.D. Cal 2009), but that the plaintiffs' claims alleging war crimes, crimes against humanity, and racial discrimination were of sufficiently "universal concern" to outweigh the weak nexus and not be subject to the prudential exhaustion requirement. *Id.* at 1030–31. The court dismissed the plaintiffs' other claims pursuant the exhaustion requirement. *Id.* at 1031.

[94] *Sarei*, 550 F.3d at 841 (Reinhardt, J., dissenting); *see also* Note, *Exhaustion*, *supra* note 84, at 2114 ("[L]ower courts have generally shown aversion to the idea of an exhaustion requirement."). Indeed, numerous courts have held that an exhaustion requirement does not apply to the ATS. *See, e.g.*, Jean v. Dorélian, 431 F.3d 776, 781 (11th Cir. 2005) (holding that an exhaustion requirement was inapplicable to plaintiffs' ATS claims and thus, that plaintiffs' claims should not have been dismissed). *But see* Rasul v. Myers, 512 F.3d 644, 661 (D.C. Cir. 2008) (dismissing ATS claims because plaintiffs had not exhausted their administrative remedies under the FTCA), *vacated on other grounds*, Rasul v. Myers, 129 S. Ct. 763 (2008).

[95] *See, e.g.*, Crook, *supra* note 8, at 660.

## III. RESPONDING TO EXTRATERRITORIAL LEGISLATION: THE EUROPEAN UNION AND SECONDARY SANCTIONS

While the United States is an enthusiastic proponent of extraterritorial legislation, other nations, including even close allies, have an uneasy relationship with America's often-expansive assertions of jurisdiction. In many cases, these allies have vigorously opposed the most aggressive U.S. claims of jurisdiction,[1] accepting only a subset of U.S. extraterritorial efforts.[2] The European Union, the largest U.S. trade partner,[3] offers a prime example in its opposition to secondary sanctions. Such sanctions seek not only to bar entities within the enacting state from exporting to or doing business with the target state, but also to bar entities in third states from doing so — either by imposing penalties on third-state entities that trade with the target state or by prohibiting those third-state entities from trading with the enacting state.[4] The EU has objected to U.S. enactment of such nakedly extraterritorial legislation on legal grounds and has worked to block these sanctions' implementation.

The EU's opposition to secondary sanctions and other assertions of extraterritorial jurisdiction seems to have a ready explanation. Such jurisdiction is of questionable legitimacy under international law,[5] and the EU is deeply devoted to those norms.[6] In short, the EU's responses consistently have aligned with its legal values, which it has cited as justification. The United States, in contrast, often shows disdain for international jurisdictional rules.[7]

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[1] *See, e.g.*, Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 63 (1999); Runa Kinzel, *Helms Burton: A View from Abroad*, U. MIAMI INT'L & COMP. L. REV., Fall 2002, at 81, 84.

[2] *See, e.g.*, Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 159 (1999).

[3] *See* WORLD TRADE ORG., INTERNATIONAL TRADE STATISTICS 2010, at 18 (2010), *available at* http://www.wto.org/english/res_e/statis_e/its2010_e/its2010_e.pdf.

[4] Secondary sanctions are also called secondary boycotts. *See* Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 429–30 (1996); *see also* Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. 625, 626, 641 (2008).

[5] *See supra* p. 1228 (outlining the traditional bases of jurisdiction and explaining why extraterritorial jurisdiction is presumptively impermissible).

[6] For example, one of the two foundational EU treaties requires that the EU's "action on the international scene shall be guided" in part by "respect for . . . international law." Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, 23 [hereinafter Treaty of Lisbon].

[7] For example, Congress passed one significant piece of extraterritorial legislation, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified as amended at 22 U.S.C. §§ 1643(l)–(m), 6021–6091 (2006 & Supp. III 2009)), discussed below, despite the State Department's pronouncement that it was "not consistent with the traditions of the international system" because "[u]nder international law and established state prac-

Recently, however, this dynamic changed. When the United States imposed a broad array of secondary sanctions on trade with Iran during the summer of 2010, the EU did not raise a legal protest as it had done in most past cases.[8] Instead, it harmonized its own laws with those of the United States, thereby all but eliminating the possibility of a conflict over extraterritoriality. An alignment of context-specific political and economic concerns partially explains this about-face. However, this Part will argue that when the EU response is viewed alongside the EU's previous acceptance of extraterritorial antitrust enforcement, an easily overlooked transsubstantive factor emerges: the European Union's own institutional capacity for concerted action. Although one certainly cannot draw firm conclusions from a handful of data points, the secondary sanctions experience suggests that the EU's own strength may be the most important factor pushing the EU to accept extraterritorial legislation.

### *A. The History of EU Opposition to Secondary Sanctions*

European resistance to secondary sanctions began as long ago as the 1960s, when the U.S. Treasury Department attempted to stop a French company controlled by U.S. nationals from executing a contract with China.[9] The first significant instance of EU opposition to secondary sanctions, however, came during the Reagan Administration.[10] In 1982, the U.S. Department of Commerce promulgated export regulations[11] in an attempt to stop the Soviet Union from constructing a major gas pipeline from Siberia to Western Europe.[12] The United States sought to bar foreign subsidiaries of U.S. entities from exporting equipment to the Soviet Union. It also sought to bar entirely foreign entities from exporting equipment to the Soviet Union if that

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tice, there are widely-accepted limits on the jurisdictional authority of a state." 141 CONG. REC. 27,752 (1995); *see also infra* p. 1291.

[8] Admittedly, the EU has accepted extraterritorial measures when a strong link to territoriality exists. *See* Griffin, *supra* note 2, at 173–75. However, even strong adherence to international law does not preclude assertions of extraterritorial jurisdiction under such circumstances. *See supra* p. 1228 (explaining different justifications for extraterritorial jurisdiction). Past EU acceptance is thus distinguishable from its recent action.

[9] Ryngaert, *supra* note 4, at 629–30.

[10] Technically, the opposition came from the European Union's precursor, commonly referred to as the European Community.

[11] Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (June 24, 1982) (codified at 15 C.F.R. pts. 376, 379, 385); Controls on Exports of Petroleum Transmission and Refining Equipment to the U.S.S.R., 47 Fed. Reg. 141 (Jan. 5, 1982) (codified at 15 C.F.R. pts. 379, 385, 399).

[12] *See* HOMER E. MOYER, JR. & LINDA A. MABRY, EXPORT CONTROLS AS INSTRUMENTS OF FOREIGN POLICY 69–70 (1985). The United States cited the crackdown on the Solidarity movement in Poland as its motivation. *See* Lowenfeld, *supra* note 4, at 432–33.

equipment was made with technology licensed from U.S. entities.[13] The European Community responded with "megaphone diplomacy," claiming that the "measures . . . are unacceptable under international law because of their extraterritorial aspects."[14] Judicial and executive action in Community member states backed up the legal objection.[15] Eventually, the United States retreated.[16]

In the 1990s, the United States again adopted extraterritorial sanctions, sparking even more strident opposition from Europe. First, Congress passed the Cuban Democracy Act of 1992[17] (CDA), which subjects foreign subsidiaries of U.S. corporations to restrictions on trade with Cuba.[18] Although the approach was similar to the pipeline regulations, EU frustration did not reach a breaking point until several years later, when President Clinton signed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.[19] More popularly known as the Helms-Burton Act, after its chief sponsors,[20] the law imposes a variety of extraterritorial trade restrictions. Most significantly, it creates a cause of action for former Cuban property owners against almost any entity engaged in trade with Cuba.[21] Helms-Burton faced worldwide opposition.[22] Nonetheless, soon after its passage, President Clinton signed another major extraterritorial sanctions measure, the

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13 Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. at 27,251–52.

14 Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Regulations 4 (Aug. 12, 1982), *available at* http://aei.pitt.edu/1768/01/US_dispute_comments_1982.pdf.

15 In the Netherlands, for example, a court held that Sensor Nederland, a locally incorporated subsidiary of a U.S. corporation, was not excused from performing its contractual obligations because of the U.S. regulations. The court reasoned that the U.S. claim to extraterritorial jurisdiction over Sensor was inconsistent with international law. In France, the government issued an order directing companies to continue performing their contracts that the U.S. regulations would have prohibited. *See* BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 83–84 (1988).

16 *See* Revision of Export Controls Affecting the U.S.S.R. and Poland, 47 Fed. Reg. 51,858 (Nov. 18, 1982) (codified at 15 C.F.R. pts. 379, 385, 390, 399).

17 Pub. L. No. 102-484, 106 Stat. 2575 (codified as amended at 22 U.S.C. §§ 6001–6010 (2006 & Supp. III 2009)).

18 *See* Laura A. Donner, Recent Development, *The Cuban Democracy Act of 1992: Using Foreign Subsidiaries as Tools of Foreign Economic Policy*, 7 EMORY INT'L L. REV. 259, 262–63 (1993).

19 Pub. L. No. 104-114, 110 Stat. 785 (codified as amended at 22 U.S.C. §§ 1643(l)–(m), 6021–6091 (2006 & Supp. III 2009)).

20 *See* Lowenfeld, *supra* note 4, at 419.

21 Specifically, among its other provisions, the law creates a cause of action for former Cuban property owners against foreign persons and entities who "traffic[] in property which was confiscated by the Cuban Government" in the Cuban revolution. 22 U.S.C. § 6082(a)(1)(A) (2006). Because trafficking includes "engag[ing] in a commercial activity using or otherwise benefiting from" confiscated property, *id.* § 6023(13)(A)(ii), most transactions with Cuban companies are within the law's ambit. *See* Lowenfeld, *supra* note 4, at 428.

22 *See* Lowenfeld, *supra* note 4, at 432.

Iran and Libya Sanctions Act of 1996[23] (ILSA). The Act, among other things, imposes sanctions on any foreign person or entity that invests more than $20 million in either country to support the development of its petroleum resources.[24]

In response to Helms-Burton, the EU again issued a formal diplomatic protest, which extended to the CDA as well, asserting that the U.S. statutes were incompatible with international law.[25] After the passage of the ILSA, however, the EU initiated proceedings at the WTO.[26] It also adopted Council Regulation 2271/96[27] to respond to "violat[ions of] international law,"[28] including the CDA, Helms-Burton, and the ILSA.[29] The regulation prohibits EU entities from complying with U.S. sanctions[30] and bars EU recognition of judgments imposed for violating them.[31] More significantly, the regulation includes a "clawback" provision that allows EU entities to recover any costs the sanctions impose.[32] Ultimately, however, the EU suspended its WTO proceedings and adopted vague policy statements favoring democracy in Cuba and counterproliferation efforts against Iran.[33] In return, the United States took advantage of provisions in both Helms-Burton and the ILSA that allowed the President to suspend application of sanctions.[34]

Despite this uneasy détente, U.S. secondary sanctions remained a major issue in the European Union. The EU continued protesting them throughout the 2000s, even though suspension meant they had little if any effect.[35] EU pre-enactment objections to the Iran Nonpro-

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[23] Pub. L. No. 104-172, 110 Stat. 1541 (codified as amended at 50 U.S.C.A. § 1701 note (West 2010)). Unlike Helms-Burton, the ILSA was at least arguably in furtherance of U.N. resolutions. *See infra* pp. 1289–90.

[24] Initially the limit was $40 million, but a provision that quickly went into effect mandated the decrease when other countries failed to join the U.S. sanctions regime. *See* Iran and Libya Sanctions Act §§ 4–5, 110 Stat. at 1542–45.

[25] *See* European Union: Demarches Protesting the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Mar. 5, 1996 & Mar. 15, 1995), *reprinted in* 35 I.L.M. 397, 398–99 (1996) [hereinafter Helms-Burton Demarches].

[26] Although the European Union referenced the ILSA, it was not formally a subject of the proceedings. *See* Clark, *supra* note 1, at 87–88.

[27] Council Regulation 2271/96, 1996 O.J. (L 309) 1 (EC).

[28] *Id.* at 1.

[29] *Id.* annex, at 5–6.

[30] *Id.* art. 5, at 2.

[31] *Id.* art. 4, at 2.

[32] *Id.* art. 6, at 2–3.

[33] *See* Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, EU-U.S., Apr. 11, 1997, 36 I.L.M. 529.

[34] *See id.*

[35] *See, e.g.*, EUROPEAN COMM'N, UNITED STATES BARRIERS TO TRADE AND INVESTMENT REPORT FOR 2008, at 8–9 (2009), *available at* http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144160.pdf.

liferation Act of 2000[36] led President Clinton to issue a signing statement that effectively assuaged European concerns about the Act's extraterritorial enforcement.[37] Early concerns about anti–money laundering provisions in the USA PATRIOT Act[38] similarly dissipated as it became apparent that those provisions were not truly extraterritorial.[39] Still, the mere possibility of sanctions continued to be a cause of EU concern. In 2004, despite the lack of any enforcement against the EU, the European Commission formally declared that the EU "continues to expect that the Bush Administration will take the appropriate steps to repeal the threat of sanctions against EU entities."[40]

### *B. Recent EU Support of New Secondary Sanctions Targeting Iran*

Given the European Union's history of opposition to U.S. secondary sanctions, a new round of such sanctions might have been expected to spark fresh legal protests. On July 1, 2010, following months of international anxiety over Iran's nuclear program, President Obama signed the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010[41] (CISADA), which drastically expands extraterritorial U.S. sanctions.[42] The law applies new pressure to foreign oil companies and financial institutions doing business with Iran or Iranian institutions. In addition, it strengthens the sanctions that the United States can impose on these companies and limits the President's authority to waive such sanctions.

CISADA's petroleum industry provisions expand those in the ILSA to include restrictions on the supply of refined petroleum and refining equipment or services by foreign or domestic persons and entities.[43] The law defines equipment or services to include not just "goods" and

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[36] Pub. L. No. 106-178, 114 Stat. 38 (codified as amended at 50 U.S.C. § 1701 note (2006)).

[37] *See* EUROPEAN COMM'N, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 10 (2000), *available at* http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_111689.pdf.

[38] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

[39] Ryngaert, *supra* note 4, at 653–54.

[40] EUROPEAN COMM'N, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 13 (2004), *available at* http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_121929.pdf.

[41] Pub. L. No. 111-195, 124 Stat. 1312 (to be codified in scattered sections of 15, 22, and 50 U.S.C.).

[42] CISADA amended the Iran Sanctions Act, which replaced the ILSA in 2006, following Libya's renunciation of terrorism and weapons of mass destruction. *See* KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 1–2, 4, 5 & n.5 (2010), *available at* http://assets.opencrs.com/rpts/RS20871_20101007.pdf.

[43] 50 U.S.C.A. § 1701 note, "Iran Sanctions" § 5(a) (West 2010). Sanctions apply to transactions valued at $1 million or more (or totaling $5 million or more in a twelve-month period). *Id.* § 1701 note, "Iran Sanctions" § 5(a)(1)–(3).

"technology" but also "information[] or support" and "assistance with respect to the construction, modernization, or repair of petroleum refineries."[44] CISADA also continues the ban on investments of $20 million or more per year.[45] CISADA's foreign financial institutions provisions are entirely new. They outline a variety of proscribed activities for banks dealing with Iran.[46] Violators are subject to regulations that "prohibit, or impose strict conditions on, the opening or maintaining in the United States of a correspondent account or a payable-through account."[47] Any bank that wishes to carry out transactions denominated in U.S. dollars must maintain such accounts. Finally, in increasing the range of sanctions and limiting presidential discretion for waivers,[48] CISADA removes the mechanism in the ILSA that resolved the U.S.-EU standoff.

In short, CISADA is at least as provocative as Helms-Burton and the ILSA — and of equally dubious permissibility under international law. However, less than a month after President Obama signed CISADA, the Council of the European Union promulgated a decision[49] governing EU entities that largely mirrors CISADA.[50] In doing so, the European Union avoided the question of whether U.S. restrictions apply to EU nationals by imposing almost the same restrictions itself. A review of the decision's text reveals just how closely it tracks U.S. restrictions.

In regulating the EU petroleum industry, the decision prohibits the "sale, supply or transfer of key equipment and technology" to those sectors of the Iranian oil and natural gas industry that engage in refining, exploration, production, or any activities involving liquefied natural gas.[51] As with CISADA,[52] the restriction applies broadly; in addition to banning the provision of equipment or technology, it prohibits "technical assistance or training and other services" related to such

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[44] *Id.* § 1701 note, "Iran Sanctions" § 5(a)(2)(B).

[45] *Id.* § 1701 note, "Iran Sanctions" § 5(a)(1)(A)(i).

[46] Specifically, banks may not facilitate efforts by Iran's government to acquire weapons of mass destruction or finance terrorism; facilitate any activities by a person subject to the United Nations' Iran sanctions; or engage in money laundering that supports such efforts or activities. 22 U.S.C.A. § 8513(c)(2)(A)–(C) (West 2010). More generally, foreign banks may not "facilitate[] a significant transaction . . . or provide[] significant financial services for" either the Revolutionary Guard or a financial institution that has been sanctioned for supporting Iran's WMD programs or state-sponsored terrorism. *Id.* § 8513(c)(2)(E).

[47] *Id.* § 8513(c)(1).

[48] *See* 50 U.S.C.A. § 1701 note, "Iran Sanctions" §§ 4(c), 6; *see also* KATZMAN, *supra* note 42, at 4–5.

[49] Council Decision 2010/413, 2010 O.J. (L 195) 39 (EU).

[50] This action stands in stark contrast to the responses of India, Russia, and China, which maintain that CISADA is impermissible. *See* Thomas Erdbrink & Colum Lynch, *Iran's Shipping Industry Wilts Under Sanctions*, WASH. POST, July 21, 2010, at A14.

[51] Council Decision 2010/413, *supra* note 49, art. 4(1), at 43.

[52] *See* 50 U.S.C.A. § 1701 note, "Iran Sanctions" § 5(a)(2)(B).

items and "financing or financial assistance" related to their "sale, supply, transfer or export."[53] In regulating EU financial institutions, the decision mandates governmental oversight of fund transfers to and from Iran not related to "foodstuffs, healthcare, medical equipment, or . . . humanitarian purposes."[54] Outright prohibitions apply to a variety of other financial transactions,[55] and a final catch-all provision requires EU banks to "exercise vigilance when doing business with entities incorporated in Iran or subject to Iran's jurisdiction" to ensure that they are not contributing to the country's nuclear program.[56]

Although member states must still resolve some implementation details, virtually no conduct by EU financial institutions or petroleum companies is prohibited under CISADA but legal under EU law. The only notable exception is the direct sale of refined petroleum to Iran, which only the United States has restricted.[57] Whether EU petroleum companies will engage in such transactions given the other substantial restrictions on them is uncertain, but likely very few transactions will fall into the "gap" between the two sets of restrictions where conflicts over extraterritorial U.S. enforcement are possible.

### *C. Understanding the New EU Approach — and Its Implications*

The European Union's willingness to endorse CISADA's provisions likely reflects many factors, but a few seem especially important. First, the economic tradeoffs that confronted the EU in the context of CISADA were far less pressing than those it faced in earlier extraterritoriality conflicts. In 1982, many European companies had contracts to supply materials to the Soviet Union, and by not including a grandfather clause in its sanctions, the United States threatened European industry while the Continent was suffering high unemployment.[58] In

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[53] Council Decision 2010/413, *supra* note 49, art. 4(2), at 43. More generally, the decision prohibits granting loans or credit to, acquiring, or creating joint ventures with Iranian oil companies. *Id.* art. 6, at 43.

[54] *Id.* art. 10(3), at 44. Specifically, financial institutions must notify "the competent authority of the Member State concerned" of any transfers over €10,000 and must obtain such authority's "prior authorisation" for any nonexempt transfers over €40,000. *Id.* at 44–45. Additionally, the decision requires member states to "exercise enhanced monitoring over all the activities of financial institutions within their jurisdiction" that relate to Iranian or Iranian-controlled banks; member states must require banks to follow heightened due diligence, recordkeeping, and reporting procedures, particularly to stop money laundering, terrorism financing, and nuclear proliferation. *Id.* art. 10(1)–(2), at 44.

[55] Namely, EU banks may not open branches in Iran, *id.* art. 11, at 45, may not offer insurance or reinsurance to any Iranian entity (other than health and travel insurance to individuals), *id.* art. 12, at 45, and may not buy, sell, or issue public or public-guaranteed bonds to or from the Iranian government or Iranian-controlled banks, *id.* art. 13, at 45.

[56] *Id.* art. 14, at 45.

[57] *See* 50 U.S.C.A § 1701 note, "Iran Sanctions" § 5(a)(3)(A).

[58] *See* CARTER, *supra* note 15, at 83–85; Clyde H. Farnsworth, *Soviet-Europe Gas Pact Split U.S. Aides*, N.Y. TIMES, June 26, 1982, at A6.

the 1990s, sanctions endangered major investment opportunities: Cuban-EU trade was surging as the island nation turned to Western Europe following the decline of the Eastern Bloc.[59] At the same time, EU companies were aggressively pursuing major oil development projects in Iran.[60] In 2010, by contrast, many of the big companies that might have suffered under CISADA's heightened restrictions had already begun pulling out of Iran in advance of trade restrictions.[61]

Second, the EU's security calculations about Iran in 2010 were quite different from its calculations about the Soviet Union in 1982 or about Cuba, Libya, or Iran itself in the 1990s. In the early 1980s, the European Community generally did not favor aggressive U.S. confrontations with the Soviet Union.[62] A decade later, in the 1990s, it saw Cuba as a peaceful trading partner, not a Communist menace,[63] and it regarded the U.S. terrorism concerns that partially prompted the ILSA as overblown.[64] However, in the past several years, the EU has come to regard Iran as a major threat. The EU has made stopping the Iranian nuclear program a primary foreign policy goal,[65] perhaps because the country is developing the potential to strike continental Europe with nuclear weapons.[66]

Third, the diplomatic context in 2010 was vastly different. In the 1980s and 1990s, the United States pushed its extraterritorial measures

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[59] *See* JOAQUÍN ROY, CUBA, THE UNITED STATES, AND THE HELMS-BURTON DOCTRINE 107–08 (2000).

[60] *See* Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 284–85 (1998); Charles Tait Graves, Note, *Extraterritoriality and Its Limits: The Iran and Libya Sanctions Act of 1996*, 21 HASTINGS INT'L & COMP. L. REV. 715, 718 (1998).

[61] *See And the Price of Nuclear Power?*, ECONOMIST, Feb. 27, 2010, at 67, 68; *Anything to Declare?*, ECONOMIST, July 3, 2010, at 58.

[62] Instead, the European Community favored a policy of engagement. *See* KENNETH A. RODMAN, SANCTIONS BEYOND BORDERS: MULTINATIONAL CORPORATIONS AND U.S. ECONOMIC STATECRAFT 83 (2001).

[63] *See* Helms-Burton Demarches, *supra* note 25.

[64] *See* Bhala, *supra* note 60, at 285 (observing that "U.S. trading partners do not believe that Iran is the godfather of international terrorism").

[65] Although the European Union has had mixed success, its "major objective . . . from 2003 has been to prevent Iran acquiring nuclear weapons." Tom Sauer, *Struggling on the World Scene: An Over-Ambitious EU Versus a Committed Iran*, 17 EUR. SECURITY 273, 282 (2008).

[66] NATO, still the institution closest to an EU military, has been particularly vocal about this threat. In 2010, NATO's Secretary General warned, "Tehran is pursuing . . . nuclear activities . . . [and] runs an extensive missile development programme . . . [that] already put[s] Allied countries within reach." Anders Fogh Rasmussen, NATO Sec'y Gen., Speech at Bucharest University: Meeting Future Challenges Together (May 7, 2010), *available at* http://www.nato.int/cps/en/natolive/opinions_63307.htm. A NATO report issued the same month declared that "[d]efending against the threat of a possible ballistic missile attack from Iran has given birth to what has become . . . an essential military mission." NATO, NATO 2020: ASSURED SECURITY; DYNAMIC ENGAGEMENT 11 (2010); *see also id.* at 16.

aggressively and expressed anger toward those who questioned them.[67] Last year, however, the United States tried to make its actions compatible with a renewed transatlantic partnership — an approach Europe invited.[68] The Obama Administration shepherded CISADA through Congress in accordance with the EU political timetable.[69] President Obama signed the bill into law[70] only after the United Nations adopted a sanctions resolution[71] and the European Union endorsed the idea of more restrictive measures.[72]

Taken together, these three factors suggest that the EU is willing to elevate especially compelling policy preferences above abstract commitments to international law. Admittedly, drawing conclusions from this observation is difficult because economic, security, and political concerns are context-specific. However, when one considers the EU's responses to sanctions alongside another area of law in which it has altered its approach to extraterritoriality, one can perceive a transsubstantive explanation for this shift: the EU's increased institutional capacity for concerted action. Because this capacity is relevant in a variety of contexts, it has the potential to explain far more than the European Union's response to CISADA.

The best way to draw out this factor is to examine antitrust enforcement, which today represents the most notable EU embrace of

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[67] In explaining the ILSA, for example, Senator Alfonse D'Amato argued, "Simply put, a foreign corporation or person will have to choose between the United States or Iran." Graves, *supra* note 60, at 715 (quoting S. REP. NO. 104-187, at 5 (1995)) (internal quotation marks omitted). The United States employed a similar attitude in defending the pipeline sanctions, prompting the French foreign minister to declare that the United States and Europe were experiencing "progressive divorce." Hedrick Smith, *Pipeline Dispute: Reagan Aims to Punish Soviet . . .* , N.Y. TIMES, July 24, 1982, at A5 (internal quotation marks omitted); *see also* Richard Eder, *. . . But Ends Up Piquing Allies All over Europe*, N.Y. TIMES, July 24, 1982, at A5.

[68] For example, after the inauguration of Barack Obama in 2009, the European Parliament passed a resolution congratulating the new President, welcoming "a strengthening of the EU-US relationship," and asking that the United States avoid "enacting legislation having an extraterritorial impact without prior consultation and agreement." The State of Transatlantic Relations in the Aftermath of the U.S. Elections, EUR. PARL. DOC. P6_TA(2009)0193 (2009).

[69] In May 2010, the Administration persuaded the House to delay the bill until after the U.N. and EU meetings on Iran. *See* Peter Crail & Matt Sugrue, *Congress Delays Iran Sanctions*, ARMS CONTROL TODAY, June 2010, *available at* http://www.armscontrol.org/act/2010_06/IranSanctions.

[70] Peter Baker, *Obama Signs into Law Tighter Sanctions on Iran*, N.Y. TIMES, July 2, 2010, at A6.

[71] Although the resolution fell short of the restrictions CISADA eventually imposed, it situated U.S. efforts in a multilateral context. *See* Neil MacFarquhar, *U.N. Approves New Sanctions to Deter Iran*, N.Y. TIMES, June 10, 2010, at A1.

[72] The European Union met after the United Nations adopted its resolution to make clear its own position. *See* Declaration on Iran, *in* Conclusions, Brussels European Council (June 17, 2010), annex II. The brief statement indicated that EU restrictions on financial institutions and the petroleum industry — the targets of the then-draft CISADA — would be forthcoming. *Id.* at 14.

extraterritoriality. This embrace marks a dramatic change from the early 1980s, when the member states of the European Community fiercely opposed U.S. extraterritorial antitrust actions. In response to the United States' growing use of the "effects test" to apply antitrust laws abroad, European states developed so-called blocking measures.[73] In 1980, for example, the United Kingdom enacted the Protection of Trading Interests Act, which included a clawback provision for recovering foreign antitrust fines.[74] The French blocking act barred providing information to foreign regulators if doing so would "threaten[] the sovereignty, the security, or the essential economic interests" of the nation.[75] In many respects, these acts were precursors to Council Regulation 2271/96, adopted in response to the CDA, Helms-Burton, and the ILSA. Over time, however, the European Union embraced an implementation test very similar to the effects test.[76] The test supports, among other policies, the European Commission's broad authority under the EU Merger Regulation to impose significant conditions on mergers outside its territory — authority that it has not hesitated to use.[77] In 1997, for example, the EU aggressively reviewed the Boeing–McDonnell Douglas merger, which involved American corporations.[78] Thus, by the 2000s, the EU had grown comfortable with action at the soft edges of extraterritoriality, where "implementation" or "effects" leave a semblance of traditional territorial jurisdiction intact. Although such action does not reach the contentious core of extraterritoriality, the EU's fundamental shift in approach is unmistakable.[79]

The most persuasive explanation for this change seems to be the EU's growth as an international economic actor. The implementation test and the Merger Regulation both were adopted within three years of the Single European Act (SEA) — the first major revision of the treaty founding what is now the European Union.[80] The SEA's objective was to create the "Single Market" across Europe.[81] This market,

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[73] *See* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 111–16 (2009).

[74] *See* Protection of Trading Interests Act, 1980, c. 11 (U.K.); VLADIMIR PAVIC, EXTRATERRITORIALITY IN THE MATTERS OF ANTITRUST 192 (2001).

[75] RAUSTIALA, *supra* note 73, at 116 (quoting David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 220 (1984)) (internal quotation marks omitted).

[76] *See* Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction — European Responses*, 26 HOUS. J. INT'L L. 309, 319–20 (2004).

[77] *See* Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 276–81 (2002).

[78] *See* Griffin, *supra* note 2, at 178–79.

[79] *See* Layton & Parry, *supra* note 76, at 322 ("[T]he E.U. approach to extraterritoriality (at least in the antitrust field) appears to be converging with that of [the] United States.").

[80] *See* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 19 (3d ed. 2003).

[81] *See id.* at 21.

in rivaling that of the United States, has leveled the playing field between U.S. and EU regulators.[82] Whereas individual European states once worried about being overwhelmed if they accepted U.S. enforcement power, the combined European Union has no such concern. Given the major EU market, the EU is as interested in regulating foreign behavior that has EU effects as the United States is in regulating foreign behavior with U.S. market effects.[83]

A similar change in institutional structure may help explain the CISADA compromise. The European Union has a different international identity today than it had in the 1980s and 1990s. Whereas the EU formerly rested on a complicated structure of different "communities" and eventually "pillars,"[84] the Treaty of Lisbon, which went into effect in 2009, created a single legal personality for the EU.[85] The treaty also greatly increased the EU's ability to speak with a single voice on the international stage. First, the president of the European Council, the EU's highest political body, is now appointed to a renewable two-and-a-half-year term and serves in a personal, rather than national, capacity.[86] Previously the position rotated every six months among the heads of member states.[87] Second, a new EU foreign minister, the High Representative of the Union for Foreign Affairs and Security Policy, represents the EU internationally and serves as a vice president of the European Commission.[88] Before the Treaty of Lisbon, officials with competing, overlapping mandates represented the EU overseas.[89] Finally, a new diplomatic corps, the European External Action Service (EEAS), supports the EU abroad.[90] In the past, the country holding the rotating Council presidency played this role.[91] Taken as a whole, the Treaty of Lisbon has given the European Union powerful new leadership capabilities. At the most basic level, the EU now has an answer to Henry Kissinger's question, often cited by European integrationists: "Who do I call if I want to speak to Europe?"[92]

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[82] *See* PAVIC, *supra* note 74, at 212; RAUSTIALA, *supra* note 73, at 124–25.

[83] *See* RAUSTIALA, *supra* note 73, at 125.

[84] *See* CRAIG & DE BÚRCA, *supra* note 80, at 6–12, 22–26.

[85] *See* Treaty of Lisbon, *supra* note 6, art. 1(55), at 38.

[86] *See id.* art. 1(16), at 17–18; Anthony Luzzatto Gardner & Stuart E. Eizenstat, *New Treaty, New Influence?*, FOREIGN AFF., Mar.–Apr. 2010, at 104, 111–12.

[87] *See* Gardner & Eizenstat, *supra* note 86, at 107.

[88] *See* Treaty of Lisbon, *supra* note 6, art. 1(19), at 21; Gardner & Eizenstat, *supra* note 86, at 108.

[89] *See* Gardner & Eizenstat, *supra* note 86, at 109.

[90] *See* Treaty of Lisbon, *supra* note 6, art. 1(30), at 27; Gardner & Eizenstat, *supra* note 86, at 108.

[91] Gardner & Eizenstat, *supra* note 86, at 108.

[92] Although the attribution to Kissinger may be apocryphal, the point still holds. *See* Gideon Rachman, *Kissinger Never Wanted to Dial Europe*, FIN. TIMES (July 22, 2009, 10:11 PM), http://blogs.ft.com/rachmanblog/2009/07/kissinger-never-wanted-to-dial-europe/.

More fundamentally, however, the EU foreign minister, guided by the European Council president and supported by the EEAS, will be able to articulate policies that represent all of the EU and that remain steady over time — a remarkable change.[93]

A unitary foreign policy structure increases the likelihood that U.S. policymakers will consider the EU's interests, for at least two reasons. First, the disappearance of the who-do-I-call dilemma may make a united Europe a major geopolitical consideration in a way that a multitude of member states never was. The United States will thus spend more time up front ensuring that foreign policy proposals take EU interests into account. Second, the ability to chart coherent, consistent policies means that the EU now has the credibility to sit at a negotiating table as the United States' diplomatic equal and work out the details of any U.S. proposal. In short, the EU no longer must resort to international legal protests to ensure its interests are considered; it can rely instead on its own international diplomatic power. Challenges to extraterritorial laws may become a defense the EU no longer needs.

### *D. Conclusion: Eliminating Future Conflicts over Extraterritoriality*

To be sure, the European Union's approach to the secondary sanctions on Iran reflects the combined pressure of a variety of interests, not an overnight shift. But at least one facet of these interests — the EU's growing capacity for collective action — may reflect a durable, transsubstantive change that extends beyond the particular situation with Iran. Although member states' political and economic interests previously yielded a consistent legal position that adhered to a restrictive approach to extraterritorial legislation, the rise of the EU's capacity for collective action hints that this alignment is under pressure. Again, antitrust may illuminate what lies ahead. As the European Union's oversight over an increasingly important market allowed it to take extraterritorial actions that frustrated the United States,[94] compromise became inevitable. Two international agreements now help minimize extraterritorial antitrust conflicts.[95] If the EU approach to sanctions follows a similar path, the CISADA compromise may be the beginning of a change in state practice with respect to extraterritoriality that could eventually alter customary international law.

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[93] A prime example of the European Union's previous failings in this regard is its response to the war in the Balkans. The EU was unable to present a coherent or consistent policy as member states changed their positions and threatened to act on their own. Accordingly, the former Yugoslavian states concluded that the officials representing the EU — the foreign ministers of the next, current, and previous countries to hold the Council presidency — were powerless. Eventually, the United States resolved the crisis. *See* Gardner & Eizenstat, *supra* note 86, at 106–07.

[94] *See* RAUSTIALA, *supra* note 73, at 125.

[95] *See* CEDRIC RYNGAERT, JURISDICTION OVER ANTITRUST VIOLATIONS IN INTERNATIONAL LAW 106–08 (2008).

## IV. EXTRATERRITORIALITY AND THE WAR ON TERROR

After the terrorist attacks of September 11, 2001, President George W. Bush announced a "war on terror,"[1] and the U.S. government soon began detaining "enemy combatants"[2] at facilities around the world, including the U.S. naval base at Guantánamo Bay, Cuba. Despite Guantánamo's location abroad, the Supreme Court has repeatedly upheld federal courts' jurisdiction to hear the habeas corpus petitions of Guantánamo detainees,[3] most recently in *Boumediene v. Bush*,[4] in which Justice Kennedy declared that the Court would not accept "the Government's argument that . . . the Constitution necessarily stops where *de jure* sovereignty ends."[5] Yet while *Boumediene* appeared to signal an expanded role for federal courts in adjudicating disputes related to the war on terror, the scope of this expansion was left unclear, and lower courts have frequently been unwilling to extend American law extraterritorially in cases outside the specific context of Guantánamo habeas petitions. One notable trend in this regard has been the courts' attempts to impose limits on *Boumediene*'s reach through varying interpretations of the nature of U.S. sovereignty. The extent to which places and actions are understood as American versus foreign plays a key role in determining the applicability of U.S. law, yet the content of these categories has varied significantly from case to case, as lower courts have struggled with the competing interests inherent in decisions about whether to give detainees access to U.S. courts. Often, the result has been to place these cases beyond the reach of American remedies, thus perpetuating the existence of "law-free zone[s]"[6] in the war on terror. This tendency suggests that one of the apparent animating principles behind *Boumediene* — the Court's attempt to establish some judicial limits on executive detention power — may not find much force outside the specific class of cases addressed in that decision.

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1 *See* President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001) (transcript available at http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/) ("Our war on terror begins with al Qaeda, but it does not end there.").

2 The precise scope of the "enemy combatant" label remains unclear. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2109–10 (2007).

3 *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 483–84 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)–(h), 119 Stat. 2739, 2741–44 (2005) (codified as amended at 28 U.S.C. § 2241 (2006)).

4 128 S. Ct. 2229 (2008).

5 *Id.* at 2253.

6 Fallon & Meltzer, *supra* note 2, at 2059.

### A. *The Context of* Boumediene

On June 28, 2004, the Supreme Court handed down its first major decision addressing the status of foreign nationals detained at Guantánamo Bay. In *Rasul v. Bush*,[7] the Court held that federal courts had statutory jurisdiction over the habeas corpus petitions of such detainees.[8] Congress soon registered its disapproval of this decision via the Detainee Treatment Act of 2005[9] (DTA), which stripped federal courts of jurisdiction over Guantánamo detainees' habeas petitions, as well as over "any other action against the United States or its agents relating to any aspect of the detention."[10] The next year, in *Hamdan v. Rumsfeld*,[11] the Court responded by holding that the DTA did not strip jurisdiction over habeas cases pending at the time of its enactment[12] and that the military commissions being held at Guantánamo were not legally authorized.[13] In response, the President sought such authorization from Congress, which quickly passed the Military Commissions Act of 2006[14] (MCA). The MCA, in addition to setting out the procedures for military commissions,[15] further amended the habeas statute to strip federal courts of jurisdiction to hear any pending habeas petitions filed by noncitizen detainees.[16]

Two years later, in *Boumediene v. Bush*, the Court finally addressed the fundamental question it had left unanswered in *Rasul* and *Hamdan*: whether alien detainees at Guantánamo are constitutionally entitled to petition for habeas corpus.[17] The Court answered yes, holding that the MCA's jurisdiction-stripping provision was an unconstitutional suspension of the writ.[18] Writing for the Court, Justice Kennedy concluded that neither the history of the writ[19] nor the Court's jurisprudence regarding the Constitution's extraterritorial application[20] supported the government's position that "the Constitution necessarily stops where *de jure* sovereignty ends."[21] Instead, "questions of extraterritoriality turn on objective factors and practical con-

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[7] 542 U.S. 466, *superseded by statute*, Detainee Treatment Act § 1005(e)–(h).
[8] *Id.* at 472–73.
[9] Pub. L. No. 109-148, div. A, tit. X, §§ 1001–1006, 119 Stat. 2739.
[10] *Id.* § 1005(e)(1).
[11] 548 U.S. 557 (2006).
[12] *Id.* at 576–84.
[13] *Id.* at 593–95, 612–13, 625–26.
[14] Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of the U.S. Code), *invalidated in part by* Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008).
[15] *Id.* §§ 2–3.
[16] *Id.* § 7.
[17] *Boumediene*, 128 S. Ct. at 2240.
[18] *See id.*
[19] *See id.* at 2244–51.
[20] *See id.* at 2253–58.
[21] *Id.* at 2253.

cerns, not formalism."[22] These functional factors weighed in favor of extending the writ to Guantánamo: the United States exercises "complete and uninterrupted control"[23] there, and if the Court found that the writ did not run there, it would allow the political branches "to govern without legal constraint" simply by entering into a lease for a territory over which another party retains "formal sovereignty."[24] "Our basic charter," the Court warned, "cannot be contracted away like this."[25]

### *B. The Lower Courts' Approaches*

The *Boumediene* Court's ringing language about the reach of American law[26] encouraged advocates for detainees[27] and caused speculation on the ways in which the decision might be a basis for clarifying and expanding detainees' legal protections.[28] Yet an examination of cases that have followed *Boumediene* reveals that such expectations may be unfounded. On the contrary, in contexts other than habeas petitions from detainees at Guantánamo, courts have tended to hold that U.S. law does not have extraterritorial application when it comes to the war on terror. But although the outcomes of these cases have been consistent, their reasoning has not: courts have adopted notably different concepts of when and to what extent American sovereignty extends far enough to justify applying American law.

Part of the inconsistency stems from the fact that *Boumediene* does not fully explain the standard that lower courts should apply. In some places the decision speaks broadly about the need for a practical approach to extraterritoriality and, relatedly, for judicial oversight of political branch actions abroad.[29] Yet Justice Kennedy also relied on the specific history of the habeas right and on the peculiar status of Guan-

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[22] *Id.* at 2258.

[23] *Id.*

[24] *Id.* at 2259.

[25] *Id.*

[26] *See, e.g.*, *id.* ("Abstaining from questions involving formal sovereignty . . . is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another.").

[27] *See, e.g.*, Press Release, ACLU, Supreme Court Restores Rule of Law to Guantánamo (June 12, 2008), http://www.aclu.org/national-security/supreme-court-restores-rule-law-guantanamo (quoting the ACLU legal director's prediction that *Boumediene* "should . . . mark the beginning of the end of the military commission process").

[28] *See, e.g.*, Sarah H. Cleveland, Essay, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 274 (2010); Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene*, and Limited Government*, 59 DEPAUL L. REV. 851, 887–94 (2010); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 261 (2009). *But see* Christina Duffy Burnett, *A Convenient Constitution?: Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 976 (2009) (suggesting that *Boumediene* "slip[ped] a version of strict territoriality . . . through the back door").

[29] *Boumediene*, 128 S. Ct. at 2257–59.

tánamo as a place where the United States not only exercises practical control, but also retains "*de facto* sovereignty"[30] by the terms of its lease.[31] Because the United States has "absolute" and "indefinite" control over Guantánamo,[32] the Court concluded that it is not really part of a foreign country: "In every practical sense," Justice Kennedy stated, "Guantánamo is not abroad . . . ."[33] By thus hedging the Court's position about which areas under American control are truly foreign, and by declining to delineate the due process rights to which detainees are entitled,[34] *Boumediene* complicated the framework for lower courts that would later have to consider the geographic reach of U.S. law.[35] Further, these courts must also contend with the complex history of the extraterritorial Constitution[36] and the role of the traditional presumption against extraterritorial application of federal statutes.[37]

*1.* Boumediene *Outside of Guantánamo:* Al Maqaleh v. Gates. — Perhaps the most anticipated case[38] to interpret *Boumediene* was *Al Maqaleh v. Gates*,[39] which addressed habeas petitions filed by detainees at Bagram Airfield in Afghanistan. In deciding whether to apply *Boumediene*'s extension of habeas rights to a military base other than Guantánamo, the D.C. Circuit adopted a narrow interpretation of *Boumediene*'s extraterritorial reach. The result was a decision that strongly suggested that Guantánamo's peculiar "not abroad" position[40] would circumscribe any further extension of the writ.

The district court in *Al Maqaleh* denied the government's motion to dismiss three habeas petitions, finding that under *Boumediene* it would be unconstitutional to apply the MCA's jurisdiction-stripping provision to habeas petitions from detainees at Bagram.[41] The D.C. Circuit reversed.[42] It held that the detainees in this case were similarly

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30 *Id.* at 2253.

31 *Id.* at 2252–53; *see also* Anthony J. Colangelo, *"*De facto *Sovereignty":* Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623, 662–69 (2009) (arguing that *Boumediene*'s use of de facto sovereignty rather than strictly practical sovereignty suggests that Guantánamo will be an exceptional case).

32 *See Boumediene*, 128 S. Ct. at 2260–61 (contrasting the United States' degree of control over Guantánamo with its control over the German military prison at issue in the primary precedent on which the government relied, *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

33 *Id.* at 2261.

34 *See id.* at 2279 (Roberts, C.J., dissenting).

35 *See id.* at 2280 ("How the detainees' claims will be decided . . . is anybody's guess.").

36 *See id.* at 2253–58 (majority opinion).

37 *See, e.g.*, Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

38 *See, e.g.*, Colangelo, *supra* note 31, at 623–24; Falkoff & Knowles, *supra* note 28, at 853–54.

39 605 F.3d 84 (D.C. Cir. 2010).

40 *Boumediene*, 128 S. Ct. at 2261.

41 *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 207–09 (D.D.C. 2009).

42 *Al Maqaleh*, 605 F.3d at 87.

situated to the detainees in *Boumediene* in a number of respects,[43] yet came to the opposite of *Boumediene*'s conclusion, based on the physical location of detention. The court labeled as "extreme" both the government's position that the United States must have de facto sovereignty over a nonterritorial location in order for the writ to run there[44] and the petitioners' argument that practical control is enough.[45] Instead, the court interpreted *Boumediene* as establishing a three-factor test: (1) the citizenship of the detainee, his status, and the process by which that status was determined; (2) the nature of the apprehension and detention sites; and (3) practical obstacles.[46] The court applied these factors to distinguish Bagram from Guantánamo. First, as a formal matter, the United States' lease with Afghanistan failed to establish de facto sovereignty.[47] Second, Bagram's location in a war zone rendered extension of the writ impractical.[48]

The D.C. Circuit's decision appears, on some levels, to be a reasonable application of the functional factors *Boumediene* identified for considering whether to extend the writ extraterritorially. The factor on which the court focused most strongly was Bagram's location in a theatre of war — an appropriately significant factor under the circumstances. Yet at the same time, *Al Maqaleh* neglected to address other considerations that played an important role in the Supreme Court's analysis of Guantánamo. For instance, the court failed to seriously explore whether the United States was, "for all practical purposes, answerable to no other sovereign for its acts on the base"[49] — a factor that Justice Kennedy identified as important when determining whether extending the writ would be "impracticable or anomalous."[50]

But perhaps more importantly for future detention cases, the *Al Maqaleh* court relied heavily on the United States' lack of de facto sovereignty over Bagram, despite nominally rejecting the government's proposition that this fact was dispositive.[51] The *Al Maqaleh* court was very open about its fear that extending the habeas writ to Bagram would result in *Boumediene*'s rationale extending to military bases all over the world, and the court did not specifically tie this general hesi-

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[43] *See id.* at 96 (noting that both sets of petitioners were aliens held as enemy combatants, and that both had had their enemy combatant status determined by military tribunals that lacked the procedural protections of a traditional military commission).

[44] *Id.* at 94–95.

[45] *Id.* at 95.

[46] *Id.* at 93–94 (citing Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008)).

[47] *See id.* at 87–88, 97.

[48] *See id.* at 97–98 (citing the *Boumediene* Court's suggestion that arguments against extending the writ would have more weight when the detention site is in "an active theater of war," *id.* at 98 (emphasis omitted) (citation omitted)).

[49] *Boumediene*, 128 S. Ct. at 2261–62.

[50] *Id.*

[51] *See Al Maqaleh*, 605 F.3d at 97, 99.

tation to war zone conditions.[52] Instead, by distinguishing Bagram from Guantánamo based on the absence of de facto sovereignty, the court provided a basis for reining in *Boumediene*'s applicability to American military bases located in peaceful countries as well as in theaters of war.

While the court did not explain the policy considerations underlying this fear, they are easy to imagine: reluctance to resist Congress's intent to limit detainees' access to courts; the expenses and complications of transporting detainees from far-flung bases; and a fear of "letting terrorists go free" (or at least being perceived as doing so). These considerations are relevant and potentially powerful. Yet the *Al Maqaleh* decision did not openly discuss these or any similar factors, nor how such factors may have weighed against the risk of a very expansive executive detention power. The fact that *Boumediene* identified this latter risk as a particularly important one[53] suggests that something more than reliance on the absence of de facto sovereignty is needed to justify the denial of habeas review where, as here, detainees do not have access to adequate procedural protections.[54] Rather than finding such a justification, the court determined that Bagram is not "as American" as Guantánamo for purposes of the writ. In establishing such a standard, *Al Maqaleh* largely brushed aside the *Boumediene* Court's concern with separation of powers issues[55] and pointed toward an understanding that would eliminate judicial oversight even when detainees are not held in a theatre of war. *Boumediene* itself neither explicitly counseled nor explicitly foreclosed this result, and Supreme Court precedents other than *Boumediene* have at times reflected a more hesitant approach to expanding extraterritorial constitutional protections.[56] But in failing to craft an explanation for its outcome that sufficiently takes into account the policies behind or the consequences of its decision, the *Al Maqaleh* court did not offer a convincing reason for its endorsement of this understanding.

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[52] *See id.* at 95 (rejecting petitioners' position largely because it provided no "limiting principle" for determining which overseas military bases would be subject to habeas).

[53] *See Boumediene*, 128 S. Ct. at 2258–59.

[54] *See Al Maqaleh*, 605 F.3d at 96 (noting that the procedures available to Bagram detainees "afford even less protection . . . than was the case with the CSRT [Combatant Status Review Tribunals at Guantánamo]").

[55] *See id.* at 98–99. The court dismissed as "speculation" the petitioners' argument that denying extension of the writ would allow the executive to shield any detention from judicial review by moving the detainee to a war zone. *Id.* While the court may have been correct that manipulation of the detention site did not occur in this case, its brief dismissal of the possibility of such a result gave short shrift to *Boumediene*'s larger concern about the executive branch evading judicial oversight of its detention policies. *See Boumediene*, 128 S. Ct. at 2258–59.

[56] *See Boumediene*, 128 S. Ct. at 2256–57 (citing *In re* Ross, 140 U.S. 453 (1891); Johnson v. Eisentrager, 339 U.S. 763 (1950)).

*2.* Boumediene *Outside of Habeas:* Al-Zahrani v. Rumsfeld. — Meanwhile, just a few months before the D.C. Circuit in *Al Maqaleh* emphasized the United States' strong degree of sovereignty over Guantánamo, the U.S. District Court for the District of Columbia had denied the relevance of that sovereignty in *Al-Zahrani v. Rumsfeld*.[57] *Al-Zahrani* addressed the claims of detainees' survivors, who sued under the Alien Tort Statute[58] (ATS), the Federal Tort Claims Act[59] (FTCA), and the Fifth and Eighth Amendments, alleging that their sons had been tortured at Guantánamo.[60] The outcome in *Al-Zahrani* turned *Boumediene*'s and *Al Maqaleh*'s sovereignty analyses on their heads: the court found that Guantánamo was just as foreign as every other American military base abroad, and thus outside the reach of the FTCA.

The FTCA preserves sovereign immunity for, among other things, "claim[s] arising in a foreign country."[61] The *Al-Zahrani* plaintiffs argued that, because *Boumediene* found that Guantánamo is not foreign,[62] the government's position that the plaintiffs' claims arose in a "foreign country" was incorrect.[63] But the trial court dismissed the plaintiffs' claims under the FTCA, holding that the bright-line test of de jure sovereignty rejected by *Boumediene* for the Suspension Clause[64] remained appropriate for statutory analysis under the FTCA.[65] Instead, the court stated that the case was governed by *United States v. Spelar*,[66] a 1949 suit involving the death of an American civilian on an American military base in Newfoundland.[67] *Spelar* determined that Great Britain's ultimate de jure sovereignty over the leased land made the base a "foreign country" for FTCA purposes.[68] *Al-Zahrani* also cited two pre-*Boumediene* — indeed, pre–war on terror — FTCA cases from other district courts finding that Guantánamo is a "foreign country."[69]

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57 684 F. Supp. 2d 103 (D.D.C. 2010).

58 28 U.S.C. § 1350 (2006).

59 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

60 *Al Zahrani*, 684 F. Supp. 2d at 105–07. The court substituted the United States as defendant in the ATCA claims, thus effectively converting those counts into additional FTCA claims, *id.* at 113–16, and dismissed the claims under the Fifth and Eighth amendments, *id.* at 108–11.

61 28 U.S.C. § 2680(k) (2006).

62 Boumediene v. Bush, 128 S. Ct. 2229, 2261 (2008) ("In every practical sense Guantanamo is not abroad . . . .").

63 *Al-Zahrani*, 684 F. Supp. 2d at 116.

64 *See Boumediene*, 128 S. Ct. at 2260–61.

65 *Al-Zahrani*, 684 F. Supp. 2d at 117–18.

66 338 U.S. 217 (1949).

67 *Id.* at 218.

68 *Id.* at 219.

69 *Al-Zahrani*, 684 F. Supp. 2d at 118 (citing Bird v. United States, 923 F. Supp. 338, 343 (D. Conn. 1996); Colon v. United States, No. 82 Civ. 34-CSH, 1982 U.S. Dist. LEXIS 16071, at *6 (S.D.N.Y. Nov. 24, 1982)).

The *Al-Zahrani* court's conclusion highlights a conflict between *Boumediene* and *Spelar* about the idea of a "foreign country": according to *Boumediene*, Guantánamo is "not abroad" because of functional and de facto sovereignty considerations; *Spelar* admits no such flexibility. Yet even within the *Spelar* decision, two concurring Justices expressed doubts about how the Court in that case understood "foreign country."[70] Specifically, they pointed out that the decision did not comport with previous cases applying American law to military bases abroad and thus led to a conflicted jurisprudence concerning U.S. sovereignty over such locations.[71] Further, as the *Al-Zahrani* court recognized, the "foreign country" exception to the FTCA has various functional justifications, such as "the absence of United States courts in such countries, with resulting problems of venue, and the difficulty of bringing defense witnesses from the scene of the alleged tort to places far removed; and a reluctance to extend the Act's benefits to foreign populations."[72] These policy considerations suggest that the limitations on the FTCA were not designed solely around the question of which country's boundaries surround a particular piece of land.

Together, *Al-Zahrani* and *Al Maqaleh* create a situation in which the executive must answer to the courts regarding the fact of detention at Guantánamo, because the base is functionally domestic enough to distinguish it from any other overseas military base,[73] but need not answer for what happens there afterward, because it is technically foreign enough to justify treating it like every other overseas military base.[74] Given the particularly strong force of stare decisis in statutory interpretation,[75] it is perhaps unsurprising that the court in *Al-Zahrani* chose to follow *Spelar*'s apparently clear directive rather than explore the question of whether *Boumediene* abrogated *Spelar* specifically as to Guantánamo by distinguishing that base's sovereign status from the status of other military bases abroad. Yet just as the *Al Maqaleh* court

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[70] *See Spelar*, 338 U.S. at 224 (Frankfurter, J., concurring) ("The very concept of 'sovereignty' is in a state of more or less solution these days."); *id.* at 225 (Jackson, J., concurring) ("[I]t may seem a somewhat esoteric doctrine that the same place at the same time may legally be both a possession of the United States and a foreign country.").

[71] Although Justices Frankfurter and Jackson agreed with the majority's decision to deny application of the FTCA, and would have backed away from previous cases extending U.S. law to military bases abroad, *see id.* at 224 (Frankfurter, J., concurring); *id.* at 225 (Jackson, J., concurring), their identification of weaknesses in the majority's reasoning would apply equally well to the view that the Court should have followed the reasoning in those previous opinions and extended the FTCA's reach.

[72] *Al-Zahrani*, 684 F. Supp. 2d at 119 (quoting Meredith v. United States, 330 F.2d 9, 10–11 (9th Cir. 1964) (internal quotation marks omitted)).

[73] *See* Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010) (contrasting Guantánamo and Bagram leaseholds).

[74] *See Al-Zahrani*, 684 F. Supp. 2d at 117–19.

[75] *E.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989).

proved reticent about the competing interests behind its sovereignty analysis, the judge in *Al-Zahrani* did not clearly explain why she did not explore the apparent contradiction between the two cases. Instead, she effectively denied the existence of any inconsistency by suggesting that the Guantánamo lease is just like any other military base lease[76] — a questionable conclusion, given that both *Boumediene* and *Al Maqaleh* carefully identified Guantánamo's different lease and different history. *Al-Zahrani* hinted at potential policy reasons supporting its outcome,[77] but it did not specifically endorse or expand upon any of these reasons. The court may have been concerned with some of the same considerations that subtly animated *Al Maqaleh*, such as following congressional intent to keep detainees' cases out of court and avoiding the court's involvement in diplomatic conflicts. But none of these potential arguments are made explicit, nor are they weighed against the substantial risk that barring detainees' FTCA claims would effectively allow the executive branch to avoid liability for its alleged torture at Guantánamo.[78]

*3. Sovereignty and Extraordinary Rendition:* Arar v. Ashcroft. — Variation in how lower courts interpret American sovereignty has also appeared in the context of extraordinary rendition. In *Arar v. Ashcroft*,[79] a divided en banc panel of the Second Circuit held that Maher Arar did not state a claim under the Torture Victim Protection Act of 1991[80] (TVPA) based on his allegations that American officials conspired with Syrian officials to send the plaintiff from New York to Syria to be tortured.[81] The TVPA "requires a demonstration that the defendants acted under color of foreign law, or under its authority."[82] The majority held that even if American officials had "encouraged or solicited" Syrian officials to torture Arar, the American defendants were not sufficiently "clothed with the authority of Syrian law" to allow the plaintiff to invoke the TVPA.[83] In dissent, Judge Pooler argued that the TVPA is properly interpreted using agency principles drawn from 42 U.S.C. § 1983.[84] Under this standard, the majority's distinction "between the actual exercise of power under foreign law

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[76] *See Al-Zahrani*, 684 F. Supp. 2d at 117.

[77] *See id.* at 119.

[78] The court had previously noted that the plaintiffs' constitutional claims were separately barred by the D.C. Circuit's decision in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied,* 130 S. Ct. 2013 (2009), which afforded qualified immunity to officers at Guantánamo. *Al-Zahrani*, 684 F. Supp. 2d at 112.

[79] 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

[80] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)).

[81] *See Arar*, 585 F.3d at 565–68.

[82] *Id.* at 568 (citing Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)).

[83] *Id.*

[84] *See id.* at 627 (Pooler, J., dissenting) (citing *Kadic*, 70 F.3d at 245).

and the encouragement, facilitation, or solicitation of that exercise of power" was "unprincipled."[85]

The question of liability in *Arar* turned on a determination that was, in some ways, the opposite of what the petitioners tried to show in *Al Maqaleh* and *Al-Zahrani*: the latter two involved allegations that American sovereignty encompassed apparently foreign places or conduct, whereas the former explored whether apparently American conduct could occur under foreign sovereignty. Even so, the divergence between the majority's and the dissent's reasoning in *Arar* implicates the struggle between bright-line conceptions of sovereignty and a more functional approach. For the majority, the American defendants solely represented the laws of the sovereign to which they owed an allegiance, because the alternative would produce an absurd result: if the defendants were found to be acting under Syrian law, then any American diplomat could be rendered "an official of a foreign government" when he or she interacted with a foreign state.[86] The dissent, in contrast, advocated the idea that American control and Syrian sovereignty could act in tandem to implicate the defendants in the laws and actions of both countries.[87] While these lines of analysis differ significantly from the analysis required in cases determining American sovereignty over a military base, the upshot of *Arar* is similar to that of *Al-Zahrani*: the majority adopts an uncompromising view of sovereignty that admits of only one source of authority, with the result that alleged victims of American mistreatment are left without a remedy.[88]

### *C. Implications for Future Detainee Cases*

Since the war on terror is likely to continue, in some form, for the foreseeable future,[89] there will inevitably be more lawsuits filed by individuals challenging their detentions or claiming that they were mistreated while detained. The Supreme Court has made it clear that Guantánamo detainees are entitled to challenge their detentions through habeas, but it has not clarified much more.[90] *Al Maqaleh*, *Al-*

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[85] *Id.* at 629.

[86] *See id.* at 568 n.3 (majority opinion).

[87] *See id.* at 629–30 (Pooler, J., dissenting) (arguing that the TVPA claim was properly pleaded where plaintiff "allege[d] that [the American] defendants, acting in concert with Syrian officials, interrogated him through torture under color of Syrian law, which they could not have accomplished under color of U.S. law alone").

[88] In addition to rejecting the plaintiff's claims under the TVPA, the court rejected his other claims for relief under the Fifth Amendment. *See id.* at 563–64 (majority opinion).

[89] *See* Boumediene v. Bush, 128 S. Ct. 2229, 2270 (2008) (observing that the war on terror's "hostilities . . . may last a generation or more").

[90] *See id.* at 2277 ("[O]ur opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined."). Further, as Professor Stephen Vladeck has observed, the Supreme Court has thus far declined to review many cases presenting issues of as much or more significance than the habeas cases. *See* Stephen I. Vladeck, *The Long*

*Zahrani*, and *Arar* all tend in the direction of denying alien plaintiffs access to courts, though they use divergent reasoning about the nature of American sovereignty in order to do so. One likely result of continuing down this path will be a pattern of inconsistent outcomes that grant relief to some plaintiffs and not others even when the plaintiffs are very similarly situated.[91] Yet more importantly, the lower courts' tendency to back away from *Boumediene*'s concern about effective judicial oversight of executive branch actions abroad invites repetition of the criticisms attracted by Guantánamo, which became a cause célèbre for human rights activists. The perception that the United States denies judicial remedies to prisoners it has mistreated has the potential to harm the country's relations with its allies and inflame its enemies.[92]

There are a number of possible ways to approach detainee cases in a manner that would accord more weight to *Boumediene*'s concerns about functional analysis and separation of powers, instead of concentrating on the technical foreignness of a location or a class of conduct. For instance, Professors Marc Falkoff and Robert Knowles suggest that *Boumediene* should be understood not as establishing an individual right to the writ for persons located at Guantánamo, but as establishing limits for when the government has "exceeded its constitutional mandate" in actions it has taken abroad.[93] Thus, they argue that the first and most important inquiry is whether Congress or the executive acted "within the scope of the power granted to it by the Constitution,"[94] and only if the answer is yes should the court proceed to investigate the contents of the rights at issue or any practical barriers to their application.[95] Alternatively, Professor Gerald Neuman suggests

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*War, The Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893, 897 (2009) (reviewing BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008)). Consistent with the trend identified by Vladeck, the Supreme Court denied certiorari in *Arar*. *See* 130 S. Ct. 3409 (2010).

91 The *Al Maqaleh* court, for instance, recognized many similarities between that case's Bagram detainees and the Guantánamo detainees in *Boumediene*: the petitioners were all noncitizens, Al Maqaleh v. Gates, 605 F.3d 84, 95–96 (D.C. Cir. 2010); some petitioners in each case were captured in or near Afghanistan while others were captured in other countries, all during the early 2000s, *Boumediene*, 128 S. Ct. at 2241; *Al Maqaleh*, 605 F.3d at 87; and all had their enemy combatant status determined by a military process that lacked the procedural protections of formal commissions or trials, *Al Maqaleh*, 605 F.3d at 96. But for the government's decision to keep the *Al Maqaleh* petitioners in Afghanistan rather than at Guantánamo, they would have been entitled to habeas review in federal court.

92 *See, e.g.*, Michael Bahar, *As Necessity Creates the Rule:* Eisentrager*,* Boumediene*, and the Enemy*, 11 U. PA. J. CONST. L. 277, 316–21 (2009) (arguing that a successful counterinsurgency strategy requires more, not less, adherence to American legal principles, a policy reflected in the U.S. Army's Field Manual).

93 Falkoff & Knowles, *supra* note 28, at 854; *see also id.* at 879–86, 897–98.

94 *Id.* at 884.

95 *Id.* Under their formulation, *Al Maqaleh* would have come out differently. *See id.* at 887.

that it may be necessary to identify "some presumptive category of foreign nationals abroad whose interests the Constitution protects,"[96] which *Boumediene* indicates would include at least the class of individuals held in U.S. custody.[97] Because these authors focus their inquiries on habeas petitions and other constitutional questions, it is unclear to what extent their reasoning would apply to cases that implicate statutory law, such as *Al-Zahrani*. The answer may depend on whether courts determine that detainees are protected by the Fifth or the Eighth Amendment, a claim the Supreme Court has thus far refused to address[98] and toward which the lower courts have not been sympathetic.[99]

Of course, any such approach would have to contend with the need to articulate limiting principles that take into account competing congressional and executive interests[100] as well as the practical and policy considerations that *Al Maqaleh* and *Al-Zahrani* may have considered but did not clearly articulate. Because *Boumediene* left the contours of these limits unclear, the lower courts have some flexibility in deciding how to define and apply them. Yet the manner in which the courts have attempted to do so thus far has not always been attentive to some of the core concerns reflected in *Boumediene*. Approaches that emphasize technical as opposed to functional aspects of sovereignty stray not only from these concerns, but also from the more general promise that *Boumediene* held: the possibility of an approach to judicial oversight of detention policies that would prevent the other branches of government from evading their constitutional and statutory obligations by carefully stepping around and over territorial boundaries.

## V. COMITY AND EXTRATERRITORIALITY IN ANTITRUST ENFORCEMENT

The globalization of trade and commerce has brought with it a corresponding wave of international behavior in restraint of trade and commerce.[1] The resulting extraterritorial application of U.S. antitrust

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[96] Neuman, *supra* note 28, at 271.

[97] *Id.* at 272.

[98] *See supra* note 88.

[99] *See* Arar v. Ashcroft, 585 F.3d 559, 563–64 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010) (refusing to apply *Bivens* remedy for alleged Fifth Amendment violation); *id.* at 569 n.4 (declining to review original panel's determination that Arar was not entitled to counsel and hearing before his removal to Syria); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 112 (D.D.C. 2010) (refusing to apply *Bivens* remedy for alleged Fifth and Eighth Amendment violations).

[100] *Cf.* Falkoff & Knowles, *supra* note 28, at 883 (recognizing that functional as opposed to formal approaches to adjudication "are susceptible to an endless cat-and-mouse game between the courts and the political branches").

[1] Extensive empirical documentation attests to the increased internationalization of anticompetitive commercial behavior. *See, e.g.*, John M. Connor, *Global Antitrust Prosecutions of Modern*

law has drawn intense legal and political debate,[2] culminating in its current status as a battleground in the fight over the proper extent of U.S. extraterritoriality.[3] Antitrust owes its centrality within the extraterritoriality debate to growth in international commerce, liberalized trade law, and newly innovated trade instruments, which together have increased the number of pressure points between countries' antitrust laws and have engendered debate over the limits of each country's jurisdiction.[4] The Sherman,[5] Clayton,[6] and Federal Trade Commission Acts[7] account for international trade applications of U.S. antitrust law by explicitly including "commerce . . . with foreign nations" in their respective purviews;[8] however, the limits of extraterritorial enforcement have never been certain.[9]

The stakes in defining those limits are high, because applying U.S. antitrust law overseas poses potential conflicts with other countries' laws and can prompt international political disputes.[10] Similarly, when other countries exercise jurisdiction in a manner that affects American interests, policymakers and affected parties in the United States face challenges in either confronting or complying with foreign

*International Cartels*, 4 J. INDUSTRY, COMPETITION & TRADE 239 (2004); John M. Connor, Cartels & Antitrust Portrayed: Numbers, Size, and Location: Private International Cartels, 1990–2008, at 10 (Apr. 3, 2009) (unpublished presentation) (on file with the Harvard Law School Library), *available at* http://ssrn.com/abstract=1367843; James M. Griffin, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Presentation Before the American Bar Association Section of Antitrust Law Annual Meeting (Aug. 12, 2003), *available at* http://www.justice.gov/atr/public/speeches/201477.pdf.

2 *See generally* PHILLIP AREEDA, LOUIS KAPLOW & AARON EDLIN, ANTITRUST ANALYSIS ¶¶ 168–169 (6th ed. 2004).

3 *See, e.g.*, Justin Desautels-Stein, *Extraterritoriality, Antitrust, and the Pragmatist Style*, 22 EMORY INT'L L. REV. 499, 525 & n.138 (2008).

4 *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 3–4 (1997).

5 15 U.S.C. §§ 1–7 (2006).

6 *Id.* §§ 12–27.

7 *Id.* §§ 41–58.

8 *Id.* §§ 1–2, 12(a), 44.

9 *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310 (7th ed. 2008) ("The American courts, the United States Government, and foreign governments in reacting to American measures assume that there are *certain* limits to enforcement jurisdiction but there is no consensus on what those limits are." (citation omitted)).

10 *See, e.g.*, JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 6:3, at 239 (2d ed. 2006) (describing the international backlash after early extraterritorial applications of the Sherman Act). In part to avoid such tensions, the comity canon instructs that "ambiguous statutes should be construed 'to avoid unreasonable interference with the sovereign authority of other nations.'" INT'L BAR ASS'N LEGAL PRACTICE DIV., REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 25 (2009) [hereinafter IBA REPORT] (quoting F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004)).

antitrust principles.[11] For example, when European regulators challenged the merger of two American corporations in 1997, international tensions escalated and required concessions by U.S. private industry and diplomatic brinksmanship on the part of the President of the United States.[12]

Scholars have principally explored two recent large-scale changes in the extraterritorial application of antitrust law: first, the comity-driven decrease in U.S. courts' exercise of jurisdiction over international civil suits, and second, the increase in the Department of Justice's criminal enforcement against foreign parties.[13] Although these two changes have complementary effects on the overall extraterritorial application of U.S. law, they work through different mechanisms: jurisdiction on the civil side and enforcement activity on the criminal side. Critiques of curtailed civil jurisdiction, however, have viewed it in a vacuum. They have both described improper judicial entanglement in foreign policy[14] and predicted a decrease in the deterrent effect of U.S. antitrust law abroad[15] without fully considering the context. But as this Part explains, curtailing jurisdiction for private enforcement and expanding activity in criminal enforcement are more closely related than the antitrust literature suggests.

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[11] *See, e.g.*, Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 211–16 (1999).

[12] *Id.* at 192–93, 211–16. The FTC had approved the merger (of U.S. competitors Boeing Company and McDonnell Douglas) after a thorough investigation, and neither company had major facilities in Europe. *Id.* at 212–13.

[13] While comity applies to both civil and criminal enforcement of U.S. law against foreign actors, its operation as a jurisdictional limit has mostly affected civil litigation, and the leading antitrust cases in which courts invoke the canon have featured civil disputes. *See, e.g.*, *Empagran*, 542 U.S. 155; Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 294 (2009) (emphasizing the canon's impact on civil litigation).

[14] *See* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The* Hartford Fire *Case*, 1993 SUP. CT. REV. 289, 290 (bemoaning that in private extraterritorial antitrust suits, "by default the policy decision falls to the courts"); Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 593 (1983) (contending that courts independently decide which "foreign laws and policies" to "respect"); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 238 (1993) (regarding the balancing involved in comity as "active[] engage[ment] in a transnational dispute regardless of [the court's] ultimate decision").

[15] *See* John M. Connor & Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 PENN ST. L. REV. 813, 841 (2008); Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 205 (2005).

### *A. Expanding Comity to Restrict Private Extraterritorial Enforcement*

In the courts as well as in the academy, the debate over international applications of U.S. antitrust law has focused largely on the principle of international comity, a canon of jurisdictional deference that has gained salience (but, in the view of many, not cogency[16]) in recent years. The growth of comity, in turn, has motivated a retrenchment of civil extraterritorial jurisdiction.[17]

All recent attempts to define the extraterritorial reach of antitrust law rely on the Foreign Trade Antitrust Improvements Act of 1982[18] (FTAIA), which clarifies that U.S. antitrust law does "not apply to conduct involving trade or commerce . . . with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect" in the United States.[19] The Supreme Court initially interpreted the FTAIA as providing broad extraterritorial jurisdiction in *Hartford Fire Insurance Co. v. California*,[20] which set out a bright-line rule conditioning deference to another country's jurisdiction on the presence of a "true conflict between domestic and foreign law" such that the defendant could not possibly have abided by both countries' laws.[21]

In a course change eleven years later, "considerations of comity" led the Court to take a different position in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*[22] The *Empagran* Court used the comity canon to narrowly construe the FTAIA's definition of extraterritorial antitrust limits.[23] Under the comity-narrowed FTAIA, the Court refused jurisdiction over foreign plaintiffs' claims against a cartel of vitamin manufacturers whose conduct had effects both in the United States and abroad, based on the Court's assumption that "the anticompetitive

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[16] *See, e.g.*, Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 8–11 (1991); Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 893 (1998).

[17] *See, e.g.*, *Empagran*, 542 U.S. at 164, 174–75.

[18] 15 U.S.C. § 6a (2006).

[19] *Id.* § 6a(1)(A). The FTAIA's definition of U.S. jurisdiction does not apply to "import trade or import commerce." *Id.* § 6a. Until 1982, a more general "effects test" guided courts in determining the extraterritorial civil enforcement of antitrust law. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

[20] 509 U.S. 764 (1993).

[21] *Id.* at 798 (quoting Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)) (internal quotation mark omitted). Although most circuits interpreted *Hartford Fire* as categorically limiting comity concerns to situations of "true conflict," *see, e.g.*, United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1223 (10th Cir. 2000); *In re* Maxwell Commc'n Corp., 93 F.3d 1036, 1050 (2d Cir. 1996), the Ninth Circuit continued to use a "jurisdictional rule of reason" after *Hartford Fire*, *see* Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 846 n.5 (9th Cir. 2006).

[22] 542 U.S. 155, 175.

[23] *Id.* at 164–66.

conduct's domestic effects were [not] linked to that foreign harm."[24] Such a link, the Court reasoned, would satisfy the FTAIA's effects test by showing that the anticompetitive conduct was not "significantly foreign,"[25] but exercising jurisdiction in the absence of linked domestic effects would mark an extraterritorial "extension of the Sherman Act's scope."[26] The holding marked a shift in the Court's conception of comity from the pre-*Empagran* bright-line concept to balancing foreign and domestic interests, and in light of compelling foreign interests this new conception of comity pushed courts away from exercising jurisdiction.[27]

The standard applied on remand confirmed *Empagran*'s significant jurisdiction-narrowing effect. The Court's opinion in *Empagran* had left the issue of "the requisite causal relationship between domestic effect and foreign injury" unresolved,[28] and the D.C. Circuit read the Supreme Court's invocation of comity to place a heavy burden on plaintiffs.[29] The plaintiffs argued that the effects on the U.S. market constituted a "but-for" cause of the foreign harm, under the theory that, had manufacturers of any "fungible and globally marketed" product cartelized without involving the United States, arbitrageurs would have imported the product from the United States and sold it to purchasers abroad, thus destroying any cartel profits.[30] The court found the but-for theory insufficient because it contravened "principles of 'prescriptive comity'" in applying the FTAIA.[31] As another court would later explain, this theory "would allow any foreign plaintiff who suffered harm abroad as a result of a foreign conspiracy to gain access to the U.S. courts," a grant broader than the FTAIA.[32] Instead, the D.C. Circuit required a showing of proximate causation,[33] and most circuits to consider the issue have followed suit.[34] This standard has

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[24] *Id.* at 175.

[25] *Id.* at 166.

[26] *Id.* at 167.

[27] *See* KERMIT ROOSEVELT, III, CONFLICT OF LAWS 226 (2010).

[28] Empagran S.A. v. F. Hoffman-LaRoche, Ltd. (*Empagran II*), 417 F.3d 1267, 1270 (D.C. Cir. 2005).

[29] *Id.* at 1270–71.

[30] *Id.* at 1270.

[31] *Id.* at 1271.

[32] eMag Solutions LLC v. Toda Kogyo Corp., No. C 02-1611, 2005 WL 1712084, at *8 (N.D. Cal. July 20, 2005).

[33] *Empagran II*, 417 F.3d at 1271.

[34] *See, e.g.*, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 987 (9th Cir. 2008); *In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 539 (8th Cir. 2007). *But see* Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir. 2004) (rejecting jurisdiction where plaintiff "did not allege . . . that *but for* the European conspiracy's effect on United States commerce, he would not have been injured in Europe" (emphasis added)).

further limited the extraterritorial use of the antitrust statutes' private rights of action.[35]

*Empagran* and its proximate-cause progeny have prompted a new wave of arguments surrounding comity in antitrust law, especially between critics who view the cases as affronts to the deterrent effect of U.S. law and proponents who herald comity-driven curtailment of extraterritoriality as essential to international legal cooperation.[36] More general criticism of comity and extraterritoriality blames courts for doctrinal incoherence and "jurisdictional chaos."[37]

### *B. Increasing Extraterritorial Criminal Prosecutions*

While civil enforcement against foreign-based antitrust violators has declined, criminal prosecutors have increasingly turned their attention to individuals and corporations outside of the United States. As in civil lawsuits, an "effects test" applies to limit the jurisdiction of criminal antitrust prosecutions against foreign actors.[38] Although the Supreme Court has not decided a case on the extraterritorial limits of criminal enforcement, the First Circuit held in *United States v. Nippon Paper Industries Co.*[39] that the Department of Justice may prosecute foreign firms and officials for "activities committed abroad which have a substantial and intended effect within the United States."[40]

By the time the First Circuit decided *Nippon Paper*, the Department of Justice and the Federal Trade Commission had embraced the *Hartford Fire* Court's broad extraterritoriality perspective in newly released international antitrust enforcement guidelines.[41] Since then,

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[35] *See generally* Michelle A. Wyant, *Reconsidering the D.C. Circuit's Proximate Cause Standard for Extraterritorial Jurisdiction: Precluding the "Globalization" Theory to Promote Global Enforcement*, 7 RICH. J. GLOBAL L. & BUS. 15 (2008).

[36] *See, e.g.*, Margaret Bloom, *Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies? A Post-*Empagran *Perspective from Europe*, 61 N.Y.U. ANN. SURV. AM. L. 433 (2005); Wyant, *supra* note 35, at 29–42.

[37] John H. Chung, Comment, *The International Antitrust Enforcement Assistance Act of 1994 and the Maelstrom Surrounding the Extraterritorial Application of the Sherman Act*, 69 TEMP. L. REV. 371, 399 (1996); *see* EINER ELHAUGE, STATUTORY DEFAULT RULES 208 (2008) (charging that comity has grown "so open-ended that it is difficult to be sure about something as basic as what the canon is trying to maximize"); Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 SMU L. REV. 103, 134 (2007) ("[T]he *Empagran* exception has produced as much confusion as existed prior to *Empagran*.").

[38] *See, e.g.*, Jordan A. Dresnick et al., *The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad*, 40 U. MIAMI INTER-AM. L. REV. 453, 473–76 (2009). For a critical analysis of the effects test, see IBA REPORT, *supra* note 10, at 12–13, 48.

[39] 109 F.3d 1 (1st Cir. 1997).

[40] *Id.* at 3 n.2.

[41] *Compare* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 12–15, 21 (1995), *with* RICHARD A.

the executive branch has appeared not to notice — or at least not to heed — *Empagran*'s departure from that perspective, as the agencies' antitrust enforcement guidelines to date have not been updated and still explicitly invoke *Hartford Fire*'s vast endorsement of extraterritoriality.[42]

The increase in criminal prosecution, however, has emerged more from increased enforcement activity than from shifts in jurisdictional boundaries. As a practical matter, criminal enforcement of U.S. antitrust law against foreign actors has waxed steadily in the past decade,[43] and a brief empirical analysis suggests that it has become even more pronounced since *Empagran*.[44] In each of the ten years before *Empagran*, the Department of Justice levied a relatively stable annual sum of large fines against non-U.S. corporations for antitrust violations. During that period, the annual sum exceeded $210 million in only one year, 1999, due to unprecedented fines against an international vitamins cartel. But in the next six years — from the inflection point at 2004 (the year of *Empagran*) to 2010, the most recent year for which complete data is available — the annual sum of large fines increased drastically. Prior to 2004 (discounting fines for the vitamins cartel), the mean annual sum was $102 million. Since 2004, the mean annual sum has been $492 million. By contrast, the mean annual sum of such fines against U.S.-based corporations has actually decreased over the same timeframe.

Both unilateral and multilateral enforcement strategies have contributed to the heightened activity and frequent successes in extraterritorial criminal prosecutions. With respect to unilateral enforcement, the growth of the Antitrust Division's "Leniency Program," which promises immunity to cartel members who self-report, has increased the frequency and success of prosecutions. This program has become

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GIVENS, ANTITRUST: AN ECONOMIC APPROACH § 17.03, at 17-9 (1983) (describing prior guidelines).

[42] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 41, at 12–15, 21.

[43] *See, e.g.*, Travis J. Hill & Stephanie B. Lezell, *Antitrust Violations*, 47 AM. CRIM. L. REV. 245, 276 (2010) (explaining the concurrent decline in criminal cases filed against American corporations and increase in overall criminal sanctions as a result of an increasingly "aggressive prosecution of international cartels"); Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Spring Meeting 1–3 (Mar. 26, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/232716.pdf.

[44] The following analysis is based on U.S. Department of Justice, Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, DATA.GOV, http://www.data.gov/raw/2256 (last visited Jan. 30, 2011) (dataset last updated Dec. 17, 2010). Years in this analysis refer to U.S. government fiscal years. The data available for these calculations are too limited — in terms of size and timeframe — to draw strong causal conclusions, but they buttress an already logical synthesis between the trends of shrinking civil jurisdiction over and expanding criminal enforcement against international cartels.

the "most effective" weapon in the Antitrust Division's arsenal for detecting and prosecuting international cartels.[45] Although the Leniency Program has existed since 1978, major revisions in 1993 enhanced the carrot it offers, rendering the program more productive.[46]

Some of the heightened criminal enforcement has followed from increased global cooperation as well. The United States has signed on to nine international agreements to collaborate in antitrust enforcement.[47] Antitrust agencies in the United States and Europe coordinate transaction reviews, share enforcement information across borders, and synchronize raids by their domestic agencies.[48] International agreements vary in robustness, with some merely "aspirational" and others formally providing for information-sharing and resource-coordinating mechanisms.[49] As an example of the latter category, the United States and the European Communities have an agreement focusing on a process for coordinating investigations.[50] In the United States, international cooperation has given prosecutors both a strategic advantage in identifying antitrust violators and a trump card in plea negotiations.[51] Access to INTERPOL's system of international arrest warrants, communication among border protection agencies, and the capability to extradite foreign nationals not only help enforcement officials to track and apprehend suspected violators, but also allow of-

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[45] Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The Evolution of Criminal Antitrust Enforcement over the Last Two Decades, Speech Before the National Institute on White Collar Crime 2–3 (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf.

[46] *Id.* at 2.

[47] *See* U.S. Dep't of Justice, Antitrust Div., *Antitrust Cooperation Agreements*, JUSTICE.GOV, http://www.justice.gov/atr/public/international/int_arrangements.htm (last visited Jan. 30, 2011). The proliferation of such agreements independently constitutes an important development in the law, with at least ninety more agreements, aside from the nine to which the United States is a signatory, operating to share information and resources among other countries. *See* Abbott B. Lipsky, Jr., *Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, 75 ANTITRUST L.J. 965, 971 (2009). Meanwhile, two international efforts to reach a global agreement have failed — under the WTO in 2003 and under the OECD in 2006. D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 51 (2007).

[48] Lipsky, *supra* note 47, at 972.

[49] *Id.* at 971.

[50] Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C., June 3–4, 1998, T.I.A.S. No. 12,958. For an example of coordinated activity under the U.S.-E.C. treaty, see Makan Delrahim, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Facing the Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies in the U.S. and E.U., Speech Before the ABA Administrative Law Section Fall Meeting 11–12 (Oct. 22, 2004), *available at* http://www.justice.gov/atr/public/speeches/206429.pdf, describing joint clandestine investigations and simultaneous international raids on suppliers of heat stabilizers and impact modifiers in 2003. The raids also involved coordination with Canada and Japan. *Id.* at 11.

[51] Hammond, *supra* note 43, at 3, 7.

ficials to plausibly threaten violators with the ongoing hassle of inclusion on an international watch list.[52]

### C. The Coordination and Substitution of Private and Public Extraterritorial Enforcement

The comity-driven decrease in civil antitrust lawsuits against foreign defendants and the concurrent increase in criminal enforcement against foreign parties represent complementary trends. These trends at least partly offset each other's impact on the achievement of the goals of the underlying antitrust law and on the overall extraterritorial enforcement of U.S. law. The resulting substitution effect mitigates concerns about either trend viewed in isolation and may even produce concrete benefits for the legal system.

The correlation between the trends observed herein has relied at least partly on coordination between the executive and judicial branches.[53] For example, *Nippon Paper* expanded the Department of Justice's extraterritorial criminal enforcement authority shortly after the Department had published new internal guidelines claiming such expanded authority for itself.[54] In *Empagran*, the Court accepted the government's appeals to comity; curtailing the threat of private enforcement would, counterintuitively, increase deterrence and decrease cartel stability.[55] The United States argued, as amicus curiae, that limiting cooperating firms' exposure to civil suits would strengthen the Leniency Program — which could only offer immunity from *criminal* enforcement — thereby further encouraging self-reporting and undercutting the stability of cartels.[56] And, consistent with the civil-to-criminal shift that *Empagran* helped to advance, despite the defendants' limited civil exposure the Department of Justice levied unprece-

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[52] *See id.* Other additions to the extraterritorial antitrust enforcement toolkit include simultaneous raids, cooperation in serving subpoenas, and "drop-in interviews" by enforcement officials. *See* Delrahim, *supra* note 50, at 11.

[53] Scholars have drawn an analogy between courts' deference to the executive branch in extraterritorial antitrust cases and courts' deference to agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11, 31 & n.66 (2009).

[54] John Gibeaut, *Sherman Goes Abroad*, A.B.A. J., July 1997, at 42, 43; *see* United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997); *id.* at 10 (Lynch, J., concurring) (discussing the newly issued DOJ/FTC guidelines).

[55] *See* F. Hoffman–La Roche Ltd. v. Empagran, S.A., 542 U.S. 155, 168 (2004).

[56] Daniel J. Fletcher, Note, *The Lure of Leniency: Maximizing Cartel Deterrence in Light of* La Roche v. Empagran *and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 341, 352 (2005); *see* Brief for the United States as Amicus Curiae Supporting Petitioners at 19–21, F. Hoffman–La Roche Ltd. v. Empagran, S.A., 542 U.S. 155 (2004) (No. 03-724), 2004 WL 234125, at *19–21.

dented criminal fines against them and won prison sentences for eleven colluding executives.[57]

This cooperation model, reflecting the expansion of comity both as a function of the courts' deference to the more institutionally competent executive branch and as a component of the broader enforcement shift from civil to criminal, answers the criticism of scholars who see comity as an expression of courts' excessive involvement in foreign policy.[58] That shift, and the judicial cooperation that enabled it, has positioned the courts to avoid comity judgments when the government has brought criminal cases, which has empowered the executive's judgments about sensitive foreign policy issues in such cases.[59]

Trends in civil and criminal extraterritoriality complement each other and therefore offset some of each other's effects. The general trend of curtailing jurisdiction for private extraterritorial antitrust claims draws harsh and abundant criticism for diminishing the deterrent effect of U.S. antitrust law abroad.[60] But to the extent that the decreased threat of civil suits has in turn decreased the strength of U.S. antitrust law as a deterrent, the countervailing increase in criminal enforcement abroad should at least partly offset that effect, through the increased threat of criminal fines and jail time even for cartelists overseas.[61]

The civil-to-criminal shift also optimizes the aggregate extraterritoriality of U.S. law. Reciprocity is a strong force in international relations and trade, and much discussion of antitrust extraterritoriality presumes the government's awareness of the potential for reciprocity. For example, studies that consider evenly balanced trade relationships anticipate that countries will keep their extraterritorial antitrust policies in check for fear of reciprocal or retributive extraterritoriality.[62] Because perceptions abroad of U.S. extraterritoriality do not differen-

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[57] Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265, 271–72 (2005).

[58] *See* sources cited *supra* note 14.

[59] *See, e.g.*, United States v. Baker Hughes Inc., 731 F. Supp. 3, 6 n.5 (D.D.C. 1990), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990).

[60] *See, e.g.*, sources cited *supra* note 15.

[61] *See, e.g.*, Fletcher, *supra* note 56, at 348–51.

[62] *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 1102 (2007) (explaining that, as between the United States and the European Communities, as "exporters on some products but importers on others . . . each knows that any pro-producer antitrust policy will harm them on products they import"). Meanwhile, models that consider trade deficits (such as the United States' trade deficit) predict strict, even excessive extraterritorial competition policies imposed on foreign exporters, because a country like the United States exports comparatively little and is therefore less exposed to the effects of other countries' antitrust laws. *See* Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1159–60 (2001); Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933, 945 (2003).

tiate civil from criminal applications,[63] the effect of curtailed civil enforcement on international reciprocity offsets that of the increase in criminal enforcement. Moreover, to the extent that the United States' trade deficit motivates it to impose strict antitrust law extraterritorially, and to the extent that the government sees criminal enforcement and the Leniency Program as stronger international cartel deterrents than civil litigation, the shift from civil to criminal extraterritorial enforcement supports the expected trade strategy.

The benefits to the substantive antitrust law and to the reciprocity-based trade strategy come not merely from the civil-to-criminal shift in the *number* of cases brought, but also from the *types* of cases brought. After all, private antitrust plaintiffs externalize the costs both of reciprocal over-enforcement and of diminished deterrence flowing from decreased cooperation with the Leniency Program, while internalizing the benefit of excessive civil enforcement in any one lawsuit.[64] While private plaintiffs are "ill-incentivized" to limit their antitrust claims for the benefit of the broader legal regime, criminal prosecutors can be expected more often to focus their efforts on those cases that most advance the policies of antitrust law.[65] The consequent normative preference for criminal rather than civil enforcement optimizes the level of deterrence[66] and of reciprocity-inducing extraterritoriality. So too, then, does the civil-to-criminal shift observed herein.

The decrease in civil jurisdiction and the increase in criminal prosecution do more than cancel out each other's downsides: the beneficial synergies between them can further the purposes of antitrust law. When viewed as a single trend instead of two, this shift involves the courts' deferring to institutional competence and disengaging from foreign relations, more optimal deterrence attained by encouraging the preferred types of enforcement, and more international cooperation achieved without damaging reciprocity-based trade and foreign relations interests. To the extent that this model begins to unify the increasing comity as a limitation on civil enforcement with the increasing activity in extraterritorial criminal enforcement, it may represent a more coherent development in the law.

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[63] *See* Ramsey, *supra* note 13, at 294 (noting that as between criminal and civil enforcement, "objections to the extraterritorial scope of U.S. antitrust law do not distinguish between the two").

[64] This incentive structure is especially pronounced for foreign plaintiffs suing under U.S. law because they have a strong individual interest in extraterritorial activity in one case and no concern for the reciprocal costs attending to that activity. These incentives explain the inclination both to curtail plaintiffs', and especially foreign plaintiffs', power to sue in U.S. courts and to leave the executive branch in charge of determining the appropriate level of extraterritorial enforcement for the accomplishment of international relations, trade, and antitrust goals.

[65] Huffman, *supra* note 37, at 114–15.

[66] *See id.* at 113–15.

# VI. EXTRATERRITORIAL LAW AND INTERNATIONAL NORM INTERNALIZATION

## *A. Introduction*

Traditionally, a state may exercise prescriptive jurisdiction over only three types of conduct: conduct that takes place within its territory, conduct of its nationals, and foreign conduct meant to have an effect within its territory or directed against its security.[1] Any other application of a state's domestic law abroad is considered a violation of international law; states are supposed to respect each other's exclusive authority to regulate behavior within their territorial boundaries.[2] The United States, however, has increasingly flouted this prohibition.[3] Although the prohibition has begun to relax in certain cases,[4] the general international norm against extraterritoriality remains,[5] and both legal scholars[6] and foreign government officials[7] have criticized the growing global reach of U.S. law.[8]

Ironically, some of the most controversial U.S. extraterritorial laws aim to advance values central to the international legal order, such as human rights and treaty compliance. Yet scholars of international law believe that such statutes must strike a careful balance. They assert that in order to strengthen international norms, domestic legal mechanisms must conform to international legal restrictions. For example, Professor Sarah Cleveland applies Professor Harold Koh's theory of

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[1] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

[2] Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 268 (2006).

[3] Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 844–45 (2009).

[4] For example, nations increasingly recognize the validity of transnational regulation, *see id.* at 268–69, and universal jurisdiction, *see* Paul B. Stephan, *A Becoming Modesty — U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 639 n.28 (2002).

[5] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 1, subch. A, intro. note (1987).

[6] *See, e.g.*, 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, 135–36 (Michael Byers & Georg Nolte eds., 2003); Parrish, *supra* note 3, at 820.

[7] *See* Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction — European Responses*, 26 HOUS. J. INT'L L. 309, 315–16 (2004).

[8] While the trend of increasing extraterritorial application of domestic law is not unique to the United States, *see* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 569 (4th ed. 2007), for the sake of simplicity, and because the United States leads the world in this development, *see* Parrish, *supra* note 3, at 852, this Part will focus specifically on U.S. extraterritoriality.

international norm internalization[9] to argue that, on the one hand, unilateral economic sanctions imposed by the United States on human rights abusers can "promote[]" norm internalization by "formally provok[ing] numerous interactions between the United States and foreign governments in which global norms are raised and clarified."[10] But Cleveland acknowledges, on the other hand, that unilateral sanctions themselves arguably violate "international law principles of nonintervention and territorial jurisdiction,"[11] and so must "be consistent with broader principles of the international community, . . . rather than compete with or undermine the development of this system."[12]

The relationship between extraterritorial law and international law, however, does not always fit into such a neatly consistent vision of the international legal order. Like unilateral sanctions, extraterritorial law provides an instrument to "produce effects similar to those of binding international norms."[13] Yet recent developments in extraterritoriality challenge the notion that domestic legal mechanisms *must* comply with the precepts of international law in order to promote the internalization of international norms. Instead, the Alien Tort Statute[14] and the Foreign Corrupt Practices Act of 1977[15] demonstrate that extraterritorially applied statutes can encourage norm enunciation and internalization even when they push, or exceed, the international legal limits on prescriptive jurisdiction. However, an egregious transgression of the jurisdictional rules without any attempt at legal justification, such as the Iran and Libya Sanctions Act of 1996,[16] can still subvert a statute's ability to reinforce other international norms.

### *B. The Alien Tort Statute*

The Alien Tort Statute (ATS), which grants U.S. district courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,"[17] demonstrates that statutes that exceed limits on prescriptive jurisdiction can nevertheless reinforce international human rights

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[9] *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997) (book review) (theorizing that nations come to obey international law through repeated transnational interactions that force enunciations of global norms, which actors ultimately internalize and voluntarily follow).

[10] Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 87 (2001).

[11] *Id.* at 6.

[12] *Id.* at 7.

[13] Krisch, *supra* note 6, at 160.

[14] 28 U.S.C. § 1350 (2006).

[15] Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

[16] Pub. L. No. 104-172, 110 Stat. 1541 (codified as amended at 50 U.S.C.A. § 1701 note (West 2010)).

[17] 28 U.S.C. § 1350.

norms. In the seminal 1980 case *Filartiga v. Peña-Irala*,[18] the Second Circuit held that the "law of nations" described in the ATS included "established norms of the international law of human rights," such as the prohibition on torture,[19] and thus conferred federal subject matter jurisdiction over a claim brought by two foreign plaintiffs against a foreign government official who had allegedly tortured their son to death in Paraguay.[20] Subsequent cases reaffirmed and strengthened the *Filartiga* precedent — *Kadic v. Karadzic*[21] held that the ATS applied to claims against private individuals,[22] and *Doe I v. Unocal Corp.*[23] held that the ATS also applied to lawsuits against multinational corporations.[24] Finally, in *Sosa v. Alvarez-Machain*,[25] the U.S. Supreme Court confirmed the ATS's grant of jurisdiction to U.S. federal courts, so long as the relevant international legal norms were sufficiently defined and accepted.[26]

The international legal principle of "universal jurisdiction" allows states to suspend traditional jurisdictional boundaries for criminal prosecutions of certain international law violations.[27] However, the ATS goes farther by expanding federal jurisdiction to cover *private* individuals' *tort* lawsuits arising under international law. The legality of this kind of universal civil jurisdiction remains highly contentious.[28] Skeptics of the ATS note that universal jurisdiction "retain[s] its moorings in criminal law; that is, as a publicly instigated and publicly controlled action to vindicate the public interest. Indeed, the rationale for universal jurisdiction can hardly support any other approach."[29] In

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[18] 630 F.2d 876 (2d Cir. 1980).

[19] *Id.* at 880; *see also id.* at 884.

[20] *See id.* at 878.

[21] 70 F.3d 232 (2d Cir. 1995).

[22] *See id.* at 239.

[23] 395 F.3d 932 (9th Cir. 2002).

[24] *See id.* at 945–46.

[25] 542 U.S. 692 (2004).

[26] *See id.* at 724–25; *see also supra* pp. 1235–37.

[27] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

[28] *Compare* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 326 ("[J]udicial and congressional reliance on the universal jurisdiction concept is legally more problematic in the civil rather than criminal context."), *with* Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 153 (2006) ("[T]he well-accepted modern rationale for exercising universal jurisdiction to impose criminal penalties also justifies exercising it to provide civil remedies."). Although the Second Circuit justified the universal civil jurisdiction granted through the ATS by citing to the Restatement (Third) of Foreign Relations' comment that international law would not preclude such an exercise, *see* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (1987)), that text has been criticized as itself lacking citation to any authority, *see* Bradley, *supra*, at 343.

[29] M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1131–32 (1999); *see also* Eric Posner, *Harold Koh, the*

academia outside the United States, "the mainstream position" is that "the whole theory that there is such a thing as tort responsibility of individuals or non-state actors in international law is completely unsupported."[30] Finally, practitioners of international law also have alleged that the extraterritorial civil claims heard and enforced under the ATS do not support universal jurisdiction and thus violate international law. Three judges on the International Court of Justice noted that the ATS "has not attracted the approbation of States generally."[31] The government of Switzerland complained that the ATS was "inconsistent with established principles of international law," which "does not recognize the principle of universal civil jurisdiction over the foreign conduct of foreign defendants not affecting the forum State."[32] The United Kingdom, joined by Germany, similarly objected that the ATS "infringes the sovereign rights of States to regulate their citizens and matters within their territory."[33]

The ATS's grant of extraterritorial jurisdiction may strain the international limits on states' prescriptive jurisdiction, but it has also simultaneously provided a new mechanism to enunciate and enforce international human rights laws. Currently, "international mechanisms for [human rights] enforcement remain underdeveloped."[34] However, the ATS offers the U.S. federal court system as an additional forum for claims by foreign plaintiffs seeking redress for violations of international human rights law, "compensating for the weakness of international tribunals by [opening] effective national courts."[35] By vesting the power to bring these claims in the individual victims themselves, rather than nation-states, the ATS provides an alternative means to articulate human rights norms "[w]hen traditional diplomacy proves inadequate to the task of enforcing international law and justice."[36]

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*Alien Tort Statute, and Decent Respect to the Opinions of Mankind*, THE VOLOKH CONSPIRACY (Apr. 19, 2009, 10:24 PM), http://volokh.com/archives/archive_2009_04_19-2009_04_25.shtml#1240194282 ("[I]f international criminals are to be punished, they should face criminal, not tort, liability . . . . International law, grounded as it is in the consent of states, supports no other outcome.").

30 Kenneth Anderson, *Responses on Non-American Views of the ATS, and Marko Milanovic's Response to Eric Posner*, OPINIO JURIS (Apr. 20, 2009, 9:01 AM), http://opiniojuris.org/2009/04/20/responses-on-non-american-views-of-the-ats/ (quoting Marko Milanovic).

31 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 48 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

32 Brief for the United States as Amicus Curiae in Support of Petitioners at app. C at 7a–8a, Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008) (mem.) (No. 07-919).

33 *Id.* app. B at 4a.

34 Cleveland, *supra* note 10, at 3.

35 Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102, 115.

36 *Id.*; *see also* Jennifer Levine, *Alien Tort Claims Act Litigation: Adjudicating on "Foreign Territory,"* 30 SUFFOLK TRANSNAT'L L. REV. 101, 125 (2006) ("[ATS] litigation remains a vital tool for upholding international human rights . . . .").

Cleveland observes that the "periodic review of foreign state practices mandated by [unilateral sanctions] continually communicates to foreign states U.S. concern over human rights compliance . . . [and has] a cross-pollinating effect . . . [on] other members of the international community . . . ."[37] Similarly, extraterritorial ATS lawsuits bring concerns about human rights protections to the world's attention: they generate "unparalleled media coverage,"[38] push U.S. courts to address developments in international law,[39] and allow plaintiffs to "use[] corporations as proxies for what are essentially attacks on government policy."[40] ATS litigation thus sends "the right signals to brutal dictators and their acolytes that impunity for human rights violations will no longer be accommodated,"[41] while the accompanying publicity further pressures abusive governments to reform their human rights policies.[42] Moreover, an analogous "cross-pollination" has also occurred: ATS precedent has served as "a leading paradigm for foreign national courts" hearing international human rights claims.[43] For example, courts in Italy and England recently cited ATS caselaw in decisions opening their own courts and suspending the sovereign immunity of defendants for claims arising from violations of human rights law.[44] Finally, when foreign governments condone human rights abuses committed by multinational corporations, costly ATS lawsuits provide another way to pressure those businesses to account for their behavior.[45] Although ATS skeptics doubt that "an outside domestic tribunal with no real connection to the events" can produce "the same sort of internalization of norms and responsibility that would be associated with a local resolution,"[46] the ATS nevertheless offers a means to ar-

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[37] Cleveland, *supra* note 10, at 89.

[38] Slaughter & Bosco, *supra* note 35, at 102.

[39] *Id.* at 106.

[40] *Id.* at 107.

[41] Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1289 (2006).

[42] *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 459 (2001).

[43] Levine, *supra* note 36, at 130.

[44] *See id.* at 130–34 (discussing Jones v. Saudi Arabia, [2004] EWCA (Civ) 1394 (Eng.); Ferrini v. Repubblica Federale di Germania (Trib. Arezzo Nov. 3, 2000) (It.)).

[45] *See* Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635, 657–58 (2004). In just one example, Unocal, in response to an ATS claim alleging that it used slave labor in collaboration with the Burmese army, "started to put prime emphasis on human rights issues[,] . . . contract[ing] two independent human rights experts for monitoring . . . [and] develop[ing] an internal voluntary code of conduct in which human rights commitments occupy center stage." *Id.* at 657. Royal Dutch Shell, ExxonMobil, and Talisman Energy have all undertaken similar corporate responsibility projects in the wake of ATS human rights lawsuits against them. *See id.* at 657–59.

[46] Bradley, *supra* note 42, at 469.

ticulate these norms when local remedies are unavailable.[47] ATS human rights litigation has thus served to "promot[e] norm development and internalization"[48] by continuously bringing global attention to human rights violations and holding violators accountable in the United States when foreign states fail to do so.

### *C. The Foreign Corrupt Practices Act*

The increasingly aggressive extraterritorial application[49] of the Foreign Corrupt Practices Act of 1977 (FCPA), which provides for "criminal and civil liability for bribery of foreign officials,"[50] offers another insight into how extraterritorially applied statutes can encourage multilateral treaty compliance. The FCPA, as amended, represents the United States' domestic implementation of the Organisation for Economic Co-operation and Development's 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[51] (OECD Convention). Under the OECD Convention, signatories pledged to criminalize and prosecute the bribery of foreign public officials, and agreed that the territorial basis for the jurisdiction of such prosecutions "should be interpreted broadly so that an extensive physical connection to the bribery act is not required."[52] However, though nearly forty states ratified the OECD Convention, only four have carried out "active enforcement," while over twenty have conducted "little or no enforcement."[53] Simultaneously, the United States has asserted an increasingly extraterritorial interpretation of

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[47] *Cf.* Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 198 (2001) ("[W]hen [local forums] are unwilling or unable to commence proceedings, . . . other states must be able to allow suits to proceed in their courts in order to ensure that universal international norms are effectively enforced.").

[48] Cleveland, *supra* note 10, at 89.

[49] *See* Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2008, at 711, 715–16 (PLI Corp. Law & Practice, Course Handbook Series No. B-1665, 2008), WL 1665 PLI/Corp 711.

[50] Bruce E. Yannett, *Foreign Corrupt Practices Act: An Overview*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2010, at 721, 724 (PLI Corp. Law & Practice, Course Handbook Series No. B-1814, 2010), WL 1814 PLI/Corp 721.

[51] Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

[52] *Id.* cmt. 25, 37 I.L.M. at 10. The United States accordingly amended the FCPA to implement the OECD Convention into domestic law. *See* Yannett, *supra* note 50, at 725.

[53] FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INTERNATIONAL, OECD ANTI-BRIBERY CONVENTION PROGRESS REPORT 2009, at 10 (2009), *available at* http://www.transparency-usa.org/news/documents/FinalOECDProgressReport2009.pdf.

the FCPA,[54] bringing corruption prosecutions against foreign businesses for bribery occurring abroad in countries such as Indonesia[55] and China.[56]

The OECD Convention signatories clearly contemplated a degree of extraterritorial application of domestic anticorruption laws, yet developing nations like Indonesia and China never signed the OECD Convention and thus never consented to the extraterritorial enforcement of U.S. anticorruption law within their borders. Indeed, the most widely accepted international anti-bribery agreement, the 2003 United Nations Convention Against Corruption,[57] directly addresses the "Protection of Sovereignty" by limiting anticorruption efforts to "a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[58] The U.N. Convention emphatically refuses to endorse the kind of extraterritorial prosecutions of foreign bribery pursued by the United States.[59] It is thus not a surprise that "host country resentment" and "transnational tension and strife"[60] result when, under the FCPA, the United States "monitor[s] and seek[s] to control sensitive affairs host countries would prefer to govern themselves."[61]

American authorities have attempted to justify extraterritorial FCPA application by citing the "territorial" and "nationality" bases of prescriptive jurisdiction recognized under international law.[62] The

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[54] *See* SHEARMAN & STERLING LLP, IT DOESN'T TAKE MUCH: EXPANSIVE JURISDICTION IN FCPA MATTERS 1 (2009), *available at* http://www.shearman.com/files/Publication/606aa3a9-5a5d-496b-9814-0928ec64d1d0/ Presentation/ PublicationAttachment/ cd9070bc-be53-4141-ba1e-a9edf231cf4a/LT-030409-Expansive-Jurisdiction-in-FCPA-Matters.pdf.

[55] *See* Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2921–24 (2005).

[56] *See* Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 294–95 (2007).

[57] U.N. Convention Against Corruption, *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005). Currently, 148 countries are parties to the Convention. *See United Nations Convention Against Corruption*, U.N. OFFICE ON DRUGS & CRIME, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Jan. 30, 2011).

[58] U.N. Convention Against Corruption, *supra* note 57, art. 4, cl. 1.

[59] *See id.* art. 4, cl. 2 ("Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.").

[60] Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 433 (1999).

[61] Ashe, *supra* note 55, at 2928.

[62] *See* H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 300–02 (2001). For elaboration on the bases of prescriptive jurisdiction, see generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

United States' "extremely broad" assertions suggest that "the involvement of virtually any channel of [American] interstate commerce, including the means of communication and travel,"[63] or "virtually any act of a United States national"[64] in furtherance of a violation of the FCPA legitimately implicates FCPA jurisdiction. Scholars are skeptical of these unprecedentedly expansive readings of the traditional bases for jurisdiction.[65] Yet even accepting these readings, FCPA enforcement abroad still cannot overcome the additional "reasonableness" limitation on extraterritoriality, which requires consideration of whether the prescribing state's interests are involved.[66] "By failing to link a violation of U.S. law to a demonstrable prejudice of national interest, the jurisdictional reach of the FCPA exceeds the legitimate grasp of U.S. . . . authorities. Indeed, taken to its apparent limits, the amended FCPA would in effect be a general warrant against international bribery."[67] In short, the United States' stated justifications for extraterritorial FCPA enforcement have failed to convince many scholars either of its territorial and nationality bases, or of its ability to satisfy the "reasonableness" requirement under international law.

Yet despite the fact that FCPA prosecutions involving developing countries may violate the prohibition on extraterritoriality, unilateral American enforcement of the OECD Convention's anticorruption policy on a global scale has encouraged other convention signatories to observe the treaty. Ensuring widespread adherence to the OECD Convention has proved difficult for two reasons: the Convention has no enforcement mechanism,[68] and OECD members have incentives to avoid enforcement in order to secure a competitive advantage for their own businesses.[69] The resulting "collective action problem" can

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[63] Brown, *supra* note 62, at 317.

[64] *Id.* at 320.

[65] *See, e.g.*, *id.* at 358–59; Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?*, 1 ASIAN-PAC. L. & POL'Y J. 16:1, 16:38 (2000). Some scholars have been particularly scathing in their critiques. *See, e.g.*, Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 283–84 (1997).

[66] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

[67] Brown, *supra* note 62, at 359; *see also* Ashe, *supra* note 55, at 2928 ("[E]ven if the conduct in the territorial U.S. was material, one could question the interest of the United States in foreign bribery generally. . . . While the U.S. has an interest in not providing a safe haven for corrupt actors, this interest does not seem to be implicated by minute, transient contact with U.S. territory, let alone no contact at all." (footnote omitted)).

[68] *See* Benjamin W. Heineman, Jr. & Fritz Heimann, *Arrested Development: The Fight Against International Corporate Bribery*, NAT'L INT., Nov.–Dec. 2007, at 80, 83.

[69] *See* Ashe, *supra* note 55, at 2941.

be solved only "when [anticorruption] prohibitions are enforced globally."[70]

Motivated by lackluster OECD Convention adherence,[71] American prosecutions of foreign firms under the FCPA enforce the OECD Convention's bribery prohibitions internationally and help solve its collective action problem. Just as Cleveland observes that the international community has been encouraged to follow U.S. unilateral sanctions with its own actions,[72] extraterritorial FCPA enforcement encourages signatories to launch their own prosecutions in accordance with the OECD Convention. For instance, an American investigation of a foreign firm often triggers a parallel foreign prosecution. By pursuing an extraterritorial FCPA enforcement action against a Swedish firm for bribing the Iraqi government, the United States exposed corrupt practices that in turn impelled Sweden — an OECD Convention signatory — to launch its own prosecution.[73] Moreover, aggressive assertions of extraterritorial FCPA jurisdiction themselves may push foreign countries into action. The Department of Justice (DOJ) premised its jurisdiction in the investigation of Statoil ASA on the grounds that bribes were moved via bank transfers through American bank accounts — "a clear example of the DOJ utilizing the FCPA's expansive jurisdiction to spur foreign law enforcement to be more active and to impose more dissuasive sanctions."[74] Finally, by pressuring businesses outside the United States' territorial reach to adopt FCPA compliance regimes,[75] extraterritorial FCPA enforcement decreases the economic advantage gained by OECD Convention signatories who fail to enforce their own anti-bribery laws, and thus reduces the incentive for noncompliance. Practitioners have observed that increased extraterritorial FCPA enforcement has correlated with improved OECD Convention compliance: "Contemporaneously with the more aggressive pursuit of foreign bribery . . . by the DOJ and SEC, regulators in other states, particularly in OECD countries, have also shown increased initiative to pursue allegations of foreign bribery . . . ."[76] By prosecuting

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[70] Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 546–47 (2008).

[71] *See* SHEARMAN & STERLING LLP, *supra* note 54, at 4.

[72] *See* Cleveland, *supra* note 10, at 12.

[73] *See SEC v. AB Volvo*, FCPA.SHEARMAN.COM, http://fcpa.shearman.com (search for "SEC v. AB Volvo") (last visited Jan. 30, 2011); *see also U.S. v. Stuart Carson, et al.*, FCPA.SHEARMAN.COM, http://fcpa.shearman.com (search for "Control Components Inc. – Kim, Han Yong") (last visited Jan. 30, 2011) (describing an FCPA prosecution of a South Korean consultant for bribery of several South Korean officials that led to similar corruption investigations in South Korea).

[74] *United States v. Statoil ASA*, FCPA.SHEARMAN.COM, http://fcpa.shearman.com/?s=matter&mode=form&id=40 (last visited Jan. 30, 2011).

[75] *See* Yannett, *supra* note 50, at 770.

[76] *Id.*

foreign firms that compliant OECD Convention signatories would have investigated themselves, the United States has stimulated multilateral compliance with the treaty.

### *D. The Iran and Libya Sanctions Act*

The ATS and FCPA contrast with the Iran and Libya Sanctions Act of 1996 (ILSA), which required the President to, among other things, impose sanctions on foreign businesses that exported to Libya in contravention of United Nations Security Council resolutions.[77] The ILSA illustrates how the blatant and unapologetic contravention of the limits on prescriptive jurisdiction can undermine a statute's ability to reinforce other international norms. Following Libya's refusal to renounce terrorism in accordance with United Nations Security Council Resolutions 731,[78] 748,[79] and 883,[80] the United States, having already restricted U.S. companies' dealings with Libya, attempted through the ILSA to pressure foreign third parties to stop doing business with the Libyan regime.[81] The ILSA required that the President choose at least two sanctions from a list[82] to impose on "any person"[83] who "exported, transferred, or otherwise provided to Libya any goods, services, technology, or other items . . . prohibited under . . . Resolution 748 of the Security Council of the United Nations . . . or under . . . Resolution 883 of the Security Council of the United Nations."[84] The President could suspend the imposition of these sanctions once he certified that Libya had fulfilled the requirements of the Security Council resolutions.[85] However, in response to the European Union's objections to the ILSA's extraterritorial reach,[86] the United States never ultimately enforced the statute.[87]

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[77] *See* Pub. L. No. 104-172, § 5(b)(1), 110 Stat. 1541, 1543 (codified as amended at 50 U.S.C.A. § 1701 note (West 2010)).

[78] S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992).

[79] S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992).

[80] S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993).

[81] *See* Jonathan B. Schwartz, *Dealing with a "Rogue State": The Libya Precedent*, 101 AM. J. INT'L L. 553, 563–64 (2007).

[82] The possible sanctions included restrictions on loans, imports, purchases by the U.S. government, and export licenses. *See* Iran and Libya Sanctions Act of 1996 § 6.

[83] *Id.* § 5(c)(1).

[84] *Id.* § 5(b)(1).

[85] *Id.* § 8(b).

[86] *See* Charles Tait Graves, *Extraterritoriality and Its Limits: The Iran and Libya Sanctions Act of 1996*, 21 HASTINGS INT'L & COMP. L. REV. 715, 722 (1998).

[87] *See* Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. 625, 649 (2008). In 2004, President George W. Bush determined that Libya had fulfilled the Security Council's demands, and he suspended the Libya sanctions pursuant to section 8(b). *See* Stephen D. Elison, *International Law*, 68 TEX. B.J. 49, 49 (2005).

Had the United States enforced the Security Council's Libya sanctions against foreign firms, the ILSA would likely have reinforced the authority of the United Nations. U.N.-mandated sanctions regimes frequently suffer from weak implementation,[88] and overall international compliance with the Libya sanctions grew "increasingly frayed."[89] By imposing the legally binding Libya sanctions on foreign businesses whose home states had defied the United Nations, the ILSA would have "help[ed] [to] carry out the orders of the U.N. Charter"[90] and "reinforc[ed] Security Council resolutions,"[91] much as Cleveland has shown that unilateral sanctions can reinforce the U.N. Charter's human rights norms.[92]

However, the nearly universal condemnation of the ILSA as "'extraterritorially' illegal"[93] prevented it from reinforcing the authority of the United Nations. A "secondary sanction," in which a state uses its economic influence to discourage foreign firms from doing business with another nation, violates traditional limits on prescriptive jurisdiction because it "impinges on the rights of neutral states to regulate their own citizens and companies."[94] Indeed, the ILSA, deemed "the most radical extension of extraterritorial jurisdiction yet attempted by Congress,"[95] makes no effort to premise its punishments on a connection between the United States and the offender, nor does it "show even the semblance of respect for the principles of international law concerning the allocation of jurisdiction between States."[96] An attempt to defend the ILSA under international law would likely have failed, as foreign states had an interest in regulating their own investments in the Libyan economy, and this conduct did not have a sufficient effect on the United States to justify U.S. prescriptive jurisdiction.[97] As one commentator remarked, the ILSA "does little to reassure those who think that many members of the [U.S.] Congress do

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88 *See* Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 368 (2007).

89 Schwartz, *supra* note 81, at 564. For instance, nations like Ukraine continued to sell weapons to Libya, *see* Graves, *supra* note 86, at 726, in violation of Resolution 748's explicit ban, *see* S.C. Res. 748, ¶ 5(a), U.N. Doc. S/RES/748 (Mar. 31, 1992).

90 Georgia McCullough Mayman, *The Iran and Libya Sanctions Act of 1996: Enforceable Response to Terrorism or Violation of International Law?*, 19 WHITTIER L. REV. 137, 165 (1997).

91 Vaughan Lowe, *US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts*, 46 INT'L & COMP. L.Q. 378, 388 (1997).

92 *See* Cleveland, *supra* note 10, at 55–56.

93 Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 929 (2009).

94 *Id.* at 932–33; *see also supra* p. 1246.

95 Graves, *supra* note 86, at 715.

96 Lowe, *supra* note 91, at 385–86.

97 *See* Timothy S. Dunning, *D'Amato in a China Shop: Problems of Extraterritoriality with the Iran and Libya Sanctions Act of 1996*, 19 U. PA. J. INT'L ECON. L. 169, 198 (1998).

not understand international law at all, but see the world as one great federal State with the United States filling the role of the federal government."[98]

While foreign states have voiced concerns about the extraterritorial nature of the ATS and the FCPA, the threat the ILSA posed to state sovereignty provoked more extreme and concrete resistance. The European Union enacted a "blocking regulation" forbidding compliance with the ILSA and a "clawback" provision allowing for the recovery of damages and legal costs in European courts.[99] After the EU threatened to convene a World Trade Organization panel to rule on the statute's legality, the United States agreed to waive enforcement of the ILSA against European firms,[100] and foreign companies ultimately defied the Act without any prosecutions.[101] Resistance to the extraterritorial nature of the ILSA prevented it from reinforcing the legally mandated Security Council sanctions on Libya.

### *E. Conclusion*

Cleveland strives to demonstrate that the United States can properly tailor unilateral sanctions to comply with international rules,[102] as she fears that they might otherwise "frustrate[], rather than promote[], the broader international legal system."[103] However, recent experience suggests that while extraterritorial statutes require at least *some* legal justification in order to promote norm internalization — American authorities have tried, albeit erroneously, to base the extraterritoriality of the ATS and the FCPA on international principles, but made no such attempt with the ILSA — *strict* adherence to international law is not necessary. Indeed, international law is a contested field.[104] It comprises various institutions, treaties, customs, general principles, and scholarship,[105] all articulating competing legal principles that frequently develop in tension with one another. Among these principles, the rule of territorial jurisdiction is just one of many "[i]nstitutional fetishism[s]"[106] accorded value. The "international legal system" is thus not a unitary entity that extraterritoriality could simply "undermine."[107]

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98 Lowe, *supra* note 91, at 386.

99 Graves, *supra* note 86, at 722.

100 *See id.*; *see also supra* pp. 1249–50.

101 *See* Graves, *supra* note 86, at 724–28.

102 *See* Cleveland, *supra* note 10, at 48–86.

103 *Id.* at 49.

104 Alexander Betts, *Forced Migration Studies*, 23 J. REFUGEE STUD. 260, 263 (2010).

105 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102, 103 (1987).

106 Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 930 (1999).

107 Cleveland, *supra* note 10, at 49.

Instead, the "patchwork"[108] nature of the international legal order allows the norm internalization process to advance even through extraterritorial statutes that push the limits on prescriptive jurisdiction.

## VII. CHAPTER 15 AND CROSS-BORDER BANKRUPTCY

As economies became increasingly interconnected during the twenty-five years preceding the recent economic crisis,[1] businesses became increasingly multinational. By 2007, at the dawn of the crisis, foreign affiliates of multinational companies employed over 77 million people, controlled over $73 trillion worth of assets, and produced nearly $6.3 trillion (almost 11.5%) of the world's output, up from just $600 billion (about 5%) in 1982.[2] With an unprecedented number of multinational companies holding an unprecedented amount of assets confronting "an unprecedented contraction of activity and trade,"[3] the centuries-old questions of which laws should apply to cross-border bankruptcy proceedings[4] and which courts should apply these laws are now more important than ever.[5]

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[108] Rolf H. Weber, *Multilayered Governance in International Financial Regulation and Supervision*, 13 J. INT'L ECON. L. 683, 685 (2010).

[1] For evidence of this trend, see generally *Globalization: A Brief Overview*, ISSUES BRIEF (Int'l Monetary Fund, Wash., D.C.), May 2008. The crisis that halted this trend began in August 2007 with tremors in the U.S. subprime market and intensified in September 2008 with the failure of Lehman Brothers. For a discussion of the crisis's origins and effects, see INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK APRIL 2009: CRISIS AND RECOVERY 2–8 (2009) [hereinafter IMF, WORLD ECONOMIC OUTLOOK], *available at* http://www.imf.org/external/pubs/ft/weo/2009/01/pdf/text.pdf. For evidence that the crisis triggered a (slight) retrenchment among multinational companies, see UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2009: TRANSNATIONAL CORPORATIONS, AGRICULTURAL PRODUCTION AND DEVELOPMENT 8–9 (2009) [hereinafter UNCTAD, WORLD INVESTMENT REPORT], *available at* http://www.unctad.org/en/docs/wir2009overview_en.pdf.

[2] All values are reported at "current prices" and are thereby inflation adjusted. *See* UNCTAD, WORLD INVESTMENT REPORT, *supra* note 1, at 9 tbl.1.

[3] IMF, WORLD ECONOMIC OUTLOOK, *supra* note 1, at 1.

[4] "Bankruptcy" or "insolvency" proceedings govern the adjustment or collection of debts owed to creditors. Though "insolvency" may be the more commonly used term worldwide for such proceedings when they involve business debtors, in North America, "bankruptcy" tends to be used for business proceedings as frequently as it is used for consumer cases. Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2279 n.15 (2000). In line with North American practice, this piece uses the term "bankruptcy" throughout.

[5] These fundamental questions were addressed in the first volume of the *Harvard Law Review*. *See* John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888). And though of increased importance now, they were quite important to begin with both because bankruptcy law is unusually extensive in scope and because bankruptcy regimes around the world dramatically differ. On bankruptcy law's significant scope, see, for example, Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555, 566 (2001), which describes bankruptcy law as "meta-law" affecting all of the debtor's legal relationships. On the significant differences among bankruptcy regimes, see Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J.

As the central questions of cross-border bankruptcy have assumed even greater significance of late, U.S. bankruptcy courts have begun grappling with an ostensibly new way to answer them by applying Chapter 15,[6] which was incorporated into the Bankruptcy Code through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[7] (BAPCPA). Largely tracking the Model Law on Cross-Border Insolvency that the United Nations Commission on International Trade Law (UNCITRAL) had earlier promulgated,[8] Chapter 15 establishes a framework for U.S. bankruptcy courts "to provide effective mechanisms for dealing with cases of cross-border insolvency."[9] Notably, while the chapter governs the recognition of foreign proceedings and, in effect, the degree to which U.S. courts can allow the application of foreign bankruptcy provisions in the United States, neither Chapter 15 nor any other part of the Code extensively covers the opposite question — the degree to which U.S. courts can apply U.S. bankruptcy provisions abroad.

The Code's new framework for foreign extraterritoriality and the absence of a corresponding framework for U.S. extraterritoriality might lead one to believe that just as the stakes of cross-border bankruptcies are reaching new heights, Chapter 15 foolishly commits U.S. courts to defer to foreign bankruptcy law in some instances without a reciprocal commitment from foreign courts to defer to U.S. bankruptcy law in others. Despite this apparent asymmetry and the debate that Chapter 15 has incited among scholars,[10] the chapter has neither, on net, dramatically changed U.S. cross-border bankruptcy jurisprudence nor disadvantaged the United States. If U.S. courts perhaps recognize

105, 111 (2005); and Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2251 (2000).

6 11 U.S.C. §§ 1501–1532 (2006).

7 Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

8 UNCITRAL adopted the Model Law on May 30, 1997, "to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote . . . [c]ooperation between the courts and other competent authorities of this State and foreign States." Rep. of the U.N. Comm'n on Int'l Trade Law on Its 30th Sess., May 12–30, 1997, U.N. Doc. A/52/17; GAOR, 52d Sess., Supp. No. 17, Annex I pmbl. (July 4, 1997) (Annex I to the report is the Model Law on Cross-Border Insolvency). Shortly thereafter, the United Nations General Assembly approved the Model Law for transmission to interested governments as "increased cross-border trade and investment [had led] to greater incidence of cases where enterprises and individuals ha[d] assets in more than one State." G.A. Res. 52/158, pmbl., U.N. Doc. A/RES/52/158 (Jan. 30, 1998). According to Professor Jay Westbrook, who worked closely with congressional staff in drafting Chapter 15, the new chapter "was drafted to follow the Model Law as closely as possible." Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 719 & n.41 (2005).

9 11 U.S.C. § 1501(a).

10 *Compare* Westbrook, *supra* note 8 (supporting Chapter 15), *with* Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143 (2005) (criticizing Chapter 15).

more foreign proceedings under Chapter 15 than under its predecessor, they have also arguably become both more wary of foreign forum shopping and more willing to apply the rest of the Code abroad.

Ironically, the problem with these developments is not that they are overly far-reaching but that they are not far-reaching enough. As the ongoing Lehman Brothers bankruptcy[11] illustrates, even with Chapter 15, the United States still lacks a well-defined process for handling large, complex multinational bankruptcies and instead must rely on ad hoc cross-border protocols among private parties, an approach that Chapter 15 has actually encouraged. Yet this approach has been at best a mixed blessing in the Lehman proceedings and cannot be counted on to deliver reliable results going forward, amid what many practitioners fear will be "a global onslaught of . . . bankruptcies unprecedented in terms of scope, size and reach."[12]

### *A. Framing the Debate: Universalism Versus Territorialism*

Although it has proven limited in effect so far, Chapter 15 was initially heralded as a victory for "universalism."[13] One of two central frameworks for cross-border bankruptcy, universalism is predicated on the view that one court applying one country's bankruptcy laws should direct multinational proceedings.[14] In its "pure" form, universalism posits that only one judicial body — that of the debtor's home country — should play any role in cross-border cases.[15] In its more common "modified" form, which Chapter 15 adopts, universalism allows for courts outside the debtor's home country to open secondary cases supplementing the main case.[16] To varying degrees in either form, its advocates assert, universalism leads to a number of benefits,

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[11] *In re* Lehman Bros. Holdings Inc., No. 08-13555 (Bankr. S.D.N.Y. filed Sept. 15, 2008).

[12] Matt Miller, *Bankruptcy's Global Onslaught*, THE DEAL MAGAZINE (Mar. 6, 2009), http://www.thedeal.com/newsweekly/2009/03/bankruptcy%27s_global_onslaught/print/. Notably, despite the recent economic crisis, this "global onslaught" has yet to commence. However, one reason for the delay is that companies and governments have simply "put off the reckoning" through bailouts and loan extensions. *Id.* These extensions, coupled with maturing bonds from overly optimistic leveraged buyouts consummated at the peak of the pre-crisis era, lead some analysts to fear "a potential financial doomsday" beginning in 2012. Nelson D. Schwartz, *Tight Credit Seen as Corporate Debts Come Due*, N.Y. TIMES, Mar. 16, 2010, at A1.

[13] *See, e.g.*, Westbrook, *supra* note 8, at 716.

[14] Scholars generally assume that the substantive laws applied under a universalist framework are those of the home country administering the proceedings. *See, e.g.*, Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000). But the application of home country laws is not required by universalists as choice of law rules could lead to the unified application of foreign law instead. Bufford, *supra* note 5, at 109.

[15] Bufford, *supra* note 5, at 108.

[16] *Id.* at 108–09.

including more efficient allocation of capital,[17] maximization of liquidation value,[18] reduced costs,[19] and greater predictability.[20]

Questioning whether these benefits can be realized in a world with sharply differing bankruptcy regimes, others advocate a "territorialist" approach. Territorialism stems from what its most vocal supporter, Professor Lynn LoPucki, characterizes as "the default rule in every substantive area of law," namely, "that each country has the exclusive right to govern within its borders."[21] Territorialists thus contend that bankruptcy courts should have jurisdiction only over the assets of companies within their borders, and they accordingly call for proceedings to be initiated in each nation where a debtor has substantial assets.[22] Among court-appointed representatives from these proceedings, territorialism — at least in LoPucki's "cooperative" form — encourages cooperation[23] and in this sense is not altogether different from modified universalism. But territorialists object to the "all-or-nothing system" whereby "[c]ourts in other jurisdictions are required to follow the 'home' court's lead"[24] as territorialists argue that the home country of a multinational entity is in many instances indeterminate[25] and, even if discernible, subject to change to the detriment of creditors.[26]

### *B. Non-U.S. Extraterritoriality: A Consideration of Chapter 15*

Informed by the territorialist-universalist divide, practitioners and scholars from around the world have spent the past fifteen years attempting to find solutions to the management of multinational defaults.[27] Chapter 15 was a central result of their efforts. Although a product of U.S. legislation, Chapter 15 is more aptly described as the creation of UNCITRAL because it was drafted to mirror the Model

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[17] Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 778 (1999).

[18] *See* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 465 (1991).

[19] *See* Bebchuk & Guzman, *supra* note 17, at 778.

[20] Bufford, *supra* note 5, at 110.

[21] LoPucki, *supra* note 5, at 2218.

[22] *Id.* at 2218–19.

[23] *See id.*

[24] LoPucki, *supra* note 10, at 148.

[25] Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 713 (1999). LoPucki emphasizes two instances in which the determination of the home country is likely to be problematic: when a company's principal assets, operations, headquarters, and place of incorporation are in different countries and when a company consists of a group of corporations. LoPucki, *supra* note 5, at 2217.

[26] *See* LoPucki, *supra* note 5, at 2234–37.

[27] *See* Jay Lawrence Westbrook, *Multinational Financial Distress: The Last Hurrah of Territorialism*, 41 TEX. INT'L L.J. 321, 337 (2006) (reviewing LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005)).

Law[28] and was subject to scant congressional debate.[29] The actual impact of Chapter 15 has involved far more debate — though in fact the chapter has effected little substantive change.

Chapter 15 replaced section 304 of the Code, which had been enacted as part of the Bankruptcy Reform Act of 1978.[30] Section 304 permitted courts to grant "appropriate relief" in a case ancillary to a foreign proceeding brought by a foreign representative.[31] Commonly taking the form of an injunction stopping lawsuits and seizures of the debtor's U.S. assets,[32] § 304 relief was accorded on a discretionary basis. When deciding whether to grant such relief, courts looked to a number of factors in § 304, five of which are reproduced almost verbatim in § 1507(b) to guide courts in deciding whether to grant additional assistance.[33] Section 1507(b), however, elevates one of § 304(c)'s six factors — comity — to its introductory language "to make it clear that it is the central concept to be addressed."[34]

The degree to which § 304 itself advanced comity is a matter of great dispute, which reflects a larger debate about the section's place in the territorialist-universalist continuum. Noted universalist Professor Jay Westbrook argues that § 304 "for the first time codified United States notions of comity . . . in bankruptcy matters"[35] and was, on balance, interpreted by courts in universalist terms.[36] But scholars do not unanimously share this view of § 304: some emphasize that courts interpreted § 304 in drastically different fashions, with certain judges emphasizing comity and others adopting a far less deferential approach to foreign proceedings.[37] For example, in *In re Toga Manufacturing, Ltd.*,[38] the bankruptcy court read § 304 to require a U.S. creditor claim to be litigated in the United States because the creditor "would receive substantially unequal treatment" under Canadian

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[28] For a discussion of the Model Law, see *supra* note 8.

[29] LoPucki, *supra* note 10, at 166. Chapter 15's territorialist critics attribute this lack of debate to an effort among universalists to bring in universalism "through the back door." *Id.* The statute's universalist supporters, in contrast, stress Chapter 15's "virtually unanimous bipartisan support" and suggest "that it could have passed years earlier." Westbrook, *supra* note 8, at 719.

[30] Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532 (2006)).

[31] 11 U.S.C. § 304(a)–(b), 92 Stat. at 2560–61 (repealed 2005).

[32] Westbrook, *supra* note 8, at 717.

[33] *Compare* 11 U.S.C. § 304(c)(1)–(4), (6), 92 Stat. at 2561 (repealed 2005), *with* 11 U.S.C. § 1507(b)(1)–(5) (2006). *See also* H.R. REP. NO. 109-31, at 109 (2005).

[34] H.R. REP. NO. 109-31, at 109.

[35] Westbrook, *supra* note 8, at 718.

[36] *See id.* at 719.

[37] *See, e.g.*, Bebchuk & Guzman, *supra* note 17, at 784; Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 FORDHAM L. REV. 2543, 2550 (1996).

[38] 28 B.R. 165 (Bankr. E.D. Mich. 1983).

law.[39] In a contemporaneous case — *In re Culmer*[40] — another court reached a far different conclusion, noting that it would defer to foreign law unless "the evidence . . . indicate[d] that its application therein would be wicked, immoral, or violate American law and public policy."[41] The contrast between cases such as *In re Toga* and *In re Culmer*[42] is attributed by some to "conflicting policies" within § 304[43] and by others to a failure of judges to apply § 304 correctly.[44] Adherents to the latter view are split among those who criticize cases like *In re Culmer* as the product of universalists' "cho[osing] not to read § 304 as written"[45] and those who disapprovingly deem *In re Toga* aberrant.[46] Yet, whether or not *In re Toga* was atypical, universalists concede that § 304 was not so purely universalist as to be beyond improvement.[47]

Chapter 15 does not depart from § 304 in treating recognized foreign proceedings as ancillary,[48] but it applies to business debtors in a broader class of situations: when a foreign representative or foreign court seeks assistance in the United States with a foreign proceeding,[49] when assistance is sought in a foreign country with a case brought under the Code,[50] when both a foreign and a U.S. proceeding are pending concurrently,[51] and when creditors or other interested parties in a foreign country seek to commence or participate in a case or proceeding under the Code.[52] The first of these situations, outlined in subchapter III,[53] is the most relevant to the universalism-territorialism debate. Under subchapter III, § 1517 provides that if a foreign proceeding is

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[39] *Id.* at 170.

[40] 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

[41] *Id.* at 629.

[42] For a more recent contrast within the same circuit, compare *Bank of New York v. Treco* (*In re Treco*), 240 F.3d 148, 151 (2d Cir. 2001), where the court refused to turn over funds to the Bahamas on the ground that distribution of the funds would not accord with the Code under § 304(c), with *Argo Fund Ltd. v. Board of Directors of Telecom Argentina, S.A.* (*In re Board of Directors of Telecom Argentina, S.A.*), 528 F.3d 162, 173–75 (2d Cir. 2008), which recognized an Argentine bankruptcy case while noting that foreign proceedings need not afford creditors the same protection as U.S. law.

[43] *See* Burman, *supra* note 37, at 2550.

[44] *See* Bebchuk & Guzman, *supra* note 17, at 785.

[45] Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 84 (2005); *see also id.* at 84–85.

[46] *See* Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, *in* 31ST ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY & REORGANIZATION 935, 964–65 (PLI Comm. L. & Practice, Course Handbook Ser. No. 18810, 2009).

[47] *See* Westbrook, *supra* note 8, at 720 (suggesting that Chapter 15's "drafters were anxious to adopt those approaches . . . that [were] more cooperation-friendly than [§ 304]").

[48] *See* 11 U.S.C. § 1504 (2006).

[49] *Id.* § 1501(b)(1).

[50] *Id.* § 1501(b)(2).

[51] *Id.* § 1501(b)(3).

[52] *Id.* § 1501(b)(4).

[53] *Id.* §§ 1515–1524.

recognized at all, it can be recognized as either a "foreign main proceeding" if it is pending "where the debtor has the center of its main interests"[54] (COMI) or a "foreign nonmain proceeding"[55] if the debtor carries out "nontransitory economic activity"[56] in the foreign country. Recognition of a foreign proceeding as main or nonmain gives the U.S. bankruptcy court, at the request of the foreign representative, the discretion to "grant any appropriate relief"[57] provided that "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."[58] Yet the recognition of a proceeding as nonmain is likely to lead to "distinctly limited" assistance.[59] In contrast, main recognition requires the court to apply, among other things, the automatic stay to debtor property within the United States[60] and the Code's avoidance provisions for postpetition transfers.[61] However, even main recognition cannot prevent a creditor from filing an involuntary plenary case in the United States with respect to the debtor's U.S. assets.[62] And it cannot prevent the court from refusing to take action that is contrary to public policy[63] or ordering further assistance "consistent with the principles of comity."[64]

But the evidence on Chapter 15 cooperation is equivocal. On the one hand, courts applying Chapter 15 between October 2005 and June 2009 granted foreign recognition — whether main or nonmain — in the vast majority (around 94%) of cases.[65] This finding arguably evinces a level of universalist cooperation even greater than anticipated by Westbrook, who hypothesized that as many as 25% of cases would be subject to jurisdictional disputes.[66] On the other hand, two

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[54] *Id.* § 1517(b)(1).

[55] *Id.* § 1517(b)(2).

[56] *Id.* § 1502(2).

[57] *Id.* § 1521(a).

[58] *Id.* § 1522(a).

[59] Westbrook, *supra* note 8, at 723.

[60] 11 U.S.C. § 1520(a)(1).

[61] *Id.* § 1520(a)(2).

[62] *Id.* § 1528. While this provision seems inconsistent with the rest of the chapter's universalist stance, it largely lacks practical effect as "involuntary bankruptcies are highly disfavored in U.S. law and notoriously difficult to initiate." LoPucki, *supra* note 45, at 87. *But see* RHTC Liquidating Co. v. Union Pac. R.R. Co. (*In re* RHTC Liquidating Co.), 424 B.R. 714, 716 (Bankr. W.D. Pa. 2010) (denying motion to dismiss involuntary Chapter 7 case against Chapter 15 debtor).

[63] 11 U.S.C. § 1506.

[64] *Id.* § 1507(b); *see also id.* § 1507(a). In deciding whether such assistance is consistent with comity, the court is instructed to examine five factors. *See id.* § 1507(b)(1)–(5).

[65] *See* Jeremy Leong, Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases 13 (2010) (unpublished manuscript) (on file with the Harvard Law School Library), *available at* http://works.bepress.com/jeremy_leong/1.

[66] Westbrook, *supra* note 27, at 327. The 94% foreign recognition rate under Chapter 15 suggests — but does not necessarily require — a lower degree of dispute.

additional developments suggest that Chapter 15 jurisprudence is not as universalist as it may appear.

First, a recent study indicates that under Chapter 15, courts have shown greater reluctance to grant foreign recognition to petitions connected with proceedings in "haven" jurisdictions.[67] The study's author argues that "[t]his denial of cooperation"[68] accelerated after *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*,[69] in which the court refused to grant any recognition to proceedings in the Cayman Islands linked to two failed hedge funds.[70] In the course of reaching this decision, Judge Lifland suggested that Chapter 15 imposed a more "rigid procedural structure for recognition of foreign proceedings" than did § 304.[71] A subsequent Cayman Islands hedge fund proceeding, *In re Basis Yield Alpha Fund (Master)*,[72] elicited a similar response from Judge Lifland's colleague Judge Gerber.[73]

While reduced recognition of haven proceedings is a "denial of cooperation" that even universalists would welcome, the other "anti-cooperative" development under Chapter 15 is more difficult for universalists to defend. The same study finding that U.S. courts have usually granted foreign recognition under Chapter 15 reveals that U.S. courts have tended to protect U.S. creditors. In most cases, courts granting recognition have not entrusted assets for distribution abroad, and even those that have entrusted assets tended to do so only subject to qualifications guarding U.S. creditors.[74] Moreover, among the few cases that have resulted in entrustment without qualification, a substantial fraction appeared not to involve U.S. creditor claims.[75]

Though these findings may not necessarily evince overarching U.S. antipathy toward foreign bankruptcy regimes, at the very least they suggest that Chapter 15 has not ushered in an era of unfettered deference to foreign proceedings. A key reason may be the lack of global acceptance of the Model Law: as of this writing, the United States was one of only eighteen countries to have adopted legislation based on the Model Law.[76] And, as discussed below in the context of the Lehman

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[67] Andrew B. Dawson, *Offshore Bankruptcies*, 88 NEB. L. REV. 317, 340 (2009).

[68] *Id.*

[69] 374 B.R. 122 (Bankr. S.D.N.Y. 2007); *see* Dawson, *supra* note 67, at 338–40.

[70] *In re Bear Stearns*, 374 B.R. at 132.

[71] *Id.*

[72] 381 B.R. 37 (Bankr. S.D.N.Y. 2008).

[73] *See id.* at 46, 55 (denying summary judgment motion for grant of foreign main recognition).

[74] *See* Leong, *supra* note 65, at 13 (finding orders for entrustment in only forty of eighty-eight cases, twenty-eight of which included qualifications).

[75] *See id.* at 14 (reporting that of the twelve entrustment cases without qualification, four did not appear to affect U.S. creditors).

[76] *Status: 1997 — Model Law on Cross-Border Insolvency*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Jan. 30, 2011). The

proceedings, courts in nations that have accepted the Model Law may still issue conflicting rulings. Thus, lacking a guarantee that courts of other nations — whether Model Law adherents or not — will cooperate, U.S. courts may be encouraged to act uncooperatively.[77]

### *C. U.S. Extraterritoriality: Beyond Chapter 15*

Chapter 15 also does not significantly further cooperation because it applies only to debtors already subject to a foreign proceeding.[78] It is therefore generally silent on U.S. bankruptcy law's extraterritorial reach.[79] The basis for this reach tends to be § 541, which provides that an "estate is comprised of . . . property, *wherever located*."[80] But the legislative history accompanying the Bankruptcy Reform Act of 1978 does not provide any insight into the meaning of "wherever located,"[81] and Congress did not take up the issue during the BAPCPA reform process. Moreover, the Supreme Court has refused to address the Code's extraterritoriality despite lower court divisions on the cross-border reach of certain provisions.[82]

Notwithstanding these divisions, there has recently been strong support for extraterritorial application of the Code.[83] Notably, *French v. Liebmann* (*In re French*)[84] was the first decision to hold that Congress intended for § 548 (governing fraudulent transfers) to be applied abroad.[85] And the Southern District of New York recently concluded in *In re Gucci*[86] that the automatic stay applied to assets located overseas.[87] Courts have also indicated a willingness to facilitate extraterri-

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British Virgin Islands, a territory of the United Kingdom, has also adopted Model Law–type legislation, but, notably, both China and Germany have not. *See id.*

77 *See* Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 62–63 (2001) (discussing this "prisoners' dilemma" of cross-border bankruptcy).

78 *Compare* 11 U.S.C. § 1502(1) (2006) (defining "debtor" as "an entity that is the subject of a foreign proceeding"), *with id.* § 101(13) (defining "debtor" more broadly).

79 Indeed, even if another Model Law nation pledged to always allow U.S. courts to apply U.S. law abroad upon finding the United States to be the COMI, it still would not immediately follow from Chapter 15 that U.S. courts could apply the Code extraterritorially.

80 11 U.S.C. § 541(a) (emphasis added).

81 *See* T. Brandon Welch, Comment, *The Territorial Avoidance Power of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 553, 562–63 (2008).

82 *See, e.g.*, French v. Liebmann, 549 U.S. 815 (2006) (mem.) (rejecting a petition for certiorari on the extraterritoriality of fraudulent transfer provisions codified in § 548, *see* Petition for Writ of Certiorari with Appendix, *French*, 549 U.S. 815 (No. 05-1459), 2006 WL 1358435).

83 *Cf.* Welch, *supra* note 81, at 561 (noting that only a minority of cases find insufficient authorization for the Code's extraterritorial application).

84 440 F.3d 145 (4th Cir. 2006).

85 *Id.* at 152. *But see In re* Midland Euro Exch. Inc., 347 B.R. 708, 717–18 (Bankr. C.D. Cal. 2006) (noting the circuit split on § 548 in light of *In re French* and finding no congressional intent to apply the section extraterritorially).

86 309 B.R. 679 (S.D.N.Y. 2004).

87 *Id.* at 683.

toriality through the "back door" of § 109, which provides that a debtor is "a person that . . . has . . . property in the United States."[88] Courts have tended to read this provision capaciously, imposing "virtually no formal barrier"[89] to foreign debtors filing as U.S. plenary proceedings what really should be ancillary foreign main proceedings subject to Chapter 15 recognition.[90]

But courts' expansive interpretation of the eligibility requirement and their willingness to apply the Code extraterritorially does not mean that they are wholly insensitive to comity concerns. Even before the enactment of Chapter 15, which had the intention, if not necessarily the effect, of promoting comity,[91] U.S. courts refrained from applying the Code extraterritorially out of "the mutual interest of all nations in smoothly functioning international law,"[92] per *Maxwell Communication Corp. v. Société Générale* (*In re Maxwell Communication Corp.*).[93] Indeed, the § 304 decision *In re Maxwell*, which implicated over 400 subsidiaries across the globe,[94] is often cited as an example of international law's smooth functioning in a complex cross-border bankruptcy.[95] Yet international law functioned well in *In re Maxwell* precisely because, in its public form, it hardly had to function at all — the case was the first to employ a private cross-border protocol to harmonize proceedings.[96]

### *D. Lehman Brothers and Cross-Border Insolvency Protocols*

Such "case-specific, private international insolvency treaties"[97] have become even more significant in complex cross-border bankruptcies in the wake of the Model Law's adoption.[98] Per the Model Law, Chapter 15 explicitly allows for protocols,[99] and they have been used in several

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88 11 U.S.C. § 109(a) (2006).

89 *In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 9 (Bankr. S.D.N.Y. 2003) (quoting 2 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 109.02[3] (15th rev. ed. 2003)).

90 *See, e.g.*, *In re* McTague, 198 B.R. 428, 431 (Bankr. W.D.N.Y. 1996) (finding just $194 in a U.S. bank account sufficient property for a plenary case in the United States). But such cases can be dismissed for other reasons. *See, e.g.*, *In re* Yukos Oil Co., 321 B.R. 396, 411 (Bankr. S.D. Tex. 2005) (recognizing eligibility but dismissing under § 1112).

91 *See* H.R. REP. NO. 109-31, at 18, 109 (2005).

92 *Id.* at 1053.

93 93 F.3d 1036 (2d Cir. 1996).

94 *See* Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L L.J. 587, 590 (1998).

95 *See, e.g.*, Westbrook, *supra* note 4, at 2321.

96 *See* Flaschen & Silverman, *supra* note 94, at 591.

97 *Id.* at 589.

98 *See* Paul H. Zumbro, *Cross-Border Insolvencies and International Protocols — An Imperfect but Effective Tool*, 11 BUS. L. INT'L 157, 164 (2010).

99 *See* 11 U.S.C. § 1527(4) (2006).

recent cross-border cases.[100] Among these, the ongoing Lehman proceedings are especially instructive, for they illustrate the shortcomings of resorting to "private treaties" in place of a well-defined judicial or statutory framework for cross-border bankruptcy.

Lehman Brothers Holdings Inc. (LBHI) filed for Chapter 11 protection in New York on September 15, 2008.[101] It thereby spawned "the largest and most complex [bankruptcy] in history"[102]: not only would twenty-two additional LBHI affiliates go on to file in New York,[103] but, with Lehman consisting of over 7,000 legal entities in forty countries, its collapse would ultimately result in more than seventy-five distinct proceedings across the globe.[104] Because of "the lack of an international governing body with uniform oversight over these proceedings," LBHI and its U.S. affiliates in Chapter 11 reached the first-ever multilateral cross-border insolvency protocol with thirty-three non-U.S. Lehman entities.[105] Approved by the bankruptcy court on June 17, 2009,[106] the protocol emphasizes communication among parties,[107] asset preservation,[108] and judicial economy.[109]

As laudable as these goals may be, the protocol suffers from two main problems that also afflict the Model Law and Chapter 15. First, since the protocol is not legally enforceable, its aims are largely aspirational.[110] A similar shortcoming applies to the Model Law and Chapter 15. Indeed, the Lehman case illustrates that the Model Law cannot prevent courts in different jurisdictions from reaching opposite conclusions about the same issue: after a court in another Model Law juris-

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100 Other recent major bankruptcies employing cross-border protocols include those of Calpine, Nortel Networks, Quebecor, and Smurfit-Stone. *See* Zumbro, *supra* note 98, at 158 n.2.

101 Voluntary Petition (Chapter 11), *In re* Lehman Bros. Holdings Inc. (No. 08-13555) (Bankr. S.D.N.Y. Sept. 15, 2008). For an analysis of why Lehman Brothers failed, see 1 Report of Anton R. Valukas, Examiner at 43–163, *In re* Lehman Bros. Holdings Inc. (No. 08-13555) (Bankr. S.D.N.Y. March 11, 2010).

102 Press Release, Lehman Bros. Holdings Inc., Lehman Group of Companies Signs Cross-Border Insolvency Protocol 1 (May 26, 2009), *available at* http://chapter11.epiqsystems.com/LBH/Project/default.aspx (follow "Estate Information" hyperlink).

103 *General Information*, LEHMAN BROTHERS HOLDINGS INC. (CHAPTER 11), http://chapter11.epiqsystems.com/LBH/Project/default.aspx (last visited Jan. 30, 2011).

104 Press Release, Lehman Bros. Holdings Inc., *supra* note 102, at 1.

105 *Id.*; *see* Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies (May 12, 2009) (on file with the Harvard Law School Library), *available at* http://www.globalturnaround.com/cases/Lehman%20Protocol.pdf.

106 Order Approving the Proposed Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, *In re* Lehman Bros. Holdings Inc. (No. 08-13555) (Bankr. S.D.N.Y. June 17, 2009).

107 *See* Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, *supra* note 105, §§ 4–6.

108 *See id.* § 7.

109 *See id.* § 8.1.

110 *Id.* § 1.2.

diction had validated a contractual provision implicating an LBHI subsidiary's priority over certain collateral,[111] a U.S. bankruptcy court declared the provision unenforceable[112] while recognizing that its "decision place[d] [the defendant] in a difficult position in light of the [earlier] contrary determination."[113] That a court can act uncooperatively in the face of a statutory framework emphasizing cooperation suggests that parties to a privately negotiated protocol that is explicitly not enforceable would have little trouble acting obstinately.

In addition to lacking a mechanism to enforce cooperation among the entities to which it does putatively apply, the Lehman protocol mirrors the Model Law in not applying to certain major parties at all, for three of Lehman's largest units refused to sign the agreement.[114] The decision of U.K.-based subsidiary Lehman Brothers International (Europe) (LBIE) to abstain from the framework was particularly significant. LBIE filed $101 billion in claims against LBHI[115] — an amount that constituted nearly 10% of all claims filed against U.S.-based Lehman debtors[116] and that on its own would have made the LBHI bankruptcy among the largest in history. Through bilateral negotiations with LBIE, LBHI has since considerably reduced these claims.[117] Yet, as it reported this news, the LBHI estate conceded to the U.S. bankruptcy court that foreign affiliates remained its "biggest obstacle" to securing approval for a revised plan by March 2011.[118]

### *E. Conclusion*

Amid an expected "global onslaught" of defaults, such "obstacles" are unlikely to vanish even if future bankruptcies do not come close to eclipsing Lehman's. Chapter 15 has not done enough to prepare the United States for these obstacles. In further encouraging private cross-

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111 Perpetual Tr. Co. Ltd. v. BNY Corporate Tr. Servs. Ltd., [2009] EWCA (Civ) 1160, [60]–[68] (Eng.).

112 *In re* Lehman Bros. Holdings Inc., 422 B.R. 407, 422 (Bankr. S.D.N.Y. 2010).

113 *Id.* at 423.

114 *Lehman Protocol Divides Administrators*, THE BANKER (May 27, 2009), http://www.thebanker.com/Archive/News/Lehman-protocol-divides-administrators.

115 Lindsay Fortado & Linda Sandler, *Lehman Europe in Talks on $101 Billion Claim Reduction Proposal*, BLOOMBERG BUSINESSWEEK (Apr. 19, 2010), http://www.businessweek.com/news/2010-04-19/lehman-europe-in-talks-on-101-billion-claim-reduction-proposal.html.

116 *See* ALVAREZ & MARSAL, LEHMAN BROTHERS HOLDINGS INC.: THE STATE OF THE ESTATE 23 (Sept. 22, 2010) (on file with the Harvard Law School Library), *available at* http://dm.epiq11.com/LBH/document/GetDocument.aspx?DocumentId=1265151.

117 *See id.* at 29.

118 Linda Sandler & David McLaughlin, *Lehman to File New Reorganization Plan, Says It's Cooperating with Probes*, BLOOMBERG (Sept. 22, 2010), http://www.bloomberg.com/news/2010-09-22/lehman-to-file-new-reorganization-plan-in-4th-quarter-update1-.html (internal quotation marks omitted).

border protocols formulated after debtors enter bankruptcy, it exposes parties to the uncertainty and potential futility of ex post private contracting. Thus, what is needed is a strong public cross-border protocol that all countries actually adopt and follow. If this familiar plea sounds quixotic given the absence of such a treaty despite "decades of efforts,"[119] the world should not ignore it.[120] With over $700 billion in high-yield debt coming due beginning in 2012,[121] it cannot afford to.

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119 *See* LoPucki, *supra* note 25, at 700.

120 For systemically important financial institutions, regulators are not ignoring it. Recognizing that the world has "lacked the tools and the capacity to co-ordinate resolution across borders," the Financial Stability Board (FSB), made up of regulators from the globe's economic powers, aims to improve "resolution regimes to ensure that any financial institutions can be resolved without disruptions to the financial system." Letter from Mario Draghi, Chairman, FSB, to G20 Leaders (Nov. 9, 2010) (on file with the Harvard Law School Library). The FSB's proposals will be precatory, however, because any changes must be "enacted by the relevant national financial authorities." *Mandate*, FINANCIAL STABILITY BOARD, http://www.financialstabilityboard.org/about/mandate.htm (last visited Jan. 30, 2011).

121 Schwartz, *supra* note 12.