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CLASH OF THE TITANS: COLLISIONS OF ECONOMIC REGULATIONS  
AND THE NEED TO HARMONIZE PRESCRIPTIVE JURISDICTION RULES

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## INTRODUCTION

The traditional field of conflict of laws involved private laws and private actors.<sup>1</sup> Thus, issues would arise when a vehicular accident took place in Ontario, involving Canadian victims and a New York State driver, when the forum judge had to decide which country's law should be applied to the situation.<sup>2</sup> Solutions varied across the globe. Most of Europe adopted a strict bilateral approach, called the Savigny-method, where each category of legal situations was governed by a specific choice-of-law rule.<sup>3</sup> In the 1960s, the United States "rebelled" when many states adopted the interest analysis approach. Developed by the great Currie, this approach advocated flexibility by adopting substance-oriented choice-of-law rules.<sup>4</sup> During the post-Currie era, scholars advocated a variety of approaches to the choice-of-law problem.<sup>5</sup> The debate focused on the need to reconcile overlapping and possibly conflicting private law rules.

In the area of public laws and regulations, conflict-of-law rules had no place whatsoever. The term "public law taboo" was developed to describe the state of affairs where it was unthinkable for the forum judge to even consider foreign public law.<sup>6</sup> Instead, if the traditional conflict-of-law rules led the forum judge toward the inevitable application of foreign public laws, the case would simply be dismissed.<sup>7</sup> Moreover, courts resolved the issue of when to apply American public laws to conduct occurring abroad by

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<sup>1</sup> The discipline of conflict of laws is also sometimes referred to as private international law. Thus, these two terms will be used interchangeably throughout this article.

<sup>2</sup> See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

<sup>3</sup> F. VON SAVIGNY, *SYSTEM DES HEUTIGEN ROMISCHEN RECHTS* (1849).

<sup>4</sup> CURRIE, *SELECTED ESSAYS* (1963). For a general description of the American choice-of-law revolution, see Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 *Recueil des Cours* 91 (1964).

<sup>5</sup> See e.g., Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 *N.Y.U. L. REV.* 267, 295-30 (1966).

<sup>6</sup> See Philip J. McConaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 *STAN. J. INT'L L.* 255, 255-256, n. 2 (1999) [hereinafter McConaughay] (describing that the phrase "public law taboo" seems to have originated with Professor A. Lowenfeld). See also Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for Their Interaction*, 163 *Recueil des Cours* 311, 322 (1979) [hereinafter Lowenfeld].

<sup>7</sup> See Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 *VA. J. INT'L L.* 931, 935-936 (2002) [hereinafter Buxbaum]; Donald T. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Litigation*, 22 *OHIO ST. L.J.* 586, 617 (1961); see also McConaughay, *supra* note 6, at 262 (tracing this principle to the ancient refusal of states to enforce penal or revenue laws of other states).

developing so-called prescriptive jurisdiction rules. These rules dictated when the application of domestic regulations extraterritorially was warranted.<sup>8</sup>

In recent decades, the conflict-of-laws paradigm changed to encompass conflicts of public laws. As international commerce intensified, economic operators became frequently exposed to the mandatory laws and regulations of multiple countries.<sup>9</sup> This situation gave rise to regulatory clashes. I will refer to these as clashes of the titans because the new conflicts involve mandatory regulations developed by state authorities in order to govern certain types of conduct at all times without regard for the internationality of given economic operators.<sup>10</sup> Each state regulation of this type is a titan in itself, and clashes of such regulations can often lead to diplomatically embarrassing scenarios for the states involved and economically catastrophic consequences for the operators.

The traditional field of conflict of laws proved inept at resolving the new regulatory puzzles because of the public law taboo and because of its inherent nature of regulating conflicts of private laws.<sup>11</sup> Moreover, American prescriptive jurisdiction rules, designed to determine when American public laws could be applied extraterritorially, answered only half of the inquiry. Courts were concerned with the problem of applying domestic law to an international situation. They did not look to assess whether foreign public laws would be better suited to govern the given situation.<sup>12</sup> European courts followed a similar approach to their American counterpart.<sup>13</sup> The overall situation quickly became troublesome. Economic

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<sup>8</sup> Buxbaum, *supra* note 7, at 935-936. Note that traditional conflict of laws issues are resolved by reference to the Restatement (Second) of the Law of Conflict of Laws (American Law Institute 1971) [hereinafter Conflict of Laws Restatement], whereas the type of conflict raised by questions of extraterritoriality is considered in the Restatement (Third) of Foreign Relations Law of the United States (American Law Institute 1987) [hereinafter Foreign Relations Restatement], which classifies the categories of jurisdiction as jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. Foreign Relations Restatement at 401.

<sup>9</sup> See, e.g., Buxbaum, *supra* note 7, at 933.

<sup>10</sup> *Id.* at 934-936.

<sup>11</sup> Whether it is appropriate to use a method developed in the area of private law to address questions of the scope of public regulatory law is an issue that has sparked vigorous debate. See e.g. Lowenfeld, *supra* note 6; see generally Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982); Jurgen Basedow, *Conflicts of Economic Regulations*, 42 AM. J. COMP. L. 423 (1994).

<sup>12</sup> Buxbaum, *supra* note 7, at 935-936 (explaining that a court simply determines whether a particular U.S. regulation applies to a transaction, but that the court does not choose between forum regulatory law and foreign regulatory law).

<sup>13</sup> For example, in the antitrust arena, Europeans adopted a test very similar to the

operators remained exposed to several countries' mandatory public regulations. Each country had its own prescriptive jurisdiction rules which could vary greatly from continent to continent and region to region. No universal rules addressed the situation.

There is a need to address the problem and to tame the clashing titans. The state of affairs as described above remains almost the same today. Regulatory clashes occur frequently and there have been few attempts to harmonize different prescriptive jurisdiction rules. When important industries are involved, certain clashes raise serious diplomatic concerns.<sup>14</sup> Other clashes, although less diplomatically sensitive, nonetheless lead to regulatory nightmares for the economic operators involved.

Part I of this article describes regulatory clashes involving different states' public laws, and then focuses on certain areas of law, including antitrust, securities, and Internet commerce and publishing, where such clashes are most likely to take place. Part II focuses on the different solutions to this regulatory puzzle invoked by scholars, advocating either territorial-based or substance-based approaches. Part III then critiques the two approaches, while emphasizing the need to address the issue from a global perspective, that is, by seeking to harmonize jurisdiction-allocating rules on an international level.

#### I. GLOBALIZATION AND CONFLICTS OF ECONOMIC REGULATIONS

In today's globalized world, economic operators no longer function within one national system. Rather, their commercial activity tends to span across regions, countries, and continents. As their global entrepreneurship grows, so does their exposition to different countries' mandatory regulations.<sup>15</sup> When different countries' regulations start overlapping, the operator often finds itself exposed to multiple conflicting laws. This can lead to both over-regulation<sup>16</sup> and under-regulation if there are no laws at all and

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American "effects" jurisdiction. See Joined Cases 89 & 85, *Woodpulp*, 1988 E.C.R. 5193, 5233, 5246 (1988).

<sup>14</sup> See, e.g., the Boeing/McDonnell Douglas or GE/Honeywell transactions. Buxbaum, *supra* note 7, at 940, n. 40.

<sup>15</sup> Buxbaum, *supra* note 7, at 940 ("Issuers engage in securities offerings outside their home jurisdiction corporations with substantial activities in multiple countries merge with others; multinational corporations with assets, debtors and creditors in multiple countries file for bankruptcy – in each such case, more than one state may assert prescriptive jurisdiction on the basis of conduct within its territory").

<sup>16</sup> Buxbaum, *supra* note 7, at 940 (noting that the an increase in cross-border business activity created an increase in the incidence of overlapping regulatory jurisdiction); Horatia Muir-Watt, *Special Feature: Cyberge Conflicts Law: Yahoo! Cyber-Collision of Cultures: Who Regulates?* 24 MICH. J. INT'L L. 673, 677 (2003) [hereinafter Muir-Watt] (noting the potential for over-regulation in the area of cyber conflicts of law).

countries refuses to regulate the commercial activity at stake.<sup>17</sup> Areas in which such over- and under-regulation occur include, *inter alia*, antitrust law, securities regulations, and Internet publishing and commerce.

*A. Regulatory Clashes Lead to Over- or Under-Regulation*

An operator based in Ohio and engaged in cross-border commerce cannot expect that purely local Ohio statutes will govern its activity. Rather, the operator should reasonably foresee its worldwide susceptibility to laws of all those countries where it has commercial dealings. Invariably, different countries have different laws and these countries have different rules for determining when these laws apply to specific types of conduct. Such rules, which determine the precise reach of a country's laws, are typically referred to as prescriptive jurisdiction rules.<sup>18</sup>

In an ideal world, all countries would have substantially similar prescriptive jurisdiction rules and an economic operator could easily determine which countries would and could impose their rules on it. Alas, prescriptive jurisdiction rules vary from country to country and often subject the same operator to so-called "true conflict" situations.<sup>19</sup> When laws of country A dictate a certain result which laws of country B negate, it places the operator in an impossible scenario. The operator cannot comply with both countries' laws, but risks sanctions or liability for lack of compliance in the country whose rules it chooses not to obey. Such instances of over-regulation are problematic to say the least. Conversely, when country A's laws point to country B, and country B's laws point to country A the result is under-regulation or an operator who is free from regulation.

In a scenario involving multiple countries, the operator's compliance calculus becomes impossible to perform in an accurate manner. Once the operator makes compliance mistakes and wrongly assumes that it need not obey a specific country's regulations, it exposes itself to costly legal sanctions. This may hinder international commerce by placing externalities

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<sup>17</sup> See McConnaughay, *supra* note 6, at 285-87 (discussing problems of under-regulation in the area of public laws conflicts).

<sup>18</sup> See Foreign Relations Restatement, *supra* note 8, at 401. Note that the terms legislative and prescriptive jurisdiction tend to be used synonymously by scholars, and I shall refer to these two terms interchangeably.

<sup>19</sup> See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), where the U.S. Supreme Court determined that the situation at issue was not one of "true conflict" because the U.S. regulation at question was restrictive, whereas the competing British law was merely permissive; the operator could thus comply with both laws simultaneously. The terminology "true conflict" and "false conflict" was first used by Currie in the context of traditional choice-of-law analysis. See Currie, *supra* note 4.

on international commercial activities.<sup>20</sup> Such externalities are unpleasant for the operator and burdensome on the development of international commerce.<sup>21</sup>

### *B. Specific Regulatory Areas Exposed to Clashes of Public Laws*

In the United States, prescriptive jurisdiction rules work differently in different legal subfields. Regulatory areas that have been most exposed to over- or under-regulation because of clashes between American laws and other countries' laws include antitrust, securities regulations, and Internet publishing and commerce.

#### 1. Antitrust

The antitrust area experienced regulatory clashes at the beginning of the 20<sup>th</sup> century, causing the Supreme Court to adopt a purely territorial approach: United States' antitrust laws applied only to conduct occurring within American territory.<sup>22</sup> This approach led to significant under-regulation. For example, economic operators removed themselves from the reach of the Sherman Act simply by crossing the Rio Grande and by engaging in illegal activities in Mexico. Moreover, it quickly became apparent that the purely territorial rule no longer corresponded to the realities of international commerce. Thus, following World War II, American judges modified the territorial approach to hold that any conduct that was intended to produce effects within the United States and did, in fact, produce such effects could be subjected to the Sherman Act.<sup>23</sup> With extraterritorial application of the Sherman Act, American judges solved some under-regulation issues by making evasion of antitrust laws difficult.

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<sup>20</sup> Scholars have already noted that a proportional allocation of prescriptive jurisdiction among nations could help achieve the facilitation of international commerce, by increasing the likelihood of developing predictability in the system. *See, e.g.*, Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 318 (1982); Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 503 (1989); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 998 (1994).

<sup>21</sup> *See* McConaughay, *supra* note 6, at 275-276 (describing scholarship that focused on the need to facilitate international commerce by developing a system that would allocate legislative authority among the international community in order to avoid overburdening operators).

<sup>22</sup> *See generally*, *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

<sup>23</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). This case gave rise to the infamous "effects" doctrine that is used to determine the extra-territorial jurisdictional reach of the Sherman Act.

The extraterritorial application of American antitrust laws immediately caused an over-regulation problem each time the country where the alleged illegal activity took place also sought to regulate conduct based on a purely territorial theory of prescriptive jurisdiction.<sup>24</sup> American courts attempted to temper the over-regulation problem by resorting to interest-balancing methods and by including a “reasonableness” inquiry into the question of when American antitrust laws should be applied extraterritorially.<sup>25</sup> During the 1990s, the Supreme Court, in *Hartford Fire Ins. Co. v. California*, seemingly rejected such interest-balancing when it resorted to a more territorial-based approach<sup>26</sup> in order to revive the former method in *F. Hoffman LaRoche v. Empagran*.<sup>27</sup>

The *Empagran* case involved a lawsuit brought by a foreign purchaser against a vitamin-pricing cartel in an American court.<sup>28</sup> The lawsuit alleged illegal conduct, all of which took place in foreign countries.<sup>29</sup> Plaintiff alleged that such a worldwide conspiracy produced significant effects in the U.S. market, but the suit was brought based on harm in foreign markets.<sup>30</sup> The Supreme Court dismissed the case on jurisdictional grounds, holding that whenever possible, domestic statutes should be construed to avoid interference with foreign sovereign authority.<sup>31</sup> Moreover, the Supreme Court reviewed several briefs filed by a number of foreign governments, each asserting its own authority to regulate the conduct in question without interference from the United States, and expressed its desire to “help the potentially conflicting laws of different nations work together in

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<sup>24</sup> See Buxbaum, *supra* note 7, at 934, n. 7 (describing diplomatic friction caused by over-application of certain countries’ regulations, leading to blocking statutes).

<sup>25</sup> See, e.g., *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). The “reasonableness” inquiry, entailed in the interest-balancing approach, was also adopted by the Foreign Relations Restatement, *supra* note 8, at 403. For a discussion of reasonableness, see Milena Sterio, *The Globalization Era and the Conflict of Laws: What Europe Could Learn from the United States and Vice Versa*, 13 *CARDOZO J. INT’L & COMP. L.* 161, 180, n.72 (2005).

<sup>26</sup> See generally, *Hartford Fire Ins. Co., v. California*, 509 U.S. 764 (1993). According to some authors, *Hartford Fire*, by rejecting interest-balancing, revived the public law taboo. See McConaughay, *supra* note 6, at 291 (“But *Hartford Fire* clearly reads like a specific application of the public law taboo insofar as it suggests very plainly that notions of ‘comity’ and comparative interest balancing are not permissible constraints on the jurisdictional reach of the Sherman Act....”).

<sup>27</sup> See generally, *F. Hoffman LaRoche v. Empagran*, 542 U.S. 155 (2004).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* See also, Buxbaum, *supra* note 7, at 257-258.

<sup>30</sup> *F. Hoffman LaRoche v. Empagran*, 542 U.S. 155. See also, DUNOFF, RATNER, WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS*, Aspen Publishers, 2d ed. 2006, at 372 [hereinafter DUNOFF, RATNER, WIPPMAN].

<sup>31</sup> *F. Hoffman LaRoche*, 542 U.S. at 164.

harmony.”<sup>32</sup>

## 2. Securities Regulation

In the securities regulation area, clashes of different countries’ mandatory regulations occur frequently as issuers become global and register on several stock exchanges. American courts have attempted to resolve the conflicts issue by applying two jurisdictional tests designed to evaluate whether the conduct in question is sufficiently connected to the United States to mandate the application of our laws. The first is the “conduct” test, which calls for regulatory jurisdiction of the place where the allegedly illegal conduct took place.<sup>33</sup> Courts typically look for conduct that is more than mere preparation for the fraud in order to assert U.S. jurisdiction.<sup>34</sup> The second is the “effects” test, which establishes such jurisdiction in the place of the fraudulent conduct’s effects.<sup>35</sup> The effects test, similar to the effects jurisdiction in the antitrust area, seeks to protect domestic markets and investors from harm caused by foreign conduct.<sup>36</sup> Much like in the antitrust area, courts here seek to capture conduct which harms U.S. markets, but which would escape the reach of American securities regulations if such laws applied on a purely territorial model.

In cases involving the conduct test, courts have adopted two different approaches. Some American courts have accepted their exercise of prescriptive jurisdiction in cases where the conduct taking place in the U.S., in the form of misrepresentations, materially advanced the frauds in question, which took place abroad.<sup>37</sup> Such cases, relying on the so-called “fraud on the global market” theory, draw on the fact that misrepresentations made in the U.S. will affect trading prices abroad and domestically.<sup>38</sup> They call for a more liberal and generous extraterritorial application of American securities regulations. In other words, the conduct test is allegedly satisfied

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<sup>32</sup> *F. Hoffman-LaRoche*, 542 U.S. at 164.

<sup>33</sup> For a classic articulation of this test, see *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972); see also *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1045 (2d Cir. 1983); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975).

<sup>34</sup> Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 275 (2006) [hereinafter Buxbaum, *Transnational Regulatory Litigation*].

<sup>35</sup> For a classic articulation of this test, see *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968); see also *Consol. Gold Fields PLC v. Minorco S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989).

<sup>36</sup> Buxbaum, *Transnational Regulatory Litigation*, *supra* note 34, at 275-76.

<sup>37</sup> See, e.g., *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546 WHP, 2004 WL 2190357, at 17 (S.D.N.Y. 2004); see also *Tri Star Farms Ltd. V. Marconi, PLC*, 225 F. Supp. 2d 567, 572 (W.D. Pa. 2002).

<sup>38</sup> Buxbaum, *Transnational Regulatory Litigation*, *supra* note 34, at 276.



and U.S. jurisdiction exists as long as substantial activities occurred domestically.<sup>39</sup> Other courts, however, have adopted a stricter view. They require that domestic conduct lead directly to the losses suffered by the foreign investor.<sup>40</sup> The plaintiffs must show specific reliance on misstatements made within the U.S.<sup>41</sup> Arguments that allege misstatements made domestically affect prices in interconnected worldwide markets become insufficient.<sup>42</sup> Courts adopting the narrower view have expressed a concern that if fraud on the market satisfied the conduct test, then U.S. law would apply around the world, whenever fraudulent misrepresentations were made involving jointly traded securities.<sup>43</sup>

In cases involving the effects test, plaintiffs claim that if the same conduct that harmed foreign markets also harms American markets, the effects felt in the United States should be sufficient to confer jurisdiction over all claims, including those brought by foreign purchasers.<sup>44</sup> Most of the time, courts reject these claims by separating the effects on U.S. markets from those on foreign markets, treating the resulting harm to U.S. and foreign investors as independent.<sup>45</sup> This approach is similar to the one most recently adopted by the Supreme Court in the antitrust area. Federal courts lack jurisdiction over foreign plaintiffs' claims that are based on the foreign effects of the defendant's conduct and independent from any domestic effect caused by the defendant's conduct.<sup>46</sup>

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<sup>39</sup> See, e.g., *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977) (requiring only that "some activity designated to further a fraudulent scheme" must occur within the United States).

<sup>40</sup> *McNamara v. Bre-X Minerals Ltd.*, 32 F. Supp. 2d 920, 923-25 (E.D. Tex. 1999) ("In order to satisfy the conduct test, the Canadian Plaintiffs must demonstrate that domestic conduct directly caused the alleged fraud. Even if [misrepresentations made in the U.S.] were indeed a substantial part of a fraudulent scheme, the Canadian Plaintiffs still have failed to show how their losses were directly caused by these activities."). See also *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1, 9 (D.D.C. 2000); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665-66 (7th Cir. 1998).

<sup>41</sup> Buxbaum, *Transnational Regulatory Litigation*, *supra* note 34, at 276.

<sup>42</sup> *In re Bayer*, 2004 WL 2190357, at 18 (citing *In re Baan*, 103 F. Supp. 2d at 10). But see *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 362 (D. Md. 2004), where the court noted that SEC filings are the type of "devices" that a reasonable investor would rely on in purchasing securities of the filing corporation. However, in *In re Royal Ahold*, a U.S.-based accounting fraud was a material part of the alleged fraud. *Id.* at 362.

<sup>43</sup> *Tri Star Farms*, 225 F. Supp. 2d at 579. But see Buxbaum, *Transnational Regulatory Litigation*, *supra* note 34, at 282, which argues that this concern is less relevant when the norms to be applied are shared by other jurisdictions.

<sup>44</sup> Buxbaum, *Transnational Regulatory Litigation*, *supra* note 34, at 277.

<sup>45</sup> *McNamara*, 32 F. Supp. 2d at 924; see also *Kaufman v. Campeau Corp.*, 744 F. Supp. 808, 810 (S.D. Ohio 1990) (holding that, although the defendants' action in Canada may have affected U.S. investors, that effect was separate from the effect on foreign purchasers and therefore not sufficient to meet that jurisdictional test).

<sup>46</sup> See generally, *F. Hoffman LaRoche v. Empagran*, 542 U.S. 155 (2004).

### 3. Internet Publishing and Commerce

The area of Internet publishing and commerce can lead to clashes of public laws designed to regulate free speech. Such clashes typically occur when the publisher posts information in his country of origin that is not offensive under the free speech regulations of that country. The same information becomes globally available and offends free speech regulations in other countries where Internet users have access to it.<sup>47</sup> Which regulation should trump the other? Does the country where information is accessed have the right to restrict it although such information was perfectly legal where it was posted? The free availability of information collides with the right of the receiving state to protect itself against outside interference creating a regulatory conflict.<sup>48</sup>

An Australian court recently held that Australian defamation laws should apply in the case of an article published by Dow Jones in the United States, but accessed by readers in Australia.<sup>49</sup> In this case, plaintiff resided in Australia and claimed that the American-published online article defamed him.<sup>50</sup> He claimed that because the article was publicly available in Australia through the Internet, Australian defamation laws should apply.<sup>51</sup> Dow Jones claimed that under American defamation laws the plaintiff's claim had no merit, and that only American laws should apply because the publisher maintained its web servers in the United States.<sup>52</sup> Moreover, according to Dow Jones, subjecting Internet publishers to worldwide defamation laws would have a "chilling effect" on them.<sup>53</sup> Thus, Internet publishers should only be subjected to defamation laws of the place where their web servers are maintained.<sup>54</sup> The Australian High Court disagreed and held that because the publisher had voluntarily made the information accessible worldwide, it could expect to be subjected to regulations around the world, and especially in places where its conduct causes harmful effects.<sup>55</sup>

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<sup>47</sup> See Muir-Watt, *supra* note 15, at 674.

<sup>48</sup> *Id.* at 676-677 ("If the receiving State can prohibit the emission of information, this comes close to interference in the regulation of activities covered by constitutional immunity in the State where the website is located; conversely, not to do so looks very much like allowing cultural expansionism.")

<sup>49</sup> See generally, Dow Jones & Co. v. Gutnick, (2002) 194 A.L.R. 433 (Austl.).

<sup>50</sup> *Id.* at para. 2

<sup>51</sup> *Id.* at para. 6.

<sup>52</sup> *Id.* at para. 18.

<sup>53</sup> *Id.* at para. 20.

<sup>54</sup> *Id.* at para. 18.

<sup>55</sup> Justice Callinan wrote that publication occurs at the place where the matter is first provided or first published, for the purposes of defamation laws. *Id.* Moreover, he wrote that

In another case that drew global interest, a French court restricted access in France to a Yahoo! auction website selling Nazi and Third Reich-related goods, although the website was perfectly legal under American free speech regulations.<sup>56</sup> Many scholars in the United States objected to such action because the website was located in the United States. According to these scholars, France, the receiving state, was attempting to curtail fundamental freedom of expression by extraterritorially meddling with American democratic values.<sup>57</sup> On the other hand, judges and scholars in France saw the issue differently.<sup>58</sup> Why should France have to accept U.S. First Amendment protections? Why should activities conducted within France be allowed, in violation of French constitutional and criminal law, in an attempt to create an American cultural hegemony?<sup>59</sup> In other words, why should American First Amendment protections apply extraterritorially? Defendants in the Yahoo! case succeeded in obtaining an injunction in the United States District Court that barred the French order from applying domestically.<sup>60</sup> However, the Ninth Circuit, in a divided panel, ultimately dismissed the case, thus refusing to confirm such an injunction.<sup>61</sup> While some judges disagreed with the outcome, emphasizing that France was seeking to restrict First Amendment free speech protections

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the appellant, Dow Jones, was seeking to impose an American legal hegemony upon Australian residents, which “would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious disadvantage of those unfortunate enough to be reputationally damaged outside the United States.” *Id.* For a Canadian case that specifically distinguished *Gutnick*, see *Bangoura v. Washington Post*, 2005 CarswellOnt 4343 (Ont. C.A.) (defamation action by a former U.N. employee against a U.S.-based newspaper that published an article on its website stating that plaintiff’s co-workers had accused him of sexual harassment, financial improprieties and nepotism; the court distinguished *Gutnick* because in that case plaintiff lived in Victoria and was a well-known businessman, whereas plaintiff in this case did not live in Ontario. Moreover, Dow Jones had 1,700 Internet subscribers in Australia, whereas only seven subscribers existed to the defendant paper in Ontario). *Id.*

<sup>56</sup> Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, *LICRA v. Yahoo!*, No. RG 00/05308 (Tribunal de Grande Instance de Paris, Nov. 20, 2000).

<sup>57</sup> Muir-Watt, *supra* note 16, at 677.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> In *Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), the district court held that “the First Amendment precluded enforcement within the United States of a French order intended to regulate the content of its speech over the Internet.”

<sup>61</sup> *Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 433 F. 3d 1199 (9th Cir. 2006)

extraterritorially,<sup>62</sup> the majority seemed to think that an American injunction would do the opposite, by extending domestic free speech protections to French territory.<sup>63</sup>

Such Internet cases exemplify the expanding category of international conflicts with a public dimension, similar to the cases described above in the antitrust and securities regulatory areas. The regulatory puzzle involving issues of extraterritorial application of different countries' public laws is difficult to resolve; not surprisingly, it has drawn significant scholarly interest.

## II. DIFFERENT SOLUTIONS TO THE REGULATORY PUZZLE

Scholars have attempted to address the issue of such regulatory clashes in a variety of ways. Most recognize, however, that solutions must either focus on territoriality or substance.<sup>64</sup> To determine when U.S. laws should apply extraterritorially, courts that have a territorial focus seek to find a territorial or proximity link to the U.S. which would justify the application of U.S. laws.<sup>65</sup> Courts that adopt a more substantive focus seek to apply the most appropriate law in light of the circumstances of each case.<sup>66</sup>

### A. Solutions Focusing on Territoriality

Several scholars recently advocated the need to temper substance-based analysis of regulatory conflict with a more territorial approach.<sup>67</sup> In a 1993

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<sup>62</sup> "The issue is not... one of extra-territorial application of the First Amendment; if anything, it is the extra-territorial application of French law to the United States... We should not allow a foreign court order to be used as leverage to quash constitutionally protected speech by denying the United States-based target an adjudication of its constitutional rights in federal court." DUNOFF, RATNER, WIPPMAN, *supra* note 30, at 386.

<sup>63</sup> Three of the judges wrote that the French orders required only that Yahoo! restrict access by Internet users located in France, and that such orders said nothing about restricting access by Internet users in the United States. Thus, Yahoo! was arguing that it had a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others, a solution which the majority of the Ninth Circuit seemed to disagree with. DUNOFF, RATNER, WIPPMAN, *supra* note 30, at 386.

<sup>64</sup> See, e.g. Buxbaum, *supra* note 7, at 933-934.

<sup>65</sup> *Id.* (noting that in a traditional model of conflicts analysis based on territoriality, a state concerned in a conflict of economic laws will seek to protect its own regulatory interests by applying its law to the dispute).

<sup>66</sup> *Id.* at 957 ("the term substantivism, by contrast, is used to describe a choice-of-law methodology whose goal is to select the better law in any given case"); *id.* at 933-934 (noting that under a substantivist view, important economic policy interests "may be protected simply through assurance that the substance of applicable law... is sufficiently similar to that of the concerned state").

<sup>67</sup> See generally Buxbaum, *supra* note 7; McConaughay, *supra* note 6.

landmark decision that revived the so-called public law taboo, the Supreme Court endorsed the territorial analysis in the antitrust arena.<sup>68</sup> Historically, courts have not been willing to apply foreign public law. If a conflict of law rule pointed to the applicability of another nation's public law, U.S. court would dismiss the case, hence the "taboo."<sup>69</sup> Public laws were simply not a matter of adjudication for American courts.<sup>70</sup> Recently, however, the taboo has been challenged by several developments in the area of private international law. As described above, increased globalization of commerce and inter-state commercial transactions have contributed to the rise of regulatory clashes.<sup>71</sup> The role of private non-state actors has significantly expanded in this arena.<sup>72</sup> Courts have been willing to endorse party autonomy in regulatory areas where traditionally it was impossible to displace American laws in favor of foreign ones.<sup>73</sup> The concept of applying foreign public laws by American courts is no longer as taboo as it was in the past. According to some scholars, this is not necessarily a good thing.<sup>74</sup>

Phillip J. McConnaughay advocates the need to resurrect the "public law taboo."<sup>75</sup> According to McConnaughay, the conflicts field is ill suited to resolve clashes of public regulations because it leads to under-regulation and a lack of predictability.<sup>76</sup> In addition, courts and private parties are not equipped to undertake the complex burdens of attempting to identify and balance the interests of multiple countries involved.<sup>77</sup> Instead of engaging in

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<sup>68</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (the Supreme Court here seemingly rejected interest-balancing in order to focus simply on the territorial reach of the Sherman Act, thereby rejecting substantive concerns of reasonableness and comity and adopting a purely territorial approach. Note however, that the Court left open the possibility of interest-balancing in case of a true conflict – a situation where both American law and foreign law imposed certain behavior on the economic operator); see McConnaughay, *supra* note 6, at 257-258 ("Hartford Fire arguably signals a restoration of the traditional principle that neither conflicts analysis ... nor principles of contractual autonomy apply to public law..."); see also *id.* at 291-292 (discussing the revival of the public law taboo by *Hartford Fire*).

<sup>69</sup> Buxbaum, *supra* note 7, at 935-36; McConnaughay, *supra* note 6, at 262.

<sup>70</sup> McConnaughay, *supra* note 6, at 256.

<sup>71</sup> Buxbaum, *supra* note 7, at 933 (noting that the globalization of economic markets and attendant changes in cross-border regulatory strategies challenge the foundational principles of private international law).

<sup>72</sup> See, e.g., Buxbaum, *supra* note 7, at 945 (noting the role of private actors in the regulation of international economic activity).

<sup>73</sup> Consider for example the rise in arbitration, through which the dispute resolution mechanism in cross-border transactions has been privatized. Buxbaum, *supra* note 7, at 945.

<sup>74</sup> See generally McConnaughay, *supra* note 6.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> McConnaughay, *supra* note 6, at 284-285. According to this author, the risk of diminished regulation or under-regulation "is great whenever private contractual election nor

substantive analysis or interest-balancing as some courts have done,<sup>78</sup> and as the Third Restatement suggests,<sup>79</sup> McConnaughay asserts that we would be better off if courts simply refused to apply certain foreign public law altogether.<sup>80</sup> American courts could abide by territorial rules, seeking to determine when American laws should apply extraterritorially. If the judge determines that the extraterritorial application of our laws is not warranted because a foreign public law is applicable, the judge should simply dispose of the case.<sup>81</sup> Thus, territoriality concerns should trump substantive analysis in the area of regulatory clashes, where any type of interest-balancing is ill-suited.<sup>82</sup>

Similarly, Hannah L. Buxbaum advocates the need to temper substance-based conflicts analysis in the area of regulatory clashes with a territorial approach.<sup>83</sup> According to Buxbaum, purely substantive approaches lead to over-application of American laws and to process-related unfairness in the resolution of economic conflicts.<sup>84</sup>

For example, Buxbaum analyzes the infamous Lloyd's litigation to conclude that American courts chose to displace domestic securities regulations only because the British law chosen by the parties was so similar to American laws.<sup>85</sup> If the chosen law had been different, the courts

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comparative interest balancing analysis displaces forum public law." Moreover, the merger of conflicts principles and public law "substantially reduces predictability in international transactions rather than increasing it." Finally, the process of balancing multiple states' interests "in order to achieve a fair and equitable allocation of prescriptive jurisdiction" belongs in the political arena, and courts and private parties should not be engaging in it. *Id.*

<sup>78</sup> See, e.g., *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d at 597 (9th Cir. 1976).

<sup>79</sup> Foreign Relations Restatement, *supra* note 8, at 403(2).

<sup>80</sup> McConnaughay advocates a distinction between mandatory public laws, that should fall within the public law taboo, and nonmandatory public laws, which should or should not fall within the public law taboo depending on the reason for their failure to qualify as mandatory. McConnaughay, *supra* note 6, at 311-312.

<sup>81</sup> Note, however, that McConnaughay only advocates this solution for mandatory public laws. *Id.* For certain non-mandatory public laws and for private laws, the public law taboo should not be applied at all and traditional conflicts rules can still provide adequate solutions. *Id.*

<sup>82</sup> McConnaughay advocates the idea that his classification system, consisting of mandatory public laws, non-mandatory public laws, and private laws, will "reserve for the political arena, instead of an ill-equipped judiciary, any accommodation of public laws that is necessary because of overlapping regulatory interests of several nations." McConnaughay, *supra* note 6, at 312.

<sup>83</sup> Buxbaum, *supra* note 7, at 967-976 (discussing the costs of substantivist approaches in the area of conflicts of economic laws).

<sup>84</sup> *Id.* at 966.

<sup>85</sup> *Id.* at 967 (noting that the U.S. courts deciding to honor forum-selection and choice-of-law clauses at issue in favor of British securities law never considered whether U.S. law

probably would not have enforced the forum selection and choice-of-law clauses, despite the fact that a territorial analysis might have dictated the applicability of such dissimilar foreign law.<sup>86</sup> Moreover, if the court ultimately concluded that U.S. securities laws did not reach the extraterritorial conduct in question, it would simply dismiss the case.<sup>87</sup> This method is problematic for two reasons. First, a purely substantive analysis of choice of law and forum clauses is inconsistent with the traditional approaches to such clauses, which call for an initial consideration of territorial contacts. This consideration should provide “the context in which the competing policies are considered.”<sup>88</sup> Second, courts that have rejected choice of law and forum clauses on substantive grounds may feel justified in applying U.S. law even in cases where such application is weak.<sup>89</sup> Once a court declines to enforce choice of law and forum clauses, it must inquire whether U.S. law reaches the conduct in question. If it does not, the court must dismiss the case.<sup>90</sup> As courts may be reluctant to do so, they may also seek to justify weak cases of extraterritorial application of U.S. laws.<sup>91</sup> Allowing substantive analysis to always trump territoriality can lead toward the imposition of an American cultural hegemony in important regulatory areas.

Moreover, according to Buxbaum, a system of private international law based on sovereignty turns each situation of conflict of laws into a conflict between sovereigns. The question becomes which sovereign will manage to exert its regulatory power.<sup>92</sup> As some states are “more sovereign than others,”<sup>93</sup> it becomes more likely that the policies embedded in the laws and regulations of a relatively small number of powerful states will be implemented.<sup>94</sup> The power of sovereign states plays a role in determining the outcome of such regulatory conflicts.<sup>95</sup> Such a process “replaces ‘neutral’ consideration of competing laws with the application of law

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applied to the relevant transactions at all, but simply considered whether the policies embodied in U.S. securities laws would be violated by application of chosen foreign law). For an analysis of the Lloyd’s litigation, *see infra* Part II.B.

<sup>86</sup> *Id.* at 968.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 968-69.

<sup>89</sup> *Id.* at 969.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Buxbaum, *supra* note 7, at 973.

<sup>93</sup> *Id.* at 974, *citing* Saskia Sassen, *The State and Economic Globalization: Any Implications for International Law?* 1 CHI. J. INT’L L. 109, 116 (2000).

<sup>94</sup> Buxbaum, *supra* note 7, at 974.

<sup>95</sup> *Id.*

reflecting non-neutral values.”<sup>96</sup> According to Buxbaum, the substantivist system poses a danger because international regulatory standards invariably show a bias toward the approach of certain powerful states. This bias will be reflected in each instance of their application, irrelevant of whether the transaction subject to regulation bore any territorial connections with those states at all.<sup>97</sup> The solution may be to temper substance-based approaches to clashes of public laws with the more or less traditional territorial approach.

### B. Solutions Focusing on Substantivism

Some scholars argue that it would be preferable for courts to analyze regulatory conflicts situations in a substance-oriented manner. Instead of applying a purely territorial analysis, courts should analyze the substance of potentially applicable laws, domestic and foreign, in order to assess which law provides the best solution to the given issue.<sup>98</sup> The Third Restatement of Foreign Relations Law adopts the substance-oriented inquiry in a limited manner, by including a reasonableness inquiry in its list of factors that a court is to consider when deciding whether to apply American law extraterritorially.<sup>99</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 975.

<sup>98</sup> See generally Leflar, *supra* note 5, for a discussion of this approach in the domestic context; see Kegel, *supra* note 4, at 184-85, for a discussion of the distinction between conflicts justice and substantive justice. Moreover, Professor von Mehren identified three situations in which the development of substantive rules would be desirable:

In the first type of situation, the forum considers that two legal orders are sufficiently concerned with a given situation that the rules of both should be given effect, but the domestic rules do not lend themselves to cumulative application...The second general class comprises situations which, because of their multi-state characteristics, involve considerations which do not have particular significance in comparable domestic settings... A third class of situations is presented only by cases of true conflict, that is to say, situations in which two or more legal orders have legitimate reasons to regulate the dispute that has arisen, but hold mutually inconsistent views respecting the form such regulation should take.

Arthur T. von Mehren, *Special Substantive Rules for Multistate-State Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 358-59 (1974).

<sup>99</sup> See Foreign Relations Restatement, *supra* note 8, at 403(b)(2)(c) (“The importance of regulation to the regulating state.. and the degree to which the desirability of such regulation is generally accepted.”); *id.* at 403(2)(f) (“the extent to which the regulation is consistent with the traditions of the international system”); *id.* at 403(2)(h) (“the likelihood of conflict with regulation by another state”). Note, however, that the reasonableness inquiry also includes some territorial-based factors. See, e.g., *id.* at 403(2)(a) (“The link of the activity to the territory of the regulating state.”); *id.* at 403(2)(b) (“the connections, such as nationality,



Some courts have shown the desire to engage in this type of analysis. Recently, several courts of appeal enforced choice-of-law and forum-selection clauses in the infamous Lloyd's litigation. The courts ruled in favor of British law contained in investment agreements signed by American investors, thereby explicitly accepting the displacement of U.S. securities regulations.<sup>100</sup> The U.S. courts analyzed the issue and the laws at stake concluding that because the U.K. laws were substantially similar to American securities regulations, it was appropriate to enforce forum-selection and choice of law clauses in the disputed investment contracts that allowed defendants to escape the reach of American securities laws.<sup>101</sup> These decisions clearly displaced U.S. securities laws and refused to view territorial sovereignty as determinative.<sup>102</sup> Courts in these cases focused on the question of applicable economic law in light of whether the law chosen by the parties is reasonable considering the existing domestic policies.<sup>103</sup> The application of U.K. securities laws was acceptable here precisely because of the substance of those laws. In fact, some of the Lloyd's decisions engaged in a detailed comparison of U.K. securities laws with those of the U.S., leading those courts to conclude that economic policies underlying U.S. securities laws would be protected even upon application of U.K. laws.<sup>104</sup>

In the antitrust area, the Supreme Court restored a substance-oriented approach in determining the jurisdictional reach of the Sherman Act. After reviving the "public law taboo" by adopting a territorial-based approach in the last decade,<sup>105</sup> the Supreme Court reintroduced interest-balancing in the same jurisdiction-allocating analysis involving the reach of the Sherman Act over extraterritorial conduct, in a situation where other countries may also have a strong interest to regulate such conduct.<sup>106</sup> In the antitrust field,

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residence, of economic activity, between the regulatory state and the person principally responsible for the activity to be regulated").

<sup>100</sup> See generally, *Riley v. Kingsey Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992); *Roby v. Corp. of Lloyd's*, 996 F. 2d 1353 (2d Cir. 1993); *Bonny v. Soc'y of Lloyd's*, 3 F. 3d 156 (7th Cir. 1993); *Shell v. R.W. Sturge, Ltd.*, 55 F. 3d 1227 (6th Cir. 1995); *Allen v. Lloyd's of London*, 94 F. 3d 923 (4th Cir. 1996); *Haynsworth v. Lloyd's of London*, 121 F. 3d 956 (5th Cir. 1997); *Richards v. Lloyd's of London*, 135 F. 3d 1289 (9th Cir. 1998); *Lipcon v. Underwriters at Lloyd's, London*, 148 F. 3d 1285 (11th Cir. 1998).

<sup>101</sup> Buxbaum, *supra* note 7, at 960-61.

<sup>102</sup> *Id.* at 960.

<sup>103</sup> Buxbaum, *supra* note 7, at 960.

<sup>104</sup> *Id.* at 960-61.

<sup>105</sup> See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. at 764 (1993); see *supra* Part I.B.1.

<sup>106</sup> See *F. Hoffman La Roche v. Empagran*, 542 U.S. at 155 (2004). But see Buxbaum, *Transnational Regulatory Litigation*, *supra* note 34, at 274-275, which argues that the *Empagran* case did not entirely overturn the territorial approach of *Hartford Fire*, because the

substantivism seems to have reasserted itself in judicial analysis of prescriptive jurisdiction.

Some scholars advocate the need to emphasize substantivism over territorialism in solving the regulatory puzzle in specific legal subfields. For instance, in the bankruptcy arena, authors suggest that debtors have the option of choosing which country's bankruptcy laws should apply to their given situation.<sup>107</sup> Debtors are able to analyze the substance of various laws in order to choose the most beneficial to their particular circumstances. Similarly, in the securities regulatory field, scholars suggest a system under which companies could freely select the securities regime of any country to govern their securities transactions.<sup>108</sup> In the traditional regulatory conflicts arena, Andrew Guzman advocates the need to choose the most economically efficient law to regulate a given situation.<sup>109</sup> The quest for the optimal law works toward the furtherance of global wealth. The system would require courts to forego any territoriality-based analysis for a substance-oriented comparison of global laws in order to pick the one with the fewest externalities.<sup>110</sup> State-focused territorial interests would be replaced by the search for optimal global interests. This would benefit all countries, not just the forum state.<sup>111</sup> Under this approach, substance would clearly trump

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D.C. Circuit re-examining the case after remand from the Supreme Court found that plaintiffs had only managed to establish an indirect link between the U.S. prices and the harm they suffered in overseas transactions, so that the territorial link to the U.S. remained insufficient to support American jurisdiction over plaintiffs' claims. "This decision therefore maintains an allocation of regulatory authority according to territorial boundaries even over what is apparently conceded to be a global market." *Id.* at 275.

<sup>107</sup> Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997). Courts have also considered the substance of foreign law in cases of conflict between U.S. and foreign bankruptcy law; see e.g., *Remington Rand Corp. v. Bus. Sys., Inc.*, 830 F.2d 1260 (3rd Cir. 1987). See also Bankruptcy Code, 11 U.S.C. 304(c)(4)(2000) (setting forth a list of relevant factors to assist courts in making the decision whether assets of the insolvent located within the U.S. should be distributed to U.S. creditors under American distribution rules, or should be remitted for distribution in an ongoing foreign proceeding under foreign law; one of these factors is whether distribution of assets under the foreign bankruptcy regime would take place "substantially in accordance" with the order in which assets would be distributed under U.S. law).

<sup>108</sup> See, e.g., Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998). For other private choice arguments in the securities field, see Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1 (1999).

<sup>109</sup> Andrew Guzman, *Choice of Law: New Foundations*, School of Law, Boalt Hall, U.C. Berkeley Public Law and Legal Theory, Research Paper No. 28 (2000), available at <http://www.ssrn.com> (last visited on Dec. 9, 2006).

<sup>110</sup> *Id.*

<sup>111</sup> Guzman refers to the "global optimum," which he defines as "the set of substantive

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territorial sovereignty.

Both the territoriality and substantivism approaches, however, suffer from one-sidedness. They only focus on what domestic courts should do. To truly address the problem and seek a truly international solution to regulatory clashes, a more global perspective should be adopted.

### III. THE NEED TO HARMONIZE PRESCRIPTIVE JURISDICTION RULES

The above-described territorial and substantive approaches to the resolution of regulatory conflicts analyze the issue from a domestic perspective: how should American courts and judges reason when confronted with a difficult clash of several public laws, including our own? However, none of the above approaches focus on a more universal inquiry. Can we harmonize rules so that judges sitting in different jurisdictions can resort to similar solutions, thereby increasing predictability of outcomes and reducing externalities for economic operators?<sup>112</sup>

#### A. *Why Harmonization is Needed Within Specific Fields*

The need for such harmonization of jurisdiction-allocating rules is greater in certain areas. As described above, certain fields, such as antitrust, securities, and Internet commerce and publishing, have been more exposed to troublesome regulatory clashes.<sup>113</sup> In some instances, the outcomes have been painful for the operators and diplomatically challenging for the countries involved.<sup>114</sup> The need to harmonize prescriptive jurisdiction rules seems the most acute in the above three areas.

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policies that would exist if a single benevolent and well-informed global policy maker were able to establish laws". *Id.* at 19.

<sup>112</sup> Scholars have already noted the problem of overlapping regulatory jurisdiction caused by different jurisdiction allocating rules. *See, e.g.*, Buxbaum, *supra* note 7, at 940-941:

Moreover, as U.S. courts and courts in other jurisdictions began to apply regulatory law to extraterritorial conduct, additional regulatory overlaps were created as countries obtained jurisdiction based on different jurisdictional tests. One state's law might apply to conduct because it occurred within its borders, for instance, while another's might apply because of effect caused within its borders by that conduct.

<sup>113</sup> *See supra*, Part I.B.

<sup>114</sup> *See, e.g.*, the Franco-American rift caused by the Yahoo! affair. *Supra* Part I.B.3. *See also* the Laker Airways antitrust litigation, representing a notorious example of cross-border judicial warfare, where U.K. and U.S. courts exchanged anti-suit and counter-anti-suit injunctions to protect prescriptive jurisdiction. *Laker Airways Ltd. V. Pan Am. World Airways*, 235 U.S. App. D.C. 207 (1984). *See also* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 5 (1996) (analyzing this type of struggle for jurisdiction).

First, harmonization of prescriptive jurisdiction rules could lead to more predictable outcomes across the globe.<sup>115</sup> Economic operators and their legal counsel would more easily be able to predict how judges would rule. Operators could significantly reduce their externalities by adjusting conduct so they only remain subject to a certain number of regulations, and not potentially all of them.

Second, such harmonization could appease the problem of under- or over-regulation. If most jurisdictions had substantially similar jurisdiction allocating rules, a situation of under-regulation would not frequently occur. For example, if all jurisdictions adopted an effects test in the antitrust area, the operator would certainly be subject to regulation somewhere, because invariably his conduct produces effects somewhere.<sup>116</sup> A situation of under-regulation would not be altogether avoided. To adopt the same hypothesis as above, where most jurisdictions were to adopt the effects test in the antitrust area, courts in countries A, B, and C could all conclude that effects are felt within their territory and could all seek to impose their regulations. However, the operator would be able to avoid such multiple exposures from the outset, by adjusting conduct so that it doesn't produce effects in all those jurisdictions, if only he knew that all the judges would reason the same way.

Third, the "public law taboo" would no longer be necessary. If most jurisdictions adopted similar jurisdiction allocating rules, and if such harmonized rules sometimes dictated the applicability of foreign law, a judge from country A would no longer have to worry about applying country B's public law because presumably country B's judge, if consulted, would have also decided that his own law applied. Moreover, there would be no comity concerns. Country B could decide to apply country A's laws in a different situation if the harmonized jurisdiction allocating rules dictated that

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<sup>115</sup> *But see* McConnaughay, *supra* note 6, at 289-290, who advocates that the demise of the public law taboo has contributed to unpredictability of results, as opposed to enhancing their predictability, which was the reason in the first place that many scholars had written against the public law taboo. However, McConnaughay's concern is about the use of conflicts rules in U.S. courts, such as interest-balancing, to allocate American prescriptive jurisdiction in the area of public laws; he thinks that such use is inappropriate and that the taboo should be revived. My argument, on the contrary, is about the need to harmonize prescriptive jurisdiction rules among various countries in specific fields of law, so that, in essence, there would be no need to perform the type of unpredictable post-facto interest-balancing analysis that American courts engage in currently. The harmonization would occur on an international level among political branches, so that courts would no longer be engaged in the process of allocating jurisdictional domains, a process that, according to McConnaughay, is ill-suited for the judiciary.

<sup>116</sup> Of course, this presupposes a similar availability of damages in most jurisdictions that could attract and encourage potential plaintiffs. Although damages may be higher in the United States than, for example, in Europe, the availability of some forum that could attribute even a lower amount of damages, is preferable to no forum at all.

result.

Similarly, some concerns raised by the substance-oriented analysis could be avoided.<sup>117</sup> Courts would no longer have to dismiss cases whenever foreign public laws were applicable. There would be no threat of imposing one country's legal and cultural hegemony because the harmonization of jurisdiction allocating rules would invariably promote the applicability of different laws in different situations, regardless of their substance.<sup>118</sup>

Finally, concerns raised by the purely territorial approach would be thwarted. Scholars criticize the territorial approach for its one-sidedness. When an American court engages in a territorial analysis, it only cares about the proximity of a given situation to its own forum. The court does not care about other countries' interest or about their own territorial claim to govern the situation. If jurisdiction allocating rules were harmonized, judges would be forced to rule from a more global perspective. Sometimes their forum would prevail, but sometimes it would lose because of other countries' stronger interests. We would be closer to the economic optimum advocated by Andrew Guzman and closer to the global welfare which he suggests we seek.<sup>119</sup>

#### *B. Inherent Challenges to Such Harmonization*

Harmonization is easier said than done. How can we possibly get all countries in the world to agree when their regulations should apply to certain situations? Negotiations of multilateral conventions have always proved difficult and have not necessarily led to the best result. Often the lowest common denominator is chosen as a solution. Nonetheless, in the regulatory conflicts area in specific legal fields, such harmonization could be at least envisioned.

First, it would be easier to hold negotiations in some kind of an institutional international forum. Guzman advocates this idea and suggests bodies such as the World Trade Organization.<sup>120</sup> Other organizations such

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<sup>117</sup> For a discussion of concerns caused by substantivism, *see supra* Part II.A (discussing scholarship by McConaughay and Buxbaum, which cautions against the pure use of substantivism in choice-of-law analysis involving clashes of public regulations).

<sup>118</sup> It is true, as Buxbaum suggests, *supra* Part II.A, that any such harmonization of prescriptive jurisdiction rules would favor the "more sovereign" countries, as they would be able to impose their models and solutions on the rest of the world. However, even such an imperfect solution would be preferable to the current system, whereby the forum judge often over-applies domestic laws, or dismisses the case altogether when the application of foreign public laws is inevitable.

<sup>119</sup> Guzman, *supra* note 109, at 19-21.

<sup>120</sup> *Id.* at 75.

as the World Bank or UNCITRAL could be tenable alternatives.

Second, the European experience certainly shows that it is possible to harmonize conflict of law rules within culturally similar countries.<sup>121</sup> Harmonization could first be attempted within a set of culturally and legally similar countries where domestic jurisdiction allocating rules would already be similar.

Third, harmonization could be more easily achieved in certain areas such as in the securities field, where some degree of such harmonization has already occurred. For example, a Securities Convention negotiated at the Hague Private Law Conference in July 2006 allocates which country's laws will apply to securities used as collateral.<sup>122</sup> Operators coming from member countries are exposed to only one country's regulations in this field.<sup>123</sup> Some fields probably lend themselves better to harmonization. For example, scholars advocate that cyberspace and Internet regulations lend themselves better to the quest for optimal rules on prescriptive jurisdiction.<sup>124</sup>

Fourth, international negotiating experiences show that procedural rules are more easily agreed on than important substantive ones. For example, it is easier for countries to negotiate a convention on the international service of process, than it is to come to a multilateral agreement on adoption. To the extent that jurisdiction allocating rules are perceived as procedural, it may be easier to attempt a multilateral negotiation session in this domain, rather than to try to change the underlying substantive antitrust, securities, or Internet regulations.<sup>125</sup>

Finally, economic realities in some fields, such as antitrust, have already led different jurisdictions' judges to reach similar results when determining the reach of their own domestic regulations.<sup>126</sup> Thus, it would

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<sup>121</sup> See, e.g. Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1; see also the Convention on the law applicable to contractual obligations of 1980 ("Rome Convention"), 23 O.J. (L 266) (1980).

<sup>122</sup> See Hague Conference on Private International Law website, <http://www.hcch.net> (follow "Conventions" hyperlink; then follow "Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary" hyperlink) (last visited on December 1, 2006).

<sup>123</sup> *Id.*

<sup>124</sup> See generally Muir-Watt, *supra* note 16.

<sup>125</sup> Note, however, that scholars have advocated the need for a substantive cooperation on an international level in the field of antitrust laws, arguing that choice-of-law strategies are not sufficient to address problems of differing antitrust rules in the era of cross-border commerce. See Guzman, *supra* note 109. Harmonizing substantive regulations may work even better than harmonizing jurisdiction allocating rules; however, the latter may be easier to achieve and more realistic to contemplate at this time.

<sup>126</sup> Thus, in the antitrust area, American courts have resorted to the effects doctrine, while

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appear easier to harmonize those rules, to the extent that they are already substantially similar.

## CONCLUSION

Clashes of regulatory titans, as I refer to them, will undoubtedly intensify in the future as the international commercial climate increasingly moves toward globalization and cross-border markets. This article suggests that the current solutions advocated by American scholars and employed by American courts, mainly territorial and substance-based approaches to resolving questions of prescriptive jurisdiction allocation, may be insufficient in addressing this new regulatory crisis. This article suggests the need to resort to international negotiations in order to harmonize jurisdiction allocating rules among various countries, at least in some key domains, such as antitrust, securities, and Internet commercial activities. While such harmonization may be extremely difficult to achieve, I advocate the need to start at least contemplating such a solution.

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their European counter-parts have adopted a strikingly similar “implementing conduct” test. Compare *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) and *Joined Cases 89/ & 85, Woodpulp*, 1988 E.C.R. 5193, 5233, 5246 (1988).