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Donald Earl Childress III[*] and Linda J. Silberman[**]

INTRODUCTION

Judge Weis and a panel of the Third Circuit faced a legal quandary related to competing patents. A U.S. manufacturer of vinyl floor covering, Mannington Mills (a New Jersey company), brought a civil claim against another U.S. manufacturer of vinyl floor covering, Congoleum Corporation (also a New Jersey company), in the federal district court of New Jersey.[1] The operative complaint alleged that Congoleum's licensing practices in foreign markets violated federal antitrust laws.[2] The suit was based in part on Mannington Mills's allegations that Congoleum had made fraudulent representations about product performance and misrepresentations of test data to foreign patent offices in obtaining overseas patents.[3] Mannington Mills argued that if the foreign patents "were obtained by conduct considered fraudulent under" U.S. law, then Congoleum should be subject to liability under federal antitrust laws.[4]

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[**] Clarence D. Ashley Professor of Law Emerita, New York University School of Law. This Article benefitted from questions and comments offered at a conference in honor of Judge Weis hosted at the University of Pittsburgh School of Law in March 2023. The authors thank Professor Charles Kotuby for moderating the discussion and for his comments on this Article and also thank the organizers of the conference for their kind invitation. We also thank the participants in the conference, especially Professor Ronald Brand, for their questions and comments as part of the panel discussion on international comity. Professors Bill Dodge and Maggie Gardner offered helpful suggestions for this Article. We gratefully acknowledge the editorial assistance of the *University of Pittsburgh Law Review* editors.

[1] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1290 (3d Cir. 1979).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 1295. Mannington Mills's argument was an extension of the doctrine of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), whereby fraud in the

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The federal district court entered summary judgment in favor of Congoleum on the grounds that the validity of the foreign patents was to be determined by the courts of the respective foreign issuing nations and "that to enjoin Congoleum from enforcing its foreign patents in other nations against Mannington would violate the act of state doctrine."[5] On appeal, Mannington Mills argued that the case was not barred by the act of state doctrine.[6] It also contended that U.S. federal courts could hear antitrust claims "stemming from fraud" related to the procurement of foreign patents.[7]

The Third Circuit, in an opinion by Judge Weis, concluded that federal antitrust laws could extend to commerce that had effects in the United States.[8] It rejected the district court's holding that the act of state doctrine warranted dismissal and instead held that the grant of foreign patents was "not the kind of governmental action contemplated by the act of state doctrine or its correlative, foreign compulsion."[9] The panel then considered whether the laws of foreign nations relating to the foreign patents "should have a bearing on the decision to exercise or decline jurisdiction."[10]

Judge Weis and Judge Adams disagreed about how to approach that issue. Judge Adams believed that any issue involving the competing interests of foreign law was part of what he characterized as the court's subject matter jurisdiction. In Judge Adams's view, a court may not "conclude that it is invested with subject-

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procurement of a U.S. patent subjects the patentee to antitrust liability. The argument was that a patentee alleged to have committed fraud in the procurement of foreign patents is also subject to U.S. antitrust liability. As the Third Circuit explained, "Mannington asserts that it need not prove the invalidity of the foreign patents under the issuing countries' laws. It argues that they were obtained by conduct considered fraudulent under American law and would expose Congoleum to antitrust liability in this country if domestic patents were at issue." *Mannington Mills*, 595 F.2d at 1295.

[5] *Mannington Mills*, 595 F.2d at 1290. The act of state doctrine is a federal common law doctrine that provides that a U.S. court will not question the validity of an official act of a recognized foreign government fully performed in its own territory. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972); *see also* W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., 493 U.S. 400, 404–05 (1990).

[6] *Mannington Mills*, 595 F.2d at 1290–91.

[7] *Id.* at 1291.

[8] *Id.* at 1290–92. The Third Circuit explained that earlier decisions such as *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), had been superseded by other Supreme Court decisions. *Mannington Mills*, 595 F.2d at 1291–92 (citing superseded cases).

[9] *Id.* at 1294.

[10] *Id.* at 1296.

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matter jurisdiction under the Sherman Act" and then "abstain from exercising such jurisdiction in deference to considerations of international comity."[11] Rather, he argued that "those considerations are properly to be weighed at the outset when the court determines whether jurisdiction *vel non* exists."[12] And, in his view, the primary consideration as to jurisdiction was whether there was an "indication that Congoleum was conforming to a rule of conduct prescribed by foreign law" when it allegedly violated federal antitrust laws.[13]

By contrast, Judge Weis (joined by Judge Weiner) argued that a court should weigh competing interests and consider principles of international comity to determine whether to assert jurisdiction, with the conflict with foreign law as only one factor.[14] In *Mannington Mills* itself, the court remanded the case for an evaluation of ten factors counseling for or against the exercise of jurisdiction.[15] As the court explained, "it was error to dismiss the plaintiff's complaint without preparation of a record which will allow an evaluation of the factors counseling for or against the exercise of jurisdiction."[16]

Mannington Mills was one of the first federal cases to address what has come to be known as "prescriptive comity."[17] In its earliest version, federal courts, including Judge Weis in *Mannington Mills*, used terms like "international comity" and "abstention" to address competing foreign interests with respect to the reach of U.S. federal law. Although both Judge Weis and Judge Adams perceived the issue

[11] *Id.* at 1299. As Judge Adams explained in a footnote, "a court may not abstain where jurisdiction properly lies unless abstention is warranted under a recognized abstention doctrine. And to my knowledge no abstention doctrine exists with respect to considerations of international comity. Rather, . . . such considerations have been incorporated into an expanded jurisdictional test." *Id.* at 1301 n.9 (citations omitted).

[12] *Id.* at 1299.

[13] *Id.* at 1302 (explaining that "[i]t is only when foreign law requires conduct Inconsistent [sic] with that mandated by the Sherman Act that problems of international comity become significant").

[14] *See id.* at 1297–98.

[15] *Id.* (listing ten factors to be considered); *id.* at 1299 (remanding the case for further consideration based on these factors).

[16] *Id.* at 1298.

[17] The term "prescriptive comity" comes from Justice Scalia in a dissenting opinion where he characterized it as "the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted." Hartford Fire Ins. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

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as one of federal subject matter jurisdiction, subsequent cases have made it clear that the issue is not subject matter jurisdiction but is actually about the substantive reach of U.S. federal law—i.e., the extraterritoriality of U.S. federal statutes.[18] Whatever present terminology is now used for the extraterritorial scope of U.S. federal law (be it jurisdiction to prescribe, prescriptive jurisdiction, or legislative jurisdiction),[19] the approach has changed substantially since *Mannington Mills* was decided, although in the area of federal antitrust law *Mannington Mills* may have a more significant legacy, as will be discussed below.[20]

This Article, written for a symposium in honor of Judge Weis, is divided into two parts. In Part I, the Article explains the state of the prescriptive comity doctrine at the time *Mannington Mills* was decided. This Part also explores the development of prescriptive comity since that decision. In Part II, the Article evaluates prescriptive comity in the context of a debate in private international law about rules versus standards.[21] The Article concludes with observations on the doctrine going forward in light of recent United States Supreme Court decisions in related cases and cases from foreign jurisdictions that touch on similar issues.

I. PRESCRIPTIVE COMITY

This Part examines how federal courts used prescriptive comity to determine the geographic scope of federal statutes at the time of *Mannington Mills* and how courts have developed the extraterritoriality doctrine in more recent cases.[22]

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[18] *See, e.g.*, Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 254–55 (2010). This development is discussed *infra* in text accompanying notes 77–99.

[19] According to the Restatement (Fourth), jurisdiction to prescribe, "also called prescriptive or legislative jurisdiction, concerns the authority of a state to make law applicable to persons, property, or conduct. The foreign relations law of the United States distinguishes it from jurisdiction to adjudicate, which concerns the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals, and from jurisdiction to enforce, which concerns the authority of a state to exercise its power to compel compliance with law." RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 402 cmt. a (AM. L. INST. 2018).

[20] *See infra* Section I.B.

[21] The discussion of rules and standards in private international law has been developed extensively by Professor Linda J. Silberman in her 2021 Hague Academy General Course on Private International Law, entitled "The Counter-Revolution in Private International Law in the United States: From Standards to Rules?" (on file with authors).

[22] Much of the discussion of extraterritoriality in this Article is based on the more detailed treatment of the history and development of that issue found in Professor Silberman's aforementioned course, *id.*, particularly Lecture 4: Extraterritorial Reach of U.S. Statutes (on file with authors). Linda Silberman,

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A. Prescriptive Comity and Extraterritoriality

Slightly before *Mannington Mills* was decided, the Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America*, adopted a multifactor balancing test to determine when federal antitrust laws applied extraterritorially.[23] In that case, plaintiffs brought antitrust claims against Bank of America and other Honduran defendants alleging that they conspired to prevent the plaintiffs' Honduran subsidiaries from milling lumber in that country, with the purpose and effect of monopolizing Honduran lumber exports to the United States.[24] Although the Ninth Circuit noted that "[t]here is no doubt that American antitrust laws extend over some conduct in other nations,"[25] the question was how far the legislative reach of the Sherman Act extended.[26] Put another way, even where the jurisdictional requirements for an extraterritorial application of the Sherman Act are satisfied, international comity, according to the Ninth Circuit, provided an independent basis for a U.S. court to decline to exercise jurisdiction.[27] As explained by leading antitrust scholars, "[t]he distinctive holding of *Timberlane* is that notwithstanding sufficient effects [in the United States] and an antitrust violation, the court may still decline to assert its extraterritorial jurisdiction" on the basis of a multifactor balancing test.[28]

To determine whether federal antitrust laws applied to acts occurring abroad that had an impact on the U.S. market, the Ninth Circuit instructed lower courts to balance (1) the "degree of conflict" between the law to be applied and the foreign law or policy; (2) the nationalities and locations of the parties; (3) the "extent to which enforcement by either state" would achieve compliance; (4) "the relative significance of effects on the United States as compared with those elsewhere"; (5) "the extent to which there is explicit purpose to harm or affect American commerce"; (6) the foreseeability of effects within the United States; and (7) the relative importance of any conduct in the United States as compared to conduct

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Extraterritorial Reach of U.S. Statutes: From Standards to Rules, (NYU Sch. of L., Pub. L. Rsch. Paper Forthcoming 2024), https://ssrn.com/abstract=4960765 or http://dx.doi.org/10.2139/ssrn.4960765.

[23] 549 F.2d 597, 613 (9th Cir. 1976).

[24] *Id.* at 601.

[25] *Id.* at 608.

[26] *Id.* at 610.

[27] *See id.* at 613–15. As explained by the Ninth Circuit, one of the factors to consider was whether "[a]s a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover" the alleged antitrust violation? *Id.* at 615.

[28] 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 378 (4th ed. 2013).

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abroad.[29] After a full appraisal of the conflicts involved, lower courts were then to determine whether the "contacts and interests of the United States" warranted extraterritorial application of its laws.[30] Following *Timberlane*, several lower courts "expressly acknowledge[d] a judicial discretion to decline to exercise the jurisdiction conferred" by the Sherman Act.[31]

In support of this approach, the *Timberlane* court quoted the 1965 Restatement (Second) of the Foreign Relations Law of the United States,[32] which provided that "[w]here two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction."[33]

Judge Weis, in *Mannington Mills*, cited to the Ninth Circuit's decision in *Timberlane* and listed various factors to be considered in balancing U.S. interests in regulating the activity in question against the interests of foreign nations.[34] In so doing, the Third Circuit increased the number of factors from seven to ten.[35]

The approach taken in antitrust cases such as *Mannington Mills* and *Timberlane* (and adopted in other areas such as securities and trademark cases) was eventually reflected in the 1987 Restatement (Third) of the Foreign Relations Law of the United States. Section 402 of the Restatement (Third), "Bases of Jurisdiction to Prescribe," identified a variety of legitimate bases for the exercise of prescriptive jurisdiction

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[29] *Timberlane*, 549 F.2d at 614.

[30] *Id.*

[31] *See* AREEDA & HOVENKAMP, *supra* note 28, at 359–60.

[32] *Timberlane*, 549 F.2d at 613. Although titled the Restatement (Second), it was the first iteration of a Restatement of the Foreign Relations Law of the United States; it bears that name due to the American Law Institute (Second) series in which it appeared. Sarah H. Cleveland & Paul B. Stephan, *The Roles of the Restatements in U.S. Foreign Relations Law*, *in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW 1, 2 n.6 (Paul B. Stephan & Sarah H. Cleveland eds., 2020).

[33] RESTATEMENT (SECOND) OF FOREIGN RELS. L. § 40 (AM. L. INST. 1965). Judge Adams also referenced this provision of the Restatement (Second) in his concurrence in *Mannington Mills*, but he found it to be relevant to the question of whether subject matter jurisdiction exists at all and not to the question of whether subject matter jurisdiction should be exercised. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1299, 1302 (3d Cir. 1979) (Adams, J., concurring).

[34] *Mannington Mills*, 595 F.2d at 1297–98.

[35] *Id.*

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that included both conduct and effects as well as other accepted grounds, such as nationality.[36] In addition, Section 403, entitled "Limitations on Jurisdiction to Prescribe," provided in paragraph (1) that even when one of the Section 402 bases is present, a state may not exercise jurisdiction to prescribe "when the exercise of such jurisdiction is unreasonable."[37] Section 403(2) listed a set of eight factors to be considered in determining whether the assertion of prescriptive jurisdiction was "unreasonable" (referencing territorial and residency connections, the character of the activity, the competing interests and policies of states, the likelihood of conflict, and the presence of justified expectations).[38] A last subsection—Section 403(3)—provided that when the prescriptive jurisdiction of both states are not unreasonable, a court should defer to the other state if that state's interest was clearly greater.[39]

[36] RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 402 (AM. L. INST. 1987).

[37] *Id.* § 403(1) ("Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

[38] *Id.* § 403(2). The factors that the Restatement lists are particularly reminiscent of those listed by the Ninth Circuit in *Timberlane* and include

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

Id. § 403(2)(a)–(h).

[39] *Id.* § 403(3) ("When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to

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The multifactor balancing approach of *Mannington Mills* stands in tension with more recent Supreme Court cases that have employed a rule-like presumption against the extraterritorial application of U.S. law. Indeed, extraterritoriality jurisprudence has changed substantially since 1979, when *Mannington Mills* was decided. This change began with the Supreme Court's decision in *EEOC v. Arabian American Oil Co. (Aramco)*,[40] in which the Court resurrected the presumption against the extraterritorial application of U.S. federal statutes.[41]

In *Aramco*, the Supreme Court considered the question of whether Title VII of the 1964 Civil Rights Act, which prohibits discrimination on various grounds, extended to a claim by a Lebanese-born U.S. citizen who was hired in the United States to work for a Saudi Arabian company in Saudi Arabia.[42] The plaintiff alleged that after he began working abroad, he was harassed and fired because of his race, religion, and national origin.[43] The Court determined that Title VII did not apply to the defendant's conduct,[44] invoking the presumption against the extraterritorial application of U.S. federal statutes and stating that "[i]t 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.'"[45] Without such a clear expression, the Court viewed Congress as "primarily concerned with domestic conditions."[46]

The Court noted that the presumption against extraterritoriality "serves to protect against unintended clashes" with foreign law,[47] and it found that "had

evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.").

[40] 499 U.S. 244 (1991).

[41] *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1597–1603 (2020) (describing the effect of *Aramco* on the development of the doctrine). Section 38 of the Restatement (Second) had a provision entitled "Territorial Interpretation of United States Law," which stated "Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the terrtitory of the United States, unless the contrary is clearly indicated by the statute."

[42] *Aramco*, 499 U.S. at 246–47.

[43] *Id.* at 247.

[44] *Id.* at 259.

[45] *Id.* at 248 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

[46] *Id.* (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

[47] *Id.*

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Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures."[48] When Congress quickly overruled the *Aramco* holding in the Civil Rights Act of 1991 by extending Title VII to reach U.S. employees working abroad, it provided for just such an exemption if the law of a foreign country would be violated.[49] Thus, to some extent, the careful calibration of competing interests reflected in the amendment supported the view that Congress—and not the courts—was in the best position to determine the geographic scope of a particular federal statute. Put another way, perhaps comity concerns should be addressed by Congress and not the courts.

However, both before and after *Aramco*, certain statutes, specifically in the antitrust area, appeared not to be subject to the presumption or had been understood to have overcome it.[50] Thus, the test for determining the extraterritorial reach of federal antitrust statutes may be different than the test for other statutes.

In the 1993 case of *Hartford Fire Insurance Co. v. California*, the Supreme Court reexamined the question of the extraterritorial reach of federal antitrust laws.[51] The case involved an action by nineteen states seeking to apply the Sherman Act to foreign insurers who engaged in anticompetitive conduct in England that was permissible there but violated U.S. law.[52] The suit targeted various insurance companies, reinsurers, and brokers, both domestic and foreign, alleging a conspiracy in the United States and abroad among the defendants to cease selling long-tail liability insurance and certain pollution coverage.[53] Notwithstanding the "effects" on commerce in the United States, the foreign defendants argued that it would be unreasonable to subject them to U.S. antitrust liability since they carried out their activities in the London insurance market in full compliance with English law.[54] The federal district court agreed and dismissed the claims against the foreign defendants,

[48] *Id.* at 256.

[49] Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a)–(b), 105 Stat. 1077 (1991) (codified as amended at 42 U.S.C. § 2000e-1(b)).

[50] *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945) (discussing situations in which the Sherman Act applies to conduct abroad); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608–09 (9th Cir. 1976) (stating "[t]here is no doubt that American antitrust laws extend" to conduct overseas and compiling cases that had applied the Sherman Act extraterritorially).

[51] 509 U.S. 764, 769 (1993).

[52] *Id.* at 778–79.

[53] *See id.* at 769–71.

[54] *Id.* at 798–99.

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citing international comity.[55] The Ninth Circuit reversed, finding that there was an "effect" in the United States and that the interests of the United States "outweighed" those of the United Kingdom.[56]

The Supreme Court affirmed in a 5-4 decision,[57] with both the majority and the dissent pointing to Sections 402 and 403 of the Restatement (Third) as the basis for their reasoning—but reaching opposite results.[58]

In *Hartford Fire*, both the majority and the dissent agreed that there were substantial effects on commerce in the United States, but disagreed about whether the exercise of U.S. prescriptive jurisdiction was "unreasonable" in the present context.[59] Justice Souter's opinion for the majority held that there was not really a conflict at all between the two sets of laws, because the defendants were not required by UK law to do what was prohibited by U.S. law.[60] Justice Souter believed that the evaluation and balancing of competing policies was only necessary with respect to the situation described in Section 403(3) of the Restatement (Third)—that of sovereign compulsion, where one law compels a particular action to be taken and the other law prohibits that same activity.[61] Thus, in the present matter, interest balancing was unnecessary. As explained by the Court, "even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct . . . international comity would not counsel against exercising jurisdiction in the circumstances alleged here."[62]

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[55] *Id.* at 778. Notably, the district court cited the *Timberlane* decision in support of this decision. *Id.*

[56] *In re* Ins. Antitrust Litig., 938 F.2d 919, 933 (9th Cir. 1991), *rev'd in part sub nom.* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). The Ninth Circuit also relied on *Timberlane* for its decision but reached the opposite result from the district court. *Id.* at 932.

[57] *Hartford Fire*, 509 U.S. at 797.

[58] *Id.* at 796 n.23, 818–21 (Scalia, J., dissenting).

[59] The disagreement between Justices Souter and Scalia is similar to the disagreement between Judges Weis and Adams in *Mannington Mills*. Like Justice Souter, Judge Adams thought that "[i]t is only when foreign law requires conduct [i]nconsistent with that mandated by the Sherman Act that problems of international comity become significant." Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1302 (3d Cir. 1979) (Adams, J., concurring). Like Justice Scalia, Judge Weis thought that comity considerations should be considered at the beginning to determine the extraterritorial application of U.S. law. *Id.* at 1294–96.

[60] *Hartford Fire*, 509 U.S. at 799.

[61] *See id.*

[62] *Id.* at 798.

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In a dissent joined by four Justices, Justice Scalia first conceded that the presumption against extraterritoriality had been overcome with respect to the application of the antitrust laws and that it was well established that the Sherman Act applied extraterritorially.[63] However, he emphasized that the extraterritorial application of the Sherman Act was to be tempered by considerations of international comity.[64] In his view, the factors in Section 403(2) of the Restatement (Third) reflected those comity considerations and were part of the evaluation of reasonableness necessary to determine the application of U.S. law.[65] Unlike Justice Souter, Justice Scalia, analyzing those factors, concluded that it was "unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable."[66] He stressed that the relevant activity "took place primarily in the United Kingdom," that the defendants were British companies with their principal places of business outside the United States, and that Great Britain had "established a comprehensive regulatory scheme governing the London reinsurance markets."[67]

One might have been tempted to view the *Hartford Fire* majority opinion as eliminating "comity" from the prescriptive jurisdiction analysis in the absence of compulsion once it is shown that the United States has a legitimate basis for the application of its own law. However, a subsequent Supreme Court antitrust decision, *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, made clear that international comity has a role to play, but provided almost no guidance as to how it should operate.[68]

Empagran involved a suit by foreign plaintiffs against foreign and domestic vitamin manufacturers who had allegedly engaged in a price-fixing conspiracy, resulting in a rise in the price of vitamin products to customers in the United States

[63] *Id.* at 814 (Scalia, J., dissenting).

[64] *See id.* at 814–15.

[65] *Id.* at 818–19. The Restatement (Third) also included a specific provision on jurisdiction to prescribe in competition actions entitled "Jurisdiction to Regulate Anti-Competitive Activities." RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 415 (AM. L. INST. 1987). In addition to addressing the reach of U.S. competition law, Section 415(3) provided for U.S. jurisdiction to prescribe if the principal purpose of the conduct had substantial effect on the commerce of the United States "and the exercise of jurisdiction is not unreasonable." *Id.* Neither Justice Souter nor Justice Scalia referenced this provision in their opinions in *Hartford Fire*. Unlike the Restatement (Third), the recent Restatement (Fourth), discussed *infra* in text accompanying notes 96–98, does not have specific provisions on jurisdiction to prescribe in competition actions.

[66] *Hartford Fire*, 509 U.S. at 819.

[67] *Id.*

[68] *See* 542 U.S. 155, 164–69 (2004).

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and abroad.[69] At issue was the interpretation of the Foreign Trade Antitrust Improvements Act (FTAIA), a statute that excludes certain cases involving foreign injuries from the reach of the Sherman Antitrust Act.[70] In the course of determining whether the statute applied to foreign conduct and foreign harm that is the sole basis for the plaintiff's claim,[71] the Court, citing Justice Scalia's dissent in *Hartford Fire*, referenced Sections 403(1) and 403(2) of the Restatement (Third) and invoked and relied on Justice Scalia's "principle of 'prescriptive comity.'"[72]

In *Empagran*, the Supreme Court stressed that "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies," noting different treatment with respect to treble damages and leniency.[73] The defendants argued that prescriptive comity did not require an interpretation of the statute that would exclude all foreign injury cases and instead, citing *Mannington Mills* as one example, demonstrated that court decisions could "take . . . account of comity considerations case by case, abstaining where comity considerations so dictate."[74] The Court rejected this argument, stressing that such an approach was "too complex to prove workable,"[75] but left open an undefined role for prescriptive comity.[76]

In general, outside of the antitrust context, the Court had not addressed whether multifactor balancing was an appropriate approach to determine the extraterritorial reach of U.S. federal statutes. Then, in *Morrison v. National Australia Bank*, the Court reaffirmed the importance of the presumption against extraterritoriality and the need for a rule-oriented approach.[77] In *Morrison*, the Court applied the presumption against extraterritoriality to federal securities law claims brought under the 1934 Securities Exchange Act. The case involved foreign investors who purchased shares of an Australian corporation on the Australian and other foreign

[69] *Id.* at 159.

[70] *See* 15 U.S.C. § 6a.

[71] *Empagran*, 542 U.S. at 165–66.

[72] *Id.* at 164 (quoting *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting)).

[73] *Id.* at 167.

[74] *Id.* at 168.

[75] *Id.*

[76] *Id.* at 168–73.

[77] *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010).

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exchanges[78]— often referred to as a "foreign-cubed" case.[79] The Court, while affirming the lower courts' dismissal of the case, adopted a different approach that created a new architecture for addressing the extraterritorial reach of federal legislation more generally.[80] In so doing, the Court criticized the lower courts' "methodology of balancing interests," which had led to "the unpredictable and inconsistent application of § 10(b) to transnational cases."[81] Justice Scalia's majority opinion also made clear that the question of the extraterritorial reach of a federal statute was not an issue of subject matter jurisdiction but one of "merits."[82]

The Court stated that it would first apply the presumption against extraterritoriality to the federal statute (unless it finds a clear expression in the statute that the presumption has been rebutted).[83] It then turned to the plaintiffs' argument that they were only seeking a "domestic application" of the statute.[84] Citing *Aramco*, the Court's response was to look to the "focus" of the particular statute to determine whether it was in fact domestic; in *Morrison*, the Court found that the Exchange Act's focus was on the purchase and sales of domestic securities—and since the exchange in this case was foreign, there was no domestic application of the statute.[85] The concurring justices took issue with whether this transactional test took account of the "public interest" and the "'interests of investors' that [are] the objects of the statute's solicitude" but agreed that the extensive foreign links in this case warranted dismissal.[86]

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[78] *Id.* at 250, 255.

[79] *Id.* at 283 n.11 (Stevens, J., concurring) (defining foreign-cubed actions as "actions in which '(1) *foreign* plaintiffs [are] suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries'" (quoting Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 172 (2d Cir. 2008)).

[80] *Id.* at 253–61.

[81] *Id.* at 259–60.

[82] *Id.* at 253–54.

[83] *Id.* at 261.

[84] *Id.* at 266.

[85] *Id.*

[86] *Id.* at 284 (Stevens & Ginsburg, JJ., concurring) (quoting Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998)). Congress amended, through the 2010 Dodd-Frank Act, the extraterritorial reach of § 10(b) about a month after the Court's decision. The new amendment provided for some extraterritorial reach in securities cases brought by the Securities and Exchange Commission or the United States. 15 U.S.C. § 77v(c).

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This two-step "rule-oriented" approach—apply the presumption unless the statute states otherwise and then look to the focus of the statute to determine if it is domestic—is found in two later Supreme Court cases, *RJR Nabisco, Inc. v. European Community* in 2016[87] and *WesternGeco LLC v. ION Geophysical Corp.* in 2018.[88]

RJR Nabisco involved a civil suit under the Racketeer Influenced and Corrupt Organizations Act (RICO) by the European Community ("EC") "and 26 of its member states" against Nabisco for treble damages as the result of a cigarette smuggling scheme.[89] Although the Court concluded that the presumption would be rebutted for any of the predicate acts that themselves provided for extraterritorial application in the regulatory context of RICO,[90] the Court held (4-3) that the presumption applied separately to RICO's private cause of action for damages.[91] Taking up the two-step process with regards to that private action, the Court held that the focus of this provision of the statute was the injury, and because the parties conceded that the injury was outside of the United States, there was no domestic application of the statute.[92] The EC asked the Court to consider the absence of international friction in cases where foreign governments themselves were plaintiffs, but the Court refused to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign."[93]

In *WesternGeco*, the Court began with the second step and looked to the "focus" of the particular provision of the Patent Act in question, avoiding the more general question of whether the statute applied extraterritorially.[94] Although the case involved lost *foreign* profits, the Court concluded that "infringement" was the focus of the statute and because the infringement occurred in the United States, it was nonetheless a "domestic" application.[95] Here again, the Court favored clear rules over a balancing approach.

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[87] 579 U.S. 325 (2016).

[88] 585 U.S. 407 (2018).

[89] *RJR Nabisco*, 579 U.S. at 329–33.

[90] *Id.* at 338.

[91] *See id.* at 346–47.

[92] *Id.* at 349–54.

[93] *Id.* at 349.

[94] WesternGeco LLC v. ION Geophysical Corp., 585 U.S. 407, 413–14 (2018).

[95] *Id.* at 414–16.

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The changing legal landscape in these Supreme Court cases led the American Law Institute to revise the earlier Restatement (Third), Section 403(2), which had embraced a multifactor approach to determine the extraterritorial reach of federal statutes. Section 404 of the 2018 Restatement (Fourth) provides that federal statutory provisions "apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary."[96] A comment to that section then adds that "a court will determine if application of the provision would be domestic or extraterritorial by looking to the focus of the provision, for example, on conduct, transactions, or injuries."[97] There is an additional provision in Section 405, "Reasonableness in Interpretation," which provides that as "a matter of prescriptive comity, courts in the United States may interpret federal statutory provisions to include other limitations" to avoid unintended conflicts with the laws of other states.[98] Nonetheless, the invocation of prescriptive comity does not appear to be an invitation to the multifactor balancing articulated in the Restatement (Third) and was included to accommodate the Supreme Court's reasoning in *Empagran* (and other cases) where the presumption does not operate and an additional restraint on jurisdiction may be desirable.

In short, the Supreme Court has rejected a case-by-case approach to prescriptive comity and the extraterritorial application of U.S. federal law in cases outside the antitrust context. Instead, it has made clear that the geographic scope of federal law is to be determined by traditional tools of statutory interpretation as implemented by the presumption against extraterritoriality as opposed to a case-by-case balancing approach grounded in prescriptive comity. However, prescriptive comity may still have a role to play in antitrust or other cases where the presumption against extraterritoriality has been rebutted,[99] although it is unclear just how it will operate.

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[96] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 404 (AM. L. INST. 2018). The Restatement (Fourth) separates domestic and international law on jurisdiction and notes that they "influence each other but are distinct bodies of law." *Id.* § 401 cmt. a.

[97] *Id.* § 404 cmt. c.

[98] *Id.* § 405.

[99] Under Supreme Court precedent, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (citations omitted). As such, the presumption against extraterritoriality was rebutted.

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B. Mannington Mills*'s Continuing Role in Prescriptive Comity Analysis*

At least one recent appellate court decision appears to have given greater attention to Judge Weis's opinion discussing international comity in *Mannington Mills*. In *In re Vitamin C Antitrust Litigation*, plaintiffs (U.S. purchasers of Vitamin C) alleged that defendants (entities incorporated under the laws of the People's Republic of China) established a conspiracy to fix the price of Vitamin C exported to the United States in violation of antitrust laws.[100] Defendants did not deny the allegations.[101] Instead, they argued that their actions were required by Chinese law.[102] Defendants moved to dismiss the complaint under the act of state doctrine, the doctrine of foreign compulsion, and principles of international comity.[103]

Complicating the matter was the fact that the Ministry of Commerce of the People's Republic of China filed an amicus brief supporting defendants.[104] In the first such submission by China in a U.S. court,[105] the amicus brief argued that under Chinese law all Vitamin C legally exported during the relevant time had to be sold under Chinese law at coordinated prices.[106] The district court denied the motion to dismiss, rejecting each of the three defenses.[107] After a jury found the defendants liable for approximately $147 million in damages and permanently enjoined them from further violations of the antitrust laws, an appeal was taken.[108]

On appeal, the Second Circuit held that "principles of international comity required the district court to abstain from exercising jurisdiction in this case."[109] In so doing, the court employed the multifactor balancing tests set out in *Timberlane*

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[100] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (*In re* Vitamin C Antitrust Litig.), 837 F.3d 175, 178 (2d Cir. 2016).

[101] *Id.* at 179.

[102] *Id.*

[103] *Id.* at 182.

[104] *Id.* at 180.

[105] *Id.* at 180 n.5.

[106] *Id.* at 180–81.

[107] *Id.* at 182.

[108] *Id.*

[109] *Id.* at 179.

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and *Mannington Mills*,[110] although it now accepted *Hartford Fire* as establishing a threshold requirement of a "true conflict" with foreign law before weighing competing interests.[111] The court explained that the alleged conduct must be required under Chinese law such that compliance with both U.S. and Chinese law would be impossible.[112]

The Second Circuit found that defendants could not comply with both U.S. and Chinese law and then applied a multifactor balancing approach.[113] The court concluded that "the district court abused its discretion by failing to abstain on international comity grounds from asserting jurisdiction."[114]

The Supreme Court granted certiorari limited to the question of whether a federal court is "required to treat as conclusive a submission from the foreign government describing its own law"[115]—whether, in short, the Second Circuit erred in giving conclusive effect to the substance of Chinese law as set forth in the amicus brief filed on behalf of the Chinese government. The Court held that the Second Circuit erred in giving such conclusive effect.[116] The Court stated that a "federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements."[117] The case was remanded to the Second Circuit for further consideration.[118] On remand, the Second Circuit again held that "principles of international comity required the district court to dismiss this action."[119]

The Second Circuit began by explaining that in the context of federal antitrust law, to warrant dismissal on the basis of international comity, there must be a "true

[110] *Id.* at 184–85.

[111] *Id.* at 185.

[112] *Id.* at 185–86.

[113] *Id.* at 192.

[114] *Id.* at 194.

[115] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 585 U.S. 33, 41 (2018).

[116] *Id.* at 36.

[117] *Id.*

[118] *Id.* at 47.

[119] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (*In re* Vitamin C Antitrust Litig.), 8 F.4th 136, 143 (2d Cir. 2021).

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conflict."[120] The court again found that there was a true conflict here because the applicable Chinese law during the relevant period required the defendants to fix the price of Vitamin C sold on the international market.[121] Having identified a true conflict, the court then went on to adopt the *Mannington Mills* approach and examined whether international comity required dismissal.[122] In so doing, the court condensed the *Mannington Mills* factors into five factors: (1) the nationality of the parties and the site of the anticompetitive conduct; (2) the effectiveness of enforcement and alternative remedies; (3) foreseeable harms to American commerce; (4) reciprocity; and (5) the possible effect on foreign relations.[123]

First, the Second Circuit determined that the fact that the defendants were Chinese companies, located in China "and primarily doing business there," weighed in favor of dismissal.[124] Second, the court found that the effectiveness of enforcement and alternative remedies were neutral because even though China might not tolerate enforcement, treble damages and a threat of more sanctions for violating enjoinment would likely fail to affect their policy, and so the consequences of enforcing the judgment were uncertain.[125] Third, the court explained that the harm to American companies was foreseeable, and thus this factor weighed against dismissal.[126] Fourth, the court found that reciprocity concerns weighed in favor of dismissal because, if the parties were reversed, the U.S. government "would undoubtedly expect the Chinese court to recognize as a valid defense that U.S. law required the American exporter's conduct" and take a Chinese court's refusal to dismiss such a case as an affront.[127] Finally, the court explained that since the Chinese government had already expressed irritation with the American judiciary over this case and the U.S. Executive Branch had not clearly intended that the court act otherwise, consideration

[120] *Id.* at 145.

[121] *See id.* at 154.

[122] *Id.* at 159.

[123] *Id.* at 160–62.

[124] *Id.* at 160.

[125] *Id.*

[126] *Id.* at 160–61.

[127] *Id.* at 161.

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of the possible effect on foreign relations weighed in favor of dismissing on the basis of international comity.[128]

To some degree, that approach is consistent with Section 405 of the Restatement (Fourth) that references "reasonableness" in statutory interpretation as an element of prescriptive comity,[129] but potentially inconsistent with *Empagran*'s rejection of multifactor balancing in a case-by-case approach to address the extraterritorial reach of federal statutes.[130] A petition for a writ of certiorari on the prescriptive comity issue was denied by the Supreme Court in this iteration of the *In re Vitamin C* case,[131] and thus any legacy for antitrust cases left by Judge Weis in *Mannington Mills* will have to wait for further developments.

II. RULES VERSUS STANDARDS

This Part examines recent prescriptive comity cases and illustrates the trend in U.S. law that has moved from standards to rules. It also considers some cases outside the United States and offers some comparative observations.

A. Rules or Standards?

The distinction between rules and standards has been addressed in a number of areas in U.S. law,[132] and most recently in the context of private international law in a set of Hague Academy lectures by Professor Silberman.[133] The development of U.S. law on prescriptive jurisdiction/extraterritorial reach, as set forth earlier in this Article in Part I, is one of the best examples of this trend toward rules in U.S. caselaw. However, two Supreme Court decisions decided in 2023 indicate that there are other chapters of this story to be written and that further refinements may still be in order.

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[128] *Id.* at 161–62.

[129] *See supra* text accompanying note 98.

[130] *See supra* text accompanying notes 74–76.

[131] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (*In re* Vitamin C Antitrust Litig.), 8 F.4th 136 (2d Cir. 2021), *cert. denied*, 143 S. Ct. 85 (2022).

[132] *See generally* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (delineating the difference between the two in torts, criminal law, and constitutional law, among others).

[133] For a complete discussion of this development, see Professor Linda J. Silberman in her 2021 Hague Academy General Course on Private International Law, entitled "The Counter-Revolution in Private International Law in the United States: From Standards to Rules?" (on file with authors). For an example of this rules/standards debate in the context of forum non conveniens, see Donald Earl Childress III, Forum Non Conveniens *in the Fourth Restatement*, *in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW 359 (Paul B. Stephan & Sarah H. Cleveland eds., 2020).

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The first case, *Yegiazaryan v. Smagin*, illustrates the difficulty of applying the "presumption/focus rule" even where the focus has been identified.[134] In *Yegiazaryan*, Smagin, a Russian resident, obtained a London arbitral award against another Russian, now living in California, and subsequently obtained a judgment in California confirming the London award. When Yegiazaryan did not pay and allegedly diverted assets to a foreign bank, Smagin brought a civil RICO claim against him and others.[135]

Since *RJR Nabisco* had already held that a civil RICO claim only covered "domestic injuries," the question was where Smagin had suffered his financial injury.[136] If the "injury" were said to be at the domicile of the plaintiff, as defendant Yegaizaryan contended, the injury would be foreign and RICO would not apply.[137] Alternatively, if the injury were found to be where the defendant acted or where the award was confirmed, as the plaintiff Smagin maintained, there would be a "domestic injury" and the statute would apply.[138]

Justice Sotomayor, writing for a six-justice majority, explained that courts need to look at all of the circumstances surrounding the alleged injury, including, in circumstances like these, "the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity."[139] In assessing those factors, Justice Sotomayor concluded that Smagin's interests in a "California judgment against . . . a California resident . . . were directly injured by racketeering activity either taken in California or directed from California, with the aim and effect of subverting Smagin's rights to execute on that judgment in California," which sufficed to show domestic injury for purposes of RICO.[140]

The Court's holding and analysis was a striking contrast to the formalism adopted in the other extraterritorial cases with respect to the "focus" of a statute, and the three dissenting Justices (Justice Alito joined by Justices Thomas and Gorsuch)

[134] Yegiazaryan v. Smagin, 143 S. Ct. 1900, 1905–06 (2023).

[135] *Id.* at 1905–07.

[136] *Id.* at 1907–09.

[137] *Id.* at 1909.

[138] *Id.*

[139] *Id.* (footnote omitted).

[140] *Id.* at 1911.

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made just that point.[141] They complained that the Court should not have even taken the case because it offered "virtually no guidance to lower courts" and risked creating confusion with respect to the Court's precedents.[142]

Any danger that the Court was actually retreating from its preference for formal rules was dispelled in the Supreme Court's decision one week later in *Abitron Austria GmbH v. Hetronic International, Inc.*, where the Court took up the question of the foreign reach of two provisions of the Lanham Act prohibiting trademark infringement.[143] A much earlier 1952 decision of the Court, *Steele v. Bulova Watch Co.*, had applied the Act extraterritorially to reach the manufacture and sale of watches in Mexico where some of the infringing watches had "filtered" into the United States and caused consumer confusion.[144] The Court in *Steele* relied on the broad language of the Lanham Act and defendant's specific U.S. links and operations to justify application of the statute to acts outside the United States.[145] Over the years, lower courts followed this approach in trademark cases somewhat reminiscent of *Mannington Mills*, but created tension with the presumption/focus approach in more modern cases.

In *Abitron*, various foreign companies began to sell products in Europe using the trademark of the U.S. company Hetronic.[146] Although ninety-seven percent of the sales were in foreign countries to foreign customers,[147] an appellate court, applying the multifactor balancing approach used in other Lanham Act cases, upheld a $96 million jury award on the theory that potential sales to U.S. customers were diverted as the result of confusion.[148] The briefs focused on the tension between the multifactor comity test in the antitrust extraterritoriality cases and the more rule-

[141] *See id.* at 1913–14 (Alito, J., dissenting).

[142] *Id.* at 1912 (Alito, J., dissenting).

[143] 143 S. Ct. 2522, 2527 (2023).

[144] 344 U.S. 280, 284–86 (1952).

[145] *Id.* at 286. For further discussion, *see generally* Rochelle Dreyfuss & Linda Silberman, *Misapproriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases*, 8 CYBARIS 265 (2017).

[146] *Abitron*, 143 S. Ct. at 2527.

[147] Brief for Petitioners at 13, Abitron Austria GmbH v. Hetronic Int'l, Inc. (2023) (No. 21-1043).

[148] *See Abitron*, 143 S. Ct. at 2527.

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oriented, two-step formulation found in *Morrison* and *RJR Nabisco*.[149] The U.S. plaintiff, Hetronic, argued that the Lanham Act cases were like the antitrust cases and that the various factors pointed to application of U.S. law.[150] The defendant, Arbitron, contended that the Supreme Court should follow the two-step presumption/focus test it had adopted in its recent decisions and that the focus of the statute was the use of the trademark, which took place abroad, making application of the statute impermissibly extraterritorial.[151] Interestingly, the United States filed a brief that argued that the presumption/focus test should be applied but nonetheless contended that the focus of the statute was on customer confusion;[152] thus, if confusion in the United States were established, then application of the statute would be domestic and not extraterritorial.

Justice Alito, who had dissented in *Yegiazaryan*, authored a majority opinion in *Arbitron* for five Justices (Justices Thomas, Gorsuch, Kavanaugh, and Jackson), with Justice Sotomayor writing an opinion for the other four Justices who concurred in the judgment but sounded more like a dissent.[153] Justice Alito applied the two-step framework for evaluating whether a statute applies extraterritorially as set forth in *RJR Nabisco*.[154] At step one, which determines whether a provision is extraterritorial, the Court found that neither provision at issue in the Lanham Act "provides an express statement of extraterritorial application or any other clear indication that it . . . nonetheless applies abroad."[155] At step two, which determines whether the case involves a permissible domestic application of the provisions at issue, the Court found the parties' arguments to miss the mark.[156]

The parties' arguments centered around the focus of the Lanham Act's enforcement provisions.[157] But the majority found that the conduct relevant to the

[149] *See* Brief for Petitioners, *supra* note 147, at 19–20; Brief for Respondent at 20–26, Abitron Austria GmbH v. Hetronic Int'l, Inc. (2023) (No. 21-1043).

[150] Brief for Respondent, *supra* note 149, at 16–19.

[151] Brief for Petitioners, *supra* note 147, at 16–18.

[152] Brief for the United States as Amicus Curiae Supporting Neither Party at 11–12, Abitron Austria GmbH v. Hetronic Int'l, Inc. (2023) (No. 21-1043).

[153] *See Abitron*, 143 S. Ct. at 2527; *id.* at 2537 (Sotomayor, J., concurring).

[154] *Id.* at 2528–32.

[155] *Id.* at 2529.

[156] *Id.* at 2531.

[157] *Id.*

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focus test was the "infringing use in commerce."[158] Accordingly, the Court held that permissible domestic application of the Lanham Act requires infringing use of a mark in commerce to have occurred in the United States.[159] Justice Alito explained that after identifying the statute's focus, the inquiry must be whether the conduct relevant to that focus occurred in the United States.[160] In this case, the use in commerce was the conduct relevant to the focus of the provisions because Congress deemed it a violation each time a mark was used in commerce.[161] The majority held that permissible domestic application of the Lanham Act under the two provisions at issue requires infringing use of a mark in commerce to have occurred in the United States.[162]

The concurring Justices accepted the two-step presumption and focus approach,[163] but they argued that the focus of the statute was on "consumer confusion" that would respect international relations while protecting against trademark infringement domestically, the argument that the Solicitor General had proffered.[164] Perhaps the most interesting aspect of the case is the additional concurring opinion by Justice Jackson, who joined Justice Alito's opinion to create the majority but wrote separately to underscore the uncertainty of how the "use in commerce" focus would operate in future cases, such as sales to intermediaries or online sales where the product ends up in the United States.[165]

Although it is fair to say that the Court appears intent on keeping to a "rules" approach with respect to the extraterritorial reach of statutes, the recent cases illustrate that "rules" and "standards" operate along a spectrum. "Rules" are often in need of refinements that can make them appear more standard-like. Also, "rules" often necessitate elaboration for different situations and opting for a "rule" rather than a standard does not necessarily mean a clear bright line for all cases.

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[158] *Id.*

[159] *Id.* at 2531–32.

[160] *Id.* at 2531.

[161] *Id.*

[162] *Id.* at 2531–32.

[163] *Id.* at 2538 (Sotomayor, J., concurring).

[164] *Id.* at 2539–40 (Sotomayor, J., concurring).

[165] *Id.* at 2535–36, 2536 n.8 (Jackson, J., concurring).

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B. A Comparative Perspective

A comparative perspective also provides some useful insights. It is worth emphasizing that what has been characterized as a retreat from extraterritorial application of U.S. law is only a matter of statutory construction and not legislative authority. Thus, Congress can, as it has in some instances, make clear that a statute applies extraterritorially. But it is interesting that other countries appear to have accepted extraterritoriality as the "new normal" in certain areas. Both the EU and Japan appear to extend their domestic competition law to regulate parties even where the conduct primarily occurs abroad.[166] And there does not appear to be an overlay of a doctrine of "prescriptive comity" that was found in *Empagran* and later in *Vitamin C*.

While the United States appears to retreat from "balancing" as an approach to when a statute should apply extraterritorially, there are examples in the EU, particularly in the area of data protection, where the EU Court of Justice has done just that. In the EU *Google/France* case, the Court of Justice limited the scope of the General Data Protection Act, emphasizing that the European "right to be forgotten" is not recognized in many other countries.[167] Noting that other countries have strong policies allowing for full access to information, the court refused to extend the obligation to delist to non-EU defendants who list information on websites outside of the EU.[168]

The European developments are a stark contrast with the past, when European courts were strong critics of the overreach of U.S. law. In the early *Wood Pulp* cases, the European Court of Justice applied European competition law to defendants who acted outside the Community, but on the basis that conduct had occurred within the Community rather than relying on economic effects.[169] More recently, however, the EU has applied its competition law much more broadly to regulate parties outside of

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[166] *See generally* Anu Bradford, Adam S. Chilton, Katerina Linos & Alex Weaver, *The Global Dominance of European Competition Law Over American Antitrust Law*, 16 J. EMPIRICAL LEGAL STUD. 731 (2019) (exploring the global influence of EU antitrust regulation); Marek Martyniszyn, *Japanese Approaches to Extraterritoriality in Competition Law*, 66 INT'L & COMPAR. L.Q. 747 (2017) (tracing the history of Japan's embrace of extraterritoriality).

[167] Case C-507/17, Google LLC v. Comm'n Nationale de l'Informatique et des Libertés (CNIL), ECLI:EU:C:2019:772, ¶ 59 (Sept. 24, 2019).

[168] *Id.* ¶¶ 63–65.

[169] Joined Cases C-89, C-104, C-114, C-116, C-117, C-125 & C-129/85, Osakeyhtiö v. Comm'n of the Eur. Cmty., 1993 E.C.R. I-1307, I-1415.

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the EU even where the conduct primarily occurred abroad.[170] For example, in the area of financial law relating to derivative transactions, the EU has imposed its clearing requirement to parties from non-EU countries if there is a "direct, substantial and foreseeable effect within the Union."[171]

Data protection is the most recent example of difficult questions about extraterritorial regulation.[172] The European Union's General Data Protection Regulation (GDPR)[173] gives individuals the right to access and rectify personal data as well as the "right to be forgotten," i.e., to have personal data erased.[174] The GDPR expressly applies to entities established outside the EU if the entity controls or processes data of EU subjects—i.e., natural persons living in the EU.[175] In the *Google/France* case, the question was whether the obligation imposed by the GDPR to delist information extended to Google's websites worldwide, as opposed to just within the territory of the Member States.[176] The French Data Commission had ordered Google, a U.S. company, to delist certain information of French citizens.[177]

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[170] *See* Case T-286/09 RENV, Intel Corp. v. Eur. Comm'n, ECLI:EU:T:2022:19, ¶ 48 (Jan. 26, 2022); *see also* Bernadette Zelger, *EU Competition Law and Extraterritorial Jurisdiction—A Critical Analysis of the ECJ's Judgement in Intel*, 16:2–3 EUR. COMPETITION J. 613 (2020) (discussing the development of ECJ caselaw in this area as well as the *Intel* decision). *See generally* Matthias Lehmann, *American vs. European Approaches to Extraterritoriality in Civil Litigation*, *in* US LITIGATION TODAY: STILL A THREAT FOR EUROPEAN BUSINESSES OR JUST A PAPER TIGER? 197 (Andrea Bonomi & Krista Nadakavukaren Schefer eds., 2018).

[171] *See* Regulation 648/2012, of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties, and Trade Repositories, art. 4 § 1(a)(v), 2012 O.J. (L 201) 1.

[172] *See, e.g.*, Kevin D. Benish, *Whose Law Governs Your Data?: Takedown Orders and "Territoriality" in Comparative Perspective*, 55 WILLAMETTE L. REV. 599 (2019); Jennifer Daskal, *Privacy and Security Across Borders*, 128 YALE L.J.F. 1029 (2019); PROTECTING PRIVACY IN PRIVATE INTERNATIONAL AND PROCEDURAL LAW AND BY DATA PROTECTION: EUROPEAN AND AMERICAN DEVELOPMENTS (Burkhard Hess & Cristina M. Mariottini eds., 2015); Christopher Kuner, *Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law*, 5 INT'L DATA PRIV. L. 235 (2015).

[173] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR].

[174] *See* Case C-131/12, Google Spain v. Agencia Española de Protección de Datos (AEPD), ECLI:EU:C:2014:317, ¶ 99 (May 13, 2014); GDPR at ch. 1, arts. 15–17.

[175] GDPR at ch. 1, art. 3.

[176] *See* Case C-507/17, Google LLC v. Comm'n Nationale de l'Informatique et des Libertés (CNIL), ECLI:EU:C:2019:772, ¶ 39 (Sept. 24, 2019).

[177] *Id.* ¶ 30.

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Google complied and delisted the data on its EU sites—e.g., google.fr, google.de—but not on those sites in nonmember states.[178] When the case reached the European Court of Justice, it had to determine the prescriptive reach of an order to delist—in U.S. terminology, whether a world-wide take-down order was impermissibly extraterritorial.[179]

The Court of Justice first stated that the GDPR could reach Google's activities world-wide to protect French citizens, but that "balancing" was necessary.[180] The court pointed out that this particular European "right to be forgotten" is not recognized in many countries and thus should be balanced against the policies of other countries to allow full access to information.[181] At least as to this particular right, the court concluded that the statute should not extend beyond the territory of the Member States.[182]

In short, the balancing approach that has fallen out of favor in the United States may be the "new normal," particularly in the area of competition (antitrust) law in some foreign jurisdictions.

CONCLUSION

Judge Weis's opinion in *Mannington Mills* presents an important historical marker for the development of the prescriptive comity doctrine. The doctrine as employed in that decision represents a view of international comity as a standard as opposed to a rule that was ascendant at the time that case was decided. However, more recent cases in the Supreme Court have favored rules over standards and

[178] *Id.* ¶¶ 30–31.

[179] *Id.* ¶ 39(1).

[180] *Id.* ¶¶ 48–52, 60–61.

[181] *See id.* ¶¶ 59–61.

[182] *Id.* ¶¶ 73–74. Notably, the ECJ found that while the GDPR does not require delisting on websites outside of Member States, nothing in the GDPR prevents the "judicial authority of a Member State" from deciding, "in the light of national standards" and "where appropriate," that such a right must be extended to all versions of a website globally. *Id.* ¶ 72. More recent developments in global internet technologies may further challenge global compliance with the EU's regulatory regime. *See, e.g.*, Jessica Shurson, *Data Protection and Law Enforcement Access to Digital Evidence: Resolving the Reciprocal Conflicts Between EU and US Law*, 28 INT'L J.L. & INFO. TECH. 167 (2020) (exploring issues posed by data protection regimes in the EU and United States given the rise of cloud computing and law enforcement's necessity to access information in the cloud for evidence); Sandy Tsakiridi, *Blockchain and the GDPR—Friends or Foes?*, 20 PRIV. & DATA PROT. 4 (2020) (discussing tensions between emergent decentralized blockchain technology and the GDPR); Marketa Trimble, *Territorialization of the Internet Domain Name System*, 45 PEPP. L. REV. 623 (2018) (discussing the future of the domain name system in an online environment increasingly tied to physical geography).

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multifactor balancing tests. This idea of rules versus standards shows a continuing debate in private international law between the ways in which U.S. courts should evaluate questions of conflict between U.S. and foreign law. It also provides a comparative insight for cases in foreign jurisdictions dealing with similar issues. The role that rules versus standards may play in international comity remains a fertile area for development by the Supreme Court, especially in the antitrust context. Judge Weis's opinion remains an important decision for such exploration.

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