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The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation

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The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation

Hannah L. Buxbaum†

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I. INTRODUCTION

The private attorney general is a creature of domestic law, designed to assist government agencies in enforcing various statutes through private causes of action. As the growth in transnational commerce has necessitated the more frequent application of those statutes in international settings, the private attorney general has come to play a role on the global stage as well. This role involves both the private interests of an individual plaintiff and the public interests embodied in the statutory laws being enforced. Precisely because of this dual role, the private attorney general can also serve as a useful tool for exploring developments in international economic regulation. This Article uses the role of the private attorney general to examine the growing inconsistency in judicial evaluations of the public interests at stake in regulatory disputes.

Just as litigation initiated by private attorneys general incorporates both public and private interests, international regulatory disputes involve elements of both public and private law. Because international commerce necessarily involves parties and affects interests in multiple jurisdictions, it comprises behavior over which two or more countries may simultaneously seek to assert regulatory jurisdiction. International economic regulation is, in this sense, a matter of public law, turning on the government's interest in setting economic policy and on the scope of its authority to do so. At the same time, however, international commercial transactions between private actors—the means through which most international activity is conducted—are the subject of private law. Thus, analysis of international economic law reveals an interesting polarity between the public interests emphasized in economic regulation by sovereign entities and the private interests emphasized in the daily business of international commerce.

1. Statutes may incorporate a mechanism supporting private litigants' claims based on statutory violations. Plaintiffs initiating actions under such laws are described as private attorneys general, and the litigation they generate supplements government enforcement of those statutes. Section II.A infra.

2. Traditionally, public law is seen to encompass rules relating to the governmental function and to the relationship between a state and individuals, while private law is seen to govern relationships between individuals. Randy E. Barnett, Foreword: Four Senses of the Public Law—Private Law Distinction, 9 HARV. J.L. & PUB. POL'Y 267 (1986) (discussing a public/private law distinction based on the nature of the parties subject to regulation).

3. In this sense, the public aspect of international economic regulation is two-fold: It involves both domestic public law (antitrust regulation) and international public law (the effect outside its own territory of a sovereign's authority). Cf. Andreas F. Lowenfeld, Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case, 89 AM. J. INT'L L. 42, 47 (1995) ("[T]he reach of a nation's law is a subject of international law—public custom law").

4. Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 AM. J. INT'L L. 280, 280 (1982) ("Public international law regulates activity among human beings operating in groups called nation-states, while private international law regulates the activities of smaller subgroups or of individuals as they interact with each other.").

5. This description of the primary emphasis in each area is not intended to suggest exclusive
The tension between asserting public regulatory interests and facilitating private international commercial activity is particularly evident in the area of antitrust regulation. The extent to which the United States may apply its antitrust laws to foreign conduct (in other words, the extent to which it may assert its regulatory interests abroad) has been the subject of intense interest for decades, and the language used to discuss this question of extraterritorial regulation is the language of public law. Moreover, the Supreme Court has recently reinforced the paramount importance of effectuating domestic antitrust policy even when the antitrust concerns arise in an international setting. Interestingly, however, this extraterritoriality jurisprudence has developed independently of (though concurrently with) developments in the international contract arena. Courts deciding international contract disputes have subordinated the public interests involved, even where the particular transactions raise questions of regulatory law, in order to facilitate international commerce and to permit the greatest possible degree of party autonomy. In the contract context, regulatory policies are discussed not within the framework of public law, but as elements in a private-law analysis.

This Article uses the private attorney general mechanism as a framework to examine the peculiar double role played by U.S. regulatory law—asserted as the pure manifestation of sovereign interest in one setting, and balanced against competing policies in the other. Part II discusses the role of the private attorney general in antitrust law generally and in international antitrust cases in particular, exploring the discrepant approaches to private antitrust claims in two litigation settings. Part III analyzes the U.S. approach to extraterritorial antitrust regulation, examining the expansive role private plaintiffs play in asserting the public interests embodied in antitrust law. Part IV contrasts that antitrust jurisprudence with the ongoing marginalization of the private attorney general in international contract cases, a development that suggests the predominance of private, rather than public, interests in such litigation. By examining the disparate treatment accorded the private attorney general in these two settings, these three parts illustrate the overall inconsistency in the value assigned to public regulatory interests more generally. Finally, Part V

emphasis. There is of course a public interest aspect to private law, and some public laws serve private interests as well. See generally Philip J. McConnaughay, Reviving the "Public Law Taboo" in International Conflict of Laws, 35 STAN. J. INT'L L. 255, 302 (1999) (noting that activity subject to antitrust regulation may inflict "private harms" while many private-law rules serve public efficiency interests). Indeed, this Article later argues that the public/private dichotomy is in many ways an insufficient foundation for analysis of international regulatory law. Section V.B infra.


7. EARL W. KINTNER & MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 63 (1974) ("Antitrust litigation in the United States that concerns the nation's foreign commerce can present problems that are virtually 'diplomatic' in nature.").


9. See cases discussed in Part IV infra.
discusses certain consequences of that inconsistency. It begins by examining more closely the efficacy of the private attorney general in international cases. It then takes up the theoretical debate that has framed the discussion of international antitrust issues: whether conflict-of-laws methodology, developed for use in private-law disputes, might be used to analyze questions of regulatory jurisdiction. Drawing on the treatment of antitrust interests in international contract cases, Part V argues that this debate is largely moot because questions of regulatory jurisdiction have already proven to be susceptible to analysis based on traditional conflict-of-laws principles. It further suggests that such analysis provides a necessary sensitivity, lacking in the current judicial approach to extraterritoriality, to the relative weight of the various public and private interests involved in instances of international regulation.

II. THE PRIVATE ATTORNEY GENERAL IN ANTITRUST LITIGATION

A. The Role of the Private Attorney General

A private litigant acts as a private attorney general if the litigant asserts a cause of action not only to obtain compensation, but also to vindicate important public interests. Although private litigation has been used to enforce important non-statutory rights, private attorneys general have had a great impact in enforcing statutory policies. Indeed, discussion of the private attorney general's function generally focuses on the particular statutory mechanisms, such as fee shifting, that are implemented to promote such litigation. The goal of developing such mechanisms, and thereby encouraging private litigation, is to deter unlawful behavior by supplementing the government resources devoted to enforcement.


11. In the case giving rise to the phrase, the judge noted that just as Congress could authorize the Attorney General to sue on behalf of the public, it could also, by statute, authorize suits by non-official persons "to vindicate the public interest." Assoc. Indus. v. Ickes, 134 F.2d 694, 704 (2d. Cir. 1943). The judge concluded that "[s]uch persons, so authorized, are, so to speak, private Attorney Generals [sic]." Id.

12. Some statutes explicitly create a private cause of action. See, for example, section 11 of the Securities Act of 1933, 15 U.S.C. § 77, which creates a private cause of action to sue for unlawful registration statements, and the Clayton Act, ch. 323, 38 Stat. 730 (1914), discussed infra. Under other statutes, the right of a private litigant to act as a private attorney general is implied. See, for example, section 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. § 78, which has been interpreted as creating a private cause of action under the securities laws.


agencies to enforce regulatory statutes are enhanced in many areas of law, including environmental law and securities regulation, by this form of private litigation.\textsuperscript{15}

The antitrust laws deliberately adopt the private attorney general as a mechanism for law enforcement. Specifically, the Clayton Act created an express remedy for private individuals injured by any violation of the antitrust laws.\textsuperscript{16} An amendment to that statute, contained in the 1976 Antitrust Improvements Act, created an additional cause of action under which state attorneys general could assert antitrust claims as representatives of state citizens.\textsuperscript{17} The statute also authorized treble damage awards to plaintiffs\textsuperscript{18} and included a fee-shifting provision, by which attorneys' fees are awarded to the successful plaintiff.\textsuperscript{19} This statutory framework reveals Congress' intention to motivate a level of private enforcement that would ensure significant compliance with the antitrust laws.\textsuperscript{20} In this, Congress was successful, as private actions have constituted a substantial portion of antitrust litigation.\textsuperscript{21}

B. \textit{Balancing Public and Private Interests in the International Case}

When a private litigant enforces a regulatory statute, the vehicle for that enforcement is of course a private lawsuit. The action thus has a wholly private aspect—securing compensation for the victim of a wrong. By initiating such an action, however, the litigant also vindicates the public interest for which the statute was enacted. The resulting tension between the

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\textsuperscript{15} Coffee, \textit{supra} note 13, at 216.


\textsuperscript{17} 15 U.S.C. §§ 15(c)-15(e). This cause of action includes the treble-damages remedy and is otherwise viewed as analogous to a private action rather than to an action initiated by the federal agencies. Thus, states (as opposed to the federal agencies) lodging antitrust cases have typically been classified as private rather than public litigants.

\textsuperscript{18} 15 U.S.C. § 15(a) (Supp. 1986) (stating that a private plaintiff "shall recover threefold the damages by him sustained"). The private plaintiff may also seek injunctive relief under section 26 of the Clayton Act.

\textsuperscript{19} Id.

\textsuperscript{20} \textit{E.g.}, Perma Life Mufflers v. Int'l Parts Corp., 392 U.S. 134, 136 (1968), rev'd, 467 U.S. 752 (1984) (recognizing the integral role of private actions in antitrust enforcement). See also \textsc{Kalinowski} \& \textsc{Sullivan}, \textit{supra} note 16, § 160.01.

public and private aspects of the private attorney general’s role has long been apparent in domestic antitrust litigation.

The domestic cases that explore the public/private tension most directly are those that developed the standing doctrine in antitrust law. Standing requirements in antitrust law are designed to bar plaintiffs from asserting public regulatory interests when the injury suffered was in fact remote from the antitrust violation alleged. In other words, they seek to weed out cases that serve only the private goals of the litigant. These requirements have at times been adjusted to reflect attitudes concerning the dual interests at stake. In one period of retrenchment, the Supreme Court reinterpreted the broad mandate of the Clayton Act to restrict the activity of private attorneys general. In a related line of cases, courts considered the balance between private and public interests in developing the “antitrust injury” doctrine. These cases noted that it would be inconsistent with the goals of the antitrust laws to permit recovery for private harms that did not implicate protected public interests. Seeking to avoid “authoriz[ing] damages for losses which are of no concern to the antitrust laws,” they required plaintiffs to establish an injury of the type the antitrust laws were designed to prevent.

Courts have weighed the public and private interests at stake in other contexts as well. Holding that the equitable defense of in pari delicto was not a bar to treble-damage actions brought by culpable plaintiffs, the Supreme Court noted the strong public interest in using private actions as a deterrent to unlawful behavior. Finally, fluctuations in enforcement patterns reveal similar shifts in the focus on public and private values. During periods in which a larger percentage of private lawsuits are “follow-ons” to public enforcement actions, the private value of

22. Stated in summary fashion, the standing requirements provide that a plaintiff must establish (1) an injury to its business or property that was (2) substantially caused by defendant’s conduct and (3) was of the type the antitrust laws were intended to prevent. KALINOWSKI & SULLIVAN, supra note 16, § 161.02. In one case discussing the standing requirements, the Supreme Court stated that “Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.” Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982).


25. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487 (1977). The court in that case held that plaintiffs “must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” Id. at 489.


27. In other words, they arise out of activities that are already subject to investigation or enforcement action by government agencies.
compensating the victim takes precedence over the public deterrent value; conversely, when more private suits are initiated independent of government action, the emphasis is on the public role of the litigant in bringing to light antitrust violations that would not otherwise have been prosecuted. 28

While the twin goals of private antitrust litigation in the domestic arena raise certain complexities there, one thing is clear—the source of applicable regulatory law. When a private attorney general brings a lawsuit against U.S. defendants based on conduct taking place within the United States, the court will apply U.S. antitrust law. In a lawsuit arising from international activities, however, the role of the private attorney general is more complicated. A U.S. plaintiff might seek to enforce U.S. antitrust law against a foreign defendant whose behavior was permitted, or perhaps even compelled, by foreign law. Later, that plaintiff might seek to enforce a treble damages award in a country whose own laws would permit only compensatory damages. The regulatory picture is thus complicated by the fact that a lawsuit initiated by a private attorney general may be viewed simply as a vehicle for the improper assertion abroad of the United States' domestic policy interests. As the volume of international commerce has increased, so too have the possibilities for conflict generated by the activity of private attorneys general.

C. The Procedural Context of Actions Initiated by Private Attorneys General

Private litigants tend to invoke the application of antitrust laws in one of two procedural contexts. 29 The first is what might be called a pure statutory action, in which the plaintiff who has suffered harm caused by the defendant's conduct exercises his or her right under the Clayton Act to sue for (treble) compensatory damages. In such cases, there is generally no contractual relationship between the parties; the typical plaintiff sues a competitor for an antitrust violation that led to damages. 30 The second context is an action in which claims under the antitrust laws are raised in litigation based on a contractual relationship between the parties. 31 Such claims can be raised

28. For an analysis of such cases based on empirical data concerning "follow-on" versus independently initiated antitrust litigation, see Thomas E. Kauper & Edward A. Snyder, Private Antitrust Cases That Follow On Government Cases, in PRIVATE ANTITRUST LITIGATION 329 (Lawrence J. White ed., 1988); see also Varan Gupta, Note, After Hartford Fire: Antitrust and Comity, 84 GEO. L.J. 2287, 2306-07 (1996) (discussing the proportional increase in private actions in the second half of the twentieth century). Even follow-on lawsuits have some deterrence value, of course, since the additional monetary penalties imposed on the defendants add to the deterrence value of governmental enforcement.

29. See generally Salop & White, supra note 21 (setting forth data on different categories of antitrust litigation).


offensively—for instance, by a licensee who believes that a breach of contract by its licensor involves violations of U.S. antitrust law. More often, however, they are raised defensively in a suit brought by the other party to enforce a foreign forum-selection or choice-of-law clause contained in the contract. In that situation, the defendant typically claims that his or her right to invoke U.S. antitrust laws should not be disturbed by the contractual agreement.

Although the rights asserted by litigants in the statutory and contract contexts are the same—the right of a private litigant to claim damages implicating the impairment of a public interest—they have been treated very differently by the courts. Parts III and IV of this Article discuss these two models in turn, analyzing the role of the private attorney general in each setting. They examine the manner in which the judiciary has evaluated the relative weight of the public and private components of the private attorney general’s role, thereby providing a framework for the later evaluation of the weight given to public interests in international antitrust law generally.

III. Asserting U.S. Antitrust Interests Abroad: Statutory Cases and the Expanded Mandate of the Private Attorney General

U.S. antitrust legislation contains virtually no language addressing its jurisdictional reach with respect to international commerce: neither the Clayton Act, which created the private cause of action, nor the Sherman Act, under which most international antitrust cases arise, speaks to its applicability beyond the borders of the United States. Moreover, the U.S. Constitution and the principles of international law relating to sovereign jurisdiction do not prevent the application of U.S. antitrust law to conduct occurring outside the United States. Clearly, though, Congress could not have intended domestic

32. E.g., Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999) (involving allegations that a licensing agreement between the parties restrained trade).
33. See, for example, Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985), discussed in detail in Subsection IV.A.1 infra.
34. Section 4 of the Clayton Act states that “any person” can sue on the basis of “anything forbidden in the antitrust laws,” thus referring back to the federal antitrust laws themselves for jurisdictional purposes. 15 U.S.C. § 15(a). Section 26 of that Act, providing for injunctive relief, contains similar language. Section 1 of the Sherman Act prohibits “every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . with foreign nations,” while section 2 makes it illegal for a person—defined to include entities organized under the laws of a foreign country—to “monopolize, or . . . conspire . . . to monopolize any part of the trade of commerce . . . with foreign nations.” 15 U.S.C. §§ 1-2 (1988). For a discussion of the “inconclusive” legislative history of the Sherman Act with respect to foreign commerce, see SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 2.3 (1997). The Foreign Trade Antitrust Improvements Act of 1982, Pub. L. 97-290, 96 Stat. 1246, codified in part as 15 U.S.C. § 6(a), introduced certain limiting language related to the effect of the foreign conduct in the United States. The FTAIA applies only to export trade of the United States, however, and it has had limited effect on general extraterritoriality analysis since its adoption.
35. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (“Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”); see also Gary B. Born, A Reappraisal of the Extraterritorial Reach of United States Law, 24 LAW & POL’Y INT’L BUS. 1, 5 (1992) (discussing the absence of such limits on extraterritorial application of the antitrust laws).
antitrust law to reach every international transaction tangentially implicating U.S. interests.\textsuperscript{36} International antitrust jurisprudence thus seeks to delimit the boundaries of U.S. law by examining congressional intent in order to define precisely the reach of the statutes.\textsuperscript{37}

The cases in which courts explored the parameters of regulatory jurisdiction were based primarily on actions by private plaintiffs that did not involve the assertion of contractual rights; in other words, to use the classifications set forth above, they addressed statutory claims by private attorneys general. Section A and Subsection B.1 below discuss cases in which courts analyzed the extraterritorial application of U.S. antitrust law, examining in particular the development of the interest-balancing approach that was ultimately rejected by the Supreme Court in \textit{Hartford Fire}. Although I will return to these cases in Subsection B.3 of Part V, readers familiar with the extraterritoriality literature may choose at this point to proceed directly to Subsection B.2, which picks up with the 1993 decision.

A. The Development of Jurisdictional Tests and the Rise of Interest Balancing

1. Beyond Territorialism

Early cases focused on determining whether U.S. antitrust laws could in any circumstances be applied to behavior that took place outside the territory of the United States. Underpinning this discussion was the assumption that international law discouraged such extraterritorial application,\textsuperscript{38} and early antitrust decisions maintained that the Sherman Act applied only to conduct taking place within the borders of the United States. As formulated in the well-known \textit{American Banana} decision of 1909,\textsuperscript{39} the prevailing view was that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”\textsuperscript{40} During this period, then, the reach of U.S. antitrust laws was deemed to extend only as far as the country’s borders.\textsuperscript{41} In the area of antitrust law, as in other commercial law

\textsuperscript{36} KINTNER & JOEILSON, supra note 7, at 22 (discussing the adverse consequences that would follow from such broad application).

\textsuperscript{37} While this analysis focused almost exclusively on the Sherman Act, the resulting doctrine was extended to suits under other antitrust laws as well. For a thorough analysis of these efforts and the conduct and effects tests that they generated, see generally Born, supra note 35; William S. Dodge, \textit{Understanding the Presumption Against Extraterritoriality}, 16 BERKELEY J. INT’L L. 85 (1998); Jonathan Turley, \textit{When in Rome: Multinational Misconduct and the Presumption Against Extraterritoriality}, 84 Nw. U. L. REV. 598 (1990); Weintraub, supra note 10.

\textsuperscript{38} Born, supra note 35, at 10. Born notes the genesis of the famed presumption against extraterritoriality in \textit{The Schooner Charming Betsy}, which held that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .” Murray v. \textit{The Schooner Charming Betsy}, 6 U.S. (2 Cranch) 64, 118 (1804).

\textsuperscript{39} \textit{Am. Banana Co. v. United Fruit Co.}, 213 U.S. 347 (1909).

\textsuperscript{40} \textit{Id.} at 356.

\textsuperscript{41} This strict form of territorialism is characterized as a so-called conduct test in that it asks
areas, however, this strict form of territorialism proved ill-suited to dealing with the expansion of international commerce.\(^2\)

Reluctant to abandon entirely the presumption against extraterritoriality, courts nevertheless began to develop more flexible notions of regulatory jurisdiction. Antitrust cases following *American Banana* broadened the scope of regulatory reach by examining the effects of the conduct in question as well as the location in which the conduct occurred.\(^3\) On this view, regardless of where the conduct occurred, the reach of U.S. regulations would extend to an action whose effects were felt within the territory of the United States.\(^4\) The exact formulation of the effects test has varied.\(^5\) Today, the application of U.S. antitrust law may be predicated on an intended and substantial effect within the United States.\(^6\) To phrase the combined holdings of these cases as a jurisdictional test, a plaintiff would have to establish conduct either taking place within the United States or having the requisite effect there in order to invoke the application of U.S. antitrust law.

In what might be characterized as a second-stage analysis, the debate then turned to whether the requirement of such a jurisdictional basis was the only limit on the application of U.S. regulatory law to extraterritorial conduct, or whether a consideration of additional factors was necessary. Courts and commentators framed this inquiry in a variety of ways. Some felt that the question was one of regulatory power itself, suggesting that U.S. antitrust law did not in fact reach every action that satisfied the jurisdictional standard.\(^7\) Others viewed it as a matter of judicial abstention, arguing that while jurisdiction to regulate existed whenever the jurisdictional standard was met, courts should decline to exercise it in certain circumstances.\(^8\) On either view,


\(^3\) This principle is sometimes described as a subjective theory of territorialism. Turley, *supra* note 37, at 605.

\(^4\) The 1945 case of *United States v. Aluminum Co. of America*, most frequently cited as the turning point for the implementation of the effects test, held that "it is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." 148 F.2d 416, 443 (2d Cir. 1945).

\(^5\) *Aluminum Co. of America* required intended and actual effects. *Id.* at 443-44. Other cases have adopted slightly different formulations. See *Timberlane Lumber v. Bank of America*, 549 F.2d 597, 610-11 (9th Cir. 1976), for a survey of cases adopting various versions of the test. The Foreign Trade Antitrust Improvements Act of 1982 required "direct, substantial, and reasonably foreseeable" effects. 15 U.S.C. § 6(a) (1988).

\(^6\) Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("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.") (citations omitted); *see also* Lowenfeld, *supra* note 3, at 47 (pointing out that *Hartford* put to rest debate over the formulation of the effects test).


\(^8\) *E.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (3d Cir. 1979) ("[H]aving concluded... that there is subject matter jurisdiction, the question remains whether
though, the question was whether some additional inquiry into the facts and circumstances of the case was relevant to the extraterritoriality analysis—that is, whether principles of comity dictated the consideration of factors beyond those analyzed in connection with the preliminary jurisdictional inquiry.\footnote{Comity, in its classic articulation, is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens . . . .” Hilton v. Guyot, 159 U.S. 113, 164 (1894). Analyzing whether comity should be granted in an international antitrust case requires an inquiry not only into the effects of the relevant conduct within the United States, but into the existence of any competing foreign regulatory interests. Consistent with such analysis, some courts began in international antitrust cases to identify and consider the interests of other states involved in the dispute. Courts believing the question to be one of regulatory power discussed the comity of \textit{nations} (that is, considerations that would have prevented Congress from extending the Sherman Act to reach particular conduct at all). Those believing the question to be one of judicial abstention discussed the comity of \textit{courts} (considerations that would prevent a court from exercising jurisdiction to adjudicate the particular case).}

\section*{2. \textit{The Rise of Interest Balancing}}

The leading case advocating an interest-balancing approach to the extraterritorial application of regulatory law is the Ninth Circuit’s 1976 \textit{Timberlane} decision.\footnote{\textit{Timberlane Lumber}, 549 F.2d at 597.} That case involved a claim by Timberlane, an Oregon partnership, that activities by the Bank of America in both Honduras and the United States amounted to violations of U.S. antitrust law.\footnote{\textit{Id.} at 601. The plaintiffs also included two Honduran affiliates of Timberlane, while the defendants included Bank of America’s subsidiary responsible for Honduran operations. Because the plaintiff alleged unlawful conduct occurring within the United States as well as abroad, the case was a “mixed” case rather than a pure extraterritoriality one.} Timberlane’s complaint alleged a variety of conspiratorial acts whose intent and effect were to prevent Timberlane’s exportation of lumber from Honduras, seeking damages for that interference under U.S. antitrust laws.\footnote{\textit{Id.} at 604-05.}

The court began its analysis of the reach of the antitrust laws by reviewing the development of the jurisdictional standard, focusing on competing articulations of the effects test.\footnote{\textit{Id.} at 610-11.} Throughout this review, though, the court appeared unwilling to end its analysis there; it seemed inclined instead to consider the interests of other countries affected by the conduct in question.\footnote{\textit{Id.} at 609 (“Extraterritorial application is understandably a matter of concern for the other countries involved.”); \textit{Id.} at 610 (“There is no consensus on how far the jurisdiction should extend.”).} Yielding to this inclination, the court finally concluded that “the effects test by itself is incomplete because it fails to consider other nations’ interests.”\footnote{\textit{Id.} at 611-12.} It then introduced a second stage to the extraterritoriality analysis:

\begin{itemize}
  \item The leading case advocating an interest-balancing approach to the extraterritorial application of regulatory law is the Ninth Circuit's 1976 \textit{Timberlane} decision.\footnote{\textit{Timberlane Lumber}, 549 F.2d at 597.} That case involved a claim by Timberlane, an Oregon partnership, that activities by the Bank of America in both Honduras and the United States amounted to violations of U.S. antitrust law.\footnote{\textit{Id.} at 601. The plaintiffs also included two Honduran affiliates of Timberlane, while the defendants included Bank of America's subsidiary responsible for Honduran operations. Because the plaintiff alleged unlawful conduct occurring within the United States as well as abroad, the case was a "mixed" case rather than a pure extraterritoriality one.} Timberlane's complaint alleged a variety of conspiratorial acts whose intent and effect were to prevent Timberlane's exportation of lumber from Honduras, seeking damages for that interference under U.S. antitrust laws.\footnote{\textit{Id.} at 604-05.}
  \item The court began its analysis of the reach of the antitrust laws by reviewing the development of the jurisdictional standard, focusing on competing articulations of the effects test.\footnote{\textit{Id.} at 610-11.} Throughout this review, though, the court appeared unwilling to end its analysis there; it seemed inclined instead to consider the interests of other countries affected by the conduct in question.\footnote{\textit{Id.} at 609 ("Extraterritorial application is understandably a matter of concern for the other countries involved."); \textit{Id.} at 610 ("[T]here is no consensus on how far the jurisdiction should extend.").} Yielding to this inclination, the court finally concluded that “the effects test by itself is incomplete because it fails to consider other nations’ interests.”\footnote{\textit{Id.} at 611-12.} It then introduced a second stage to the extraterritoriality analysis:
\end{itemize}
The court must consider whether "the interests of, and links to, the United States... are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority." To assist in this consideration of competing interests, the *Timberlane* court suggested a number of relevant factors designed to evaluate "the relative involvement and concern of each state with the suit at hand." Only after considering the competing claims of other countries to regulate the behavior in question, the court believed, could it determine whether prescriptive jurisdiction could properly be exercised by a state. It is worth pausing to note that while these factors require the identification of competing regulatory interests implicated in the case, they do not mandate an evaluation of the relative value of the different antitrust policies themselves.

In *Mannington Mills v. Congoleum Corporation*, the Third Circuit endorsed the *Timberlane* approach to the extraterritorial application of the Sherman Act. Mannington, a U.S. flooring manufacturer, initiated an action against Congoleum, a U.S. competitor, arguing that Congoleum had fraudulently procured patents for certain products abroad and thereby violated the Sherman Act. Mannington's claim raised particularly thorny issues because it sought not only treble damages, but also an injunction preventing Congoleum from enforcing foreign patents that were presumed valid. Concerned about the potential for international conflict, the court held that an interest-balancing analysis was necessary before jurisdiction could be exercised. It then adopted, with minor modifications, the *Timberlane* factors and remanded the case for their consideration. Although the *Mannington Mills* court characterized the issue as one of judicial abstention rather than statutory reach, it echoed the *Timberlane* court's reasoning that interest balancing was a necessary element of extraterritorial analysis.

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56. Id. at 613.

57. Drawing largely from similar lists included in the *Restatement (Second) of Foreign Relations Law of the United States* and proposed by Kingman Brewster, the court stated that the factors to be considered included the following: the degree of conflict with foreign law or policy; the nationality or allegiance of the parties and the locations or principal places of business of corporations; the extent to which enforcement by either state can be expected to achieve compliance; the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce; the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. Id. at 614.

58. Id. at 615 n.34.

59. DOUGLAS E. ROSENTHAL & WILLIAM M. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE 27 (1982) ("The *Timberlane* weighing does not include a balancing of vital national interests.").

60. 595 F.2d 1287 (3d Cir. 1979).

61. Id. at 1290-91.

62. Id. at 1296.

63. Id.

64. Id. at 1297-99. By adding as a factor "[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief," the *Mannington Mills* test went further than *Timberlane* to consider political factors in addition to judicial ones. Id. at 1297.

65. The *Timberlane* approach was also adopted by the Fifth Circuit in *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 885 (1982) and by the Tenth Circuit in *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869 (1981). See also Transnor (Bermuda) Ltd. v. BP North
The importance of interest balancing to extraterritoriality analysis was heightened by the adoption of an interest-balancing approach in the 1986 revision of the Restatement of Foreign Relations Law (Third Restatement). The Third Restatement divided jurisdiction into three categories: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. The applicability of U.S. law to conduct taking place outside U.S. borders is a question of jurisdiction to prescribe; it deals with the right of a state "to make its law applicable to the activities, relations, or status of persons." In sections 402 and 403, the Third Restatement addresses the bases of and limitations on jurisdiction to prescribe. Section 415, which addresses the regulation of anti-competitive activities in particular, incorporates the approach outlined in those general sections.

The sections of the Third Restatement addressing a state's jurisdiction to prescribe law provide for a two-stage analysis of the kind discussed above. The first condition for establishing regulatory jurisdiction is the existence of a jurisdictional basis (such as conduct within the territory of the state, or conduct that has or is intended to have substantial effect within that territory). Once that basis has been established, the court must further inquire whether the exercise of jurisdiction to prescribe law would in the particular case be "unreasonable." Reasonableness thus operates as a limit not on the court's discretion to adjudicate the case, but on the reach of regulatory jurisdiction itself. The factors on which the decision as to reasonableness is to be based resemble those compiled by the Timberlane court, focusing on links between the activity in question and the country or countries seeking to regulate it. Like Timberlane and Mannington Mills,
then, the Restatement suggested that the establishment of requisite jurisdictional contacts under either the conduct or effects tests must be followed by an interest analysis.

B. The Fall of Interest Balancing: Hartford Fire

1. The Case Against Interest Balancing

Despite its adoption in the Third Restatement, the comity-based approach to extraterritoriality analysis was never the subject of judicial consensus. Of the decisions that rejected outright the adoption of a balancing or reasonableness test, the two cases most often cited are Laker Airways v. Sabena and the Uranium litigation.

The Laker litigation began with an antitrust action filed in U.S. district court by Laker Airways, a U.K. company. Laker alleged that a group of U.S. and foreign competitors had engaged in predatory pricing and other conspiratorial acts in an attempt to drive Laker out of the transatlantic air travel market. The foreign defendants responded by filing in the United Kingdom for anti-suit injunctions that would bar Laker from taking any action against them, in U.S. courts, on the basis of alleged violations of U.S. antitrust law. Laker then returned to the U.S. district court to seek its own order preventing the U.S. defendants, and two additional foreign defendants, from obtaining similar anti-suit injunctions. The district court granted Laker's motion for a preliminary injunction against these defendants, stating that an injunction was necessary to prevent the defendants from "interfer[ing] with the district court's jurisdiction over the matters alleged in the complaint." The foreign defendants appealed, arguing that denying them the opportunity to take part in the U.K. proceedings violated principles of comity. The primary question before the court was therefore whether it could properly issue an injunction in protection of its own jurisdiction. Its extraterritoriality analysis was undertaken in service of this inquiry, as there would be no jurisdiction to protect if U.S. antitrust laws did not reach the conduct in question. Thus, the discussion of statutory reach took place within the framework of a conflict between courts as to adjudicatory jurisdiction rather than jurisdiction to prescribe.

73. 731 F.2d 909 (D.C. Cir. 1984).
74. The Uranium litigation comprises a number of individual cases brought in connection with a uranium cartel operating in the mid-1970s. Infra notes 87-93 and accompanying text.
75. 731 F.2d at 916-17.
76. Id. at 918.
77. Id.
78. Id. at 919.
79. Id. at 921.
80. Id. at 914-15 ("We review today the limits of a federal court's power to conserve its adjudicatory authority over a case properly filed with the court. . . "). For additional discussion of the
After reviewing the effects test for extraterritorial regulation, the court concluded that the acts alleged by Laker created a jurisdictional basis for application of U.S. antitrust law. Because the court concluded that the activity also fell within the regulatory reach of British anti-competition laws, however—in other words, because concurrent jurisdiction existed over the conduct in question—it then considered whether interest balancing might be used as a means of preferring one country’s claim to regulate over the other’s. The court rejected that suggestion. It noted that some of the potential interest-balancing factors would necessarily be neutral as between the countries involved, and that others were so political as to be inappropriate for judicial consideration. The court concluded by declining to adopt an interest-balancing approach, stating that it could identify “no neutral principle on which to distinguish judicially the reasonableness of the concurrent, mutually inconsistent exercises of jurisdiction.” The decision thus constituted a rejection of the reasoning contained in Timberlane and the Third Restatement, then in draft form.

The Laker decision echoed the approach taken in the Uranium litigation, which involved a series of cases arising from the operation of a uranium cartel in the early 1970s. In one of those cases, initiated by the Westinghouse corporation against a group of domestic and foreign uranium producers, the court addressed the effect of foreign nondisclosure laws on antitrust litigation in the United States. That case addressed the status of certain discovery demands filed by Westinghouse for documents located in foreign countries. When several defendants invoked foreign non-disclosure laws as an excuse for noncompliance, the court considered whether or not to compel production in the face of those blocking laws. After concluding that it had the authority to enter production orders, the court considered whether balancing the various interests involved might help resolve the stalemate. It concluded that it would not, and that such a test was “inherently unworkable” in the case. As did the subsequent Laker decision, the holding questioned the judiciary’s authority to weigh the various interests involved, choosing instead to apply

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81. Id. at 922-23.
82. The court also considered other possible tie-breaking mechanisms, such as paramount nationality. It rejected the argument that Laker’s status as a U.K. national required the U.S. court to defer to the U.K. court’s injunctions. Id. at 934-37.
83. Id. at 949.
84. Id.
85. Id. at 953.
88. Id. at 1144.
89. Id. at 1145. This is the equivalent of a decision that the straight jurisdictional standard has been met.
90. Id. at 1148.
U.S. law where jurisdiction obtained under the effects test. In a later stage of the Westinghouse litigation, the Seventh Circuit also addressed the question whether interest balancing had to be conducted following establishment of a jurisdictional basis under the effects test. Emphasizing the defendants’ failure to appear in that case, the court distinguished the circumstances present in Timberlane and Mannington Mills and concluded that an interest-balancing analysis was not required.

2. Hartford Fire Insurance Co. v. California

In Hartford Fire, the U.S. Supreme Court essentially eliminated the use of judicial interest balancing in extraterritorial antitrust cases. The case involved the allegations of certain U.S. states and private plaintiffs that a group of domestic and foreign reinsurers had violated the Sherman Act by forcing primary insurers to restrict the terms of their insurance policies sold in the United States. Defendants located in the United Kingdom moved to dismiss the action for lack of subject-matter jurisdiction, arguing that because their conduct was lawful under U.K. antitrust rules, U.S. antitrust law could not reasonably be extended to reach it. The district court, adopting a Timberlane approach, dismissed the claims against the foreign defendants on the basis of comity. On appeal, the Ninth Circuit reversed; although it too considered the Timberlane factors, it held that comity did not justify dismissal of the considered the Timberlane claims. The Supreme Court granted certiorari to consider the application of the Sherman Act to the conduct of the foreign defendants.

The Court began its analysis by establishing a basis for jurisdiction, accepting as true the plaintiffs’ allegations that the conduct of the foreign defendants had direct and intended effects in the United States. At that point, the Court might have addressed the Timberlane-Laker conflict by asking whether interest balancing should then be conducted. Instead, the Court

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91. Id. ("[T]hree foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to [necessary] documents. It is simply impossible to judicially 'balance' those totally contradictory and mutually negating actions.").

92. In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980).

93. Id. at 1255-56.

94. States are accorded private plaintiff status under the Clayton Act. Supra note 17.

95. 617 F.2d at 770-71.

96. These defendants argued in the alternative for a dismissal on the basis of comity.

97. 723 F. Supp. 464 (1989). It held that “the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case are [sic] not outweighed by other factors.” Id. at 490.

98. 938 F.2d 919 (9th Cir. 1991). Unlike the district court, the appellate court believed that the conflict with U.K. law and policy was outweighed by the intended and significant effects of the conduct in the United States. Id. at 933-34.


100. Id. at 796 ("[I]t 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."). The Court thus ratified the effects test.
chose to develop an alternative formulation of the test for applying U.S. law. It inquired "whether there [was] in fact a true conflict between domestic and foreign law." It defined "true conflict" as a situation in which it is not possible for the party in question to comply with the laws of both jurisdictions involved—a situation, in other words, in which behavior that violates U.S. antitrust law is compelled by the law of another jurisdiction. The Court went on to hold that in the absence of true conflict, U.S. regulatory law could be applied.

After so narrowly circumscribing the set of situations in which a "true conflict" might be presented, the Court in Hartford Fire ended its analysis. It did not discuss what the next step might be if a true conflict were to be established. Although noting Timberlane, the Court did not address whether it would ever be appropriate for a court to look to interest balancing, or to principles of comity generally, in seeking to limit the application of domestic regulatory law in an international context. However, the practical impact of the Court's decision was to reject the interest-balancing approach. In nearly all cases, once the requisite conduct or effects necessary to establish a jurisdictional basis have been identified, courts may simply apply domestic regulatory law. They need not consider the relationship of the dispute to any other jurisdiction or to the interests of other governments in regulating the particular conduct.

C. The Role of the Private Attorney General in Statutory Cases

In Hartford Fire, the Court did not differentiate between classes of litigants in establishing the "true conflict" threshold. In other words, its

101. Id. at 797-98 (quoting Société Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 555 (1987)).
102. Id. at 799.
103. Id. As many commentators have noted, this definition seems to conflate the existence of a conflict between regulatory regimes with the availability of the foreign compulsion defense. E.g., Lowenfeld, supra note 3, at 46. Under the foreign compulsion doctrine, private parties will not be liable for antitrust violations arising from conduct compelled by another government. Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970) ("When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations.").
104. In cases following Hartford Fire, lower courts have held that a comity analysis remains appropriate in the presence of a true conflict. See, for example, In re Maxwell, 93 F.3d 1036 (2d Cir. 1994), a bankruptcy case viewing "true conflict" as a threshold beyond which a balancing approach is permitted. In Trugman-Nash v. New Zealand Dairy Bd., 954 F. Supp. 733 (S.D.N.Y. 1997), the court on rehearing found a true conflict between U.S. antitrust law and New Zealand law, and then remanded the case for consideration of the Timberlane factors. A similar approach was adopted in Filetech S.A.R.L. v. France Telecom, 978 F. Supp. 464 (S.D.N.Y. 1997).
105. E.g., U.S. v. Nippon Paper Indus., 109 F.3d 1, 8 (1st Cir. 1997) ("[C]omity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of a foreign sovereign required defendants to act in a manner incompatible with the Sherman Act or in which compliance with both statutory schemes was impossible.").
106. The Hartford Fire litigation itself was initiated by a group of plaintiffs including a number
rejection of an interest-balancing role for the judiciary might affect antitrust cases initiated by government agencies as well as those initiated by private attorneys general. In government enforcement actions, however, judicial interest balancing had never assumed a major role. At least one court explicitly rejected such analysis as unnecessary to its jurisdictional inquiry. Others seem simply to have relied on the interest balancing performed by government prosecutors prior to initiating an enforcement action. In fact, guidelines issued by the Antitrust Division and the Federal Trade Commission set forth a list of factors not unlike those included in the Third Restatement to be considered before an enforcement action is pursued. Considerations of comity, in the sense of sensitivity to foreign interests, would therefore be taken into account by those responsible for initiating the action. Thus, interest balancing by the judiciary was deemed by some to be superfluous in government enforcement actions.

This justification for declining to engage in balancing tests does not, however, apply to situations in which the action has been initiated by a private plaintiff. In that case, no consideration is given either to the possibility that another regulatory regime might have an interest in regulating the conduct in question or, more generally, to the foreign policy implications of the

of private companies and nineteen states, the latter acting as representatives of their citizens.

107. United States v. Baker Hughes, 731 F. Supp. 3, 6 fn.5 (D.C. Cir. 1990) ("[W]hatever the relevance of comity concerns in antitrust disputes between private parties, they are not a factor here . . . . It is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.") (citation omitted).


109. The factors include: (1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action. Guidelines, supra note 108, § 3.2.

Although some have suggested that the references to Hartford Fire in the Guidelines indicate a rejection of interest balancing even in government enforcement actions, Dean Brockbank, The 1995 International Antitrust Guidelines: The Reach of U.S. Antitrust Law Continues to Expand, 2 J. INT'L LEGAL STUD. 1, 22-23 (1996), the overall flavor of the document reveals a continued commitment to principles of comity, which has generally been read to include some consideration of balancing factors. See Diane P. Wood, The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction, 1995 WL 150745 (D.O.J.) 7 ("[C]omity is a flexible enough concept for enforcement purposes that actions falling short of direct conflicts are nonetheless relevant.").

110. Interestingly, the Guidelines themselves also suggest that courts should refrain from engaging in interest balancing in actions brought by the government. Guidelines, supra note 108, § 3.2. Suggestions that interest balancing is necessarily the province of the executive and not the judiciary have been sharply criticized as an improper application of the separation-of-powers doctrine. E.g., Lowenfeld, supra note 3, at 53 (describing the argument as thoroughly unsound, because it treats an issue of law as if it were an issue of politics).
lawsuit. After *Hartford Fire*, actions by a federal agency are subject to interest balancing while actions brought by private attorneys general—in service of the same public interests—are not.

In rejecting judicial interest balancing, the *Hartford Fire* decision emphasized the strength of the U.S. policy interests reflected in domestic antitrust law and not the particular concerns that might surround its application in an international context. It also created a discrepancy between government and private enforcement activity, vesting the private attorney general with the power to assert domestic policy even in situations in which a government agency, considering the international implications of such an action, might decline to do so. In adopting this approach, it created a quite expansive role for the private attorney general in international statutory cases.

IV. INTERNATIONAL CONTRACT CASES:
THE MARGINALIZATION OF THE PRIVATE ATTORNEY GENERAL

In a second line of cases, courts addressed the role of domestic regulatory legislation in the context of international business transactions. These cases may be generally classified as international contract cases; that is, they turn on the interpretation and enforcement of forum-selection and choice-of-law clauses in international agreements. Similar to the statutory cases discussed in Part I, these international contract cases consider the applicability of U.S. regulatory law in an international setting. In contrast to the statutory cases, however, they reveal a focus on private-law values rather than on the strength or character of the public interest asserted. This focus manifests itself in judicial unwillingness to insist on the application of domestic regulatory law in the face of private contractual arrangements. This part of the Article discusses the manner in which the contract cases have marginalized the private attorney general by sharply restricting the circumstances in which private attorneys general can assert U.S. laws abroad.

A. Bremen and Its Descendants: The Role of National Policy in International Commerce

Contemporary international contract jurisprudence traces its roots to the 1972 decision in *Bremen v. Zapata*, in which the Supreme Court addressed the enforceability of forum-selection clauses in international agreements.

111. The courts adopting an interest-balancing approach have noted this disparity. *E.g.*, Timberlane Lumber v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976) ("Awareness of the possible foreign implications of the court’s action is especially required in private suits... for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact ... ").

112. The Guidelines themselves note that "in disputes between private parties, many courts are willing to undertake a comity analysis." Guidelines, *supra* note 108, § 3.2. After *Hartford Fire*, however, courts may do so only where a true conflict has been established.

Bremen involved a contract between Unterweser, a German towing company, and Zapata, an American oil company, for the towage of Zapata’s oil drilling rig from Louisiana to the Adriatic Sea. The agreement included a forum-selection clause in favor of the London Court of Justice and also included exculpatory clauses intended to shield Unterweser from liability in the event of damage to the oil rig. The rig was damaged in transit, and Zapata sued Unterweser in the United States District Court in Florida for negligent towage and breach of contract. Unterweser moved to dismiss, citing the forum-selection clause contained in the towage contract, and it commenced its own action against Zapata in the London Court of Justice for breach of contract. Reversing the decisions of the district court and the Fifth Circuit, the Supreme Court held that Unterweser’s motion should have been granted.

In so holding, it rejected Zapata’s argument, accepted by the lower courts, that enforcement of the forum-selection clause would violate U.S. public policy. This argument, well-articulated in Justice Douglas’s dissent, noted that the exculpatory clauses included in the towing contract would be unenforceable as against public policy in the United States while they would be enforced in the English court. It maintained that Zapata’s right to invoke this particular policy should not have been waived by its contractual agreement to litigate in English courts. Although the majority acknowledged that a violation of forum public policy could overcome the presumptive enforceability of forum-selection agreements, it held that the policy barring such exculpatory clauses would not be offended by enforcement of the particular international shipping agreement considered.

In choosing to enforce the forum-selection clause, the Court established a strong presumption in favor of such agreements: it held that selection clauses, if validly created, should be enforced unless such enforcement would be “unreasonable or unjust.” The decision stressed the importance of predictability in international commercial transactions, describing the right of parties to select a forum as an “indispensable element” in international contracting. In the years following the Bremen decision, courts addressing international contract controversies of every kind returned to the Supreme Court’s statements regarding the role of party autonomy in an efficient system

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114. *Id.* at 2-3. The exculpatory clauses provided that “[Unterweser and its] masters and crews are not responsible for defaults and/or errors in the navigation of the tow,” and that “[d]amages suffered by the towed object are in any case for account of its Owners.”

115. *Id.* at 3-4.

116. *Id.* at 4.

117. *Id.* at 23.

118. The dissent objected to the use of a foreign forum-selection clause as an evasion of U.S. law, 407 U.S. 1, 24 at fn.* (“The instant stratagem of specifying a foreign forum is essentially the same as invoking a foreign law of construction . . . .”).

119. *Id.* at 15.

120. *Id.* at 16-17.

121. *Id.* at 15. The Court noted that clauses obtained through fraud or overreaching would not be entitled to the same presumption.

122. *Id.*

123. *Id.* at 13-14.
of international commerce.\textsuperscript{124} The importance to international trade of enforcing contractual choices of forum and law is described in the decision's most frequently quoted passage:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.\textsuperscript{125}

In \textit{Bremen} itself, party autonomy was promoted at the expense of the U.S. public interest reflected in the policy against enforcing exculpatory clauses in carriage contracts.\textsuperscript{126} As later decisions adopted and strengthened the \textit{Bremen} presumption, the right to freedom of contract was balanced against a number of other public policies. As these cases reflect, the balance between implementing public policy and recognizing party autonomy shifted increasingly further in favor of party autonomy.

1. \textit{Foreign Arbitration Clauses in Regulatory Cases}

The public policy that would have been served had the \textit{Bremen} court refused to enforce the forum-selection clause was arguably not implicated at all in the case.\textsuperscript{127} More importantly, the policy involved was not what would generally be described as a regulatory one; it did not implicate the regulatory function of the state.\textsuperscript{128} In two subsequent cases, \textit{Scherk v. Alberto-Culver}\textsuperscript{129} and \textit{Mitsubishi Motors v. Soler Chrysler-Plymouth},\textsuperscript{130} the Supreme Court applied the \textit{Bremen} presumption to permit the contractual selection of foreign arbitration in two quintessential regulatory areas—securities and antitrust.\textsuperscript{131} These cases effected a shift away from the traditional position that U.S. courts reserved jurisdiction over cases involving the application of U.S. regulatory

\textsuperscript{124} While some definitions of "party autonomy" focus on the freedom of the contracting parties to choose governing law, e.g., \textsc{Eugene F. Scoles et al.}, \textit{Conflict of Laws} 858 (3d. ed. 2000), the freedom to choose a forum for the litigation of future disputes is an equally important pillar of party autonomy. Patrick J. Borchers, \textit{The Internationalization of Contractual Conflicts Law}, 28 \textsc{Vand. J. Transnat'l L.} 421, 428-31 (1995). In fact, the \textit{Bremen} Court addressed directly only the question of forum selection. \textit{But see infra} note 150 (discussing of the role of choice of law in the case).

\textsuperscript{125} 407 U.S. 1, 9 (1972).

\textsuperscript{126} In fact, the majority had argued that the policy against exculpatory clauses was not implicated at all by the facts in the particular case, reading that policy to reach only purely domestic towing arrangements. \textit{Id.} at 15-16.

\textsuperscript{127} \textit{Supra} note 124 and accompanying text.

\textsuperscript{128} Paul D. Carrington & Paul H. Haagen, \textit{Contract and Jurisdiction}, 1996 \textsc{Sup. Ct. Rev.} 331, 352 (noting that the case did not involve a "public regulatory policy aimed at protecting one party against the power of the other").

\textsuperscript{129} 417 U.S. 506 (1974).

\textsuperscript{130} 473 U.S. 614 (1985).

\textsuperscript{131} Patrick J. Borchers, \textit{Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform}, 67 \textsc{Wash. L. Rev.} 55, 66 (1992) (noting that these were previously considered a "forbidden zone" for arbitration).
In doing so, they expanded significantly the role of party autonomy in
the international contract context.

Scherk, decided two years after Bremen, addressed the enforceability of
a foreign arbitration clause in the context of securities law. The dispute arose
out of a transaction in which Alberto-Culver, a U.S. company, purchased the
enterprises of Scherk, a German businessman. The purchase contract included
a clause specifying the arbitration of any disputes in the International
Chamber of Commerce and the application of Illinois law. Upon
discovering that certain of the trademark rights it had purchased were
encumbered, Alberto-Culver brought suit in United States District Court in
Illinois, alleging that Scherk's misrepresentations constituted violations of
U.S. securities law. Scherk then moved to stay the action pending
arbitration in Paris pursuant to the terms of the contract. Alberto-Culver
opposed that motion on the grounds that an agreement to arbitrate securities
claims constituted an impermissible waiver of rights under U.S. securities
laws.

At the time Scherk was decided, U.S. courts recognized a policy that
claims under U.S. securities laws could be heard only in a judicial forum. The
Supreme Court declined to follow that policy in the case, holding that
Alberto-Culver's agreement to arbitrate was enforceable. The Court
emphasized the international nature of the agreement between the parties;
echoing its holding in Bremen, the Court stressed the need for "orderliness
and predictability" in international commerce. The majority did not address
directly the application of U.S. securities laws to the dispute, noting simply
that the contract included a clause selecting Illinois law. Thus, it weighed
the right to freedom of contract in international agreements not against the
substantive interests reflected in domestic securities law, but against the more
general policy that those interests are fundamental enough to require
consideration exclusively in U.S. courts. By striking the balance in favor of
party autonomy—extending the Bremen presumption into the regulatory

freedom of parties to privately arbitrate disputes and to contractually choose applicable law ended when
mandatory law began and began when mandatory law ended.").
133. 417 U.S. at 508.
134. Id. at 509.
135. Id. at 509-10. Section 29(a) of the Securities Exchange Act of 1934 states that "any . . .
provision binding any person to waive compliance with any provision of this title . . . shall be void."
136. In Wilko v. Swan, 346 U.S. 427 (1953), a domestic securities case, the Supreme Court had
held that only the courts, and not arbitral tribunals, had jurisdiction over suits under the securities laws.
This position has since been abandoned even on the domestic front. Shearson/American Express, Inc. v.
McMahon, 482 U.S. 220 (1987), held that Wilko did not bar the arbitration of claims under the Securities
(1989) directly overruled Wilko, holding that domestic claims under the Securities Act of 1933 could
also be subjected to arbitration.
137. 417 U.S. at 516. In emphasizing the international character of the transaction, the Court
distinguished the case from Wilko by noting that forum selection clauses in international transactions
were likely to be fully negotiated.
138. Id. at 519 n.13. As in Bremen, in fact, it was unclear whether the U.S. law in question was
in fact applicable to the transaction. Carrington & Haagen, supra note 128, at 364.
arena—the Court accepted a certain weakening of the protection afforded those fundamental interests.

In *Mitsubishi*, the Supreme Court addressed an antitrust dispute between Mitsubishi, a Japanese auto manufacturer, and Soler, a Puerto Rican auto dealership. A distribution agreement between the parties contained a clause providing for arbitration in Japan of any disputes arising from the relationship. When such a dispute in fact arose, Mitsubishi brought an action in United States District Court seeking to compel arbitration; it then filed a request for arbitration in Japan. Soler denied Mitsubishi’s allegations and entered a number of counterclaims, including causes of action under the Sherman Act alleging anti-competitive behavior by Mitsubishi. In framing the issue before it, the Court did not speak directly to the extraterritorial applicability of U.S. antitrust law to the foreign conduct in question. Instead, it viewed the question before it as one of contract—whether to enforce an arbitration clause contained in an international contract between two private parties.

The Court decided to enforce the agreement to arbitrate over Soler’s objection that claims under U.S. antitrust law were not arbitrable. Drawing on language from previous international contract cases, it based this decision on considerations of comity, looking to “the need of the international commercial system for predictability in the resolution of disputes.” As in *Scherk*, the Court viewed the issue as one of forum selection only; it did not address directly the question of governing law. It therefore came to the same conclusion in the antitrust area that it had come to earlier in the securities area—despite their fundamental importance, the regulatory claims were not so important that they could not be considered in an arbitral forum if the parties had so agreed.

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140. Id. at 618-19.
141. Id. at 619-20.
142. Id. at 624 (“We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction.”).
143. Id. at 640. This was the same argument as that raised in the securities context by *Wilko*—that claims under the antitrust laws were too important to be heard outside a judicial forum. The Court had previously determined that the arbitration clause encompassed Soler’s antitrust counterclaims. *Id.* at 628.
144. Id. at 629.
145. In oft-discussed dictum contained in footnote 19 to the majority opinion, the Court notes that Mitsubishi’s counsel had conceded the applicability of U.S. law to Soler’s antitrust claims. *Id.* at 637. The contract itself, however, contained a choice-of-law clause in favor of Swiss law. Some commentators have argued that the Court’s assumption that U.S. antitrust law would be applied was an evasion of the issue in the face of this choice-of-law clause and considering the role of the arbitrator. E.g., Ludwig von Zumbusch, *Arbitrability of Antitrust Claims Under U.S., German and EEC Law: The "International Transaction" Criterion and Public Policy*, 22 Tex. Int’l L.J. 291, 300-01 (1987).
146. E.g., *PPG Indus., Inc. v. Pilkington PLC*, 825 F. Supp. 1465 (D. Ariz. 1993) (reaching the same conclusion in another antitrust case). In a similar case outside of the antitrust arena, the Supreme Court enforced an arbitration clause in a shipping contract, holding that such enforcement did not violate
2. Foreign Choice-of-Law Clauses in Regulatory Cases

The holding in *Bremen* addressed only the enforcement of a forum-selection clause. Implicit in the decision, however, was the understanding that English law would be applied to the dispute. Indeed, the court spoke broadly of both forum-selection and choice-of-law clauses in discussing the importance of certainty in international contracts. It spoke of rejecting the “parochial concept that all disputes must be resolved under our laws and in our courts,” and noted that “we cannot have [international commerce] exclusively on our terms, governed by our laws, and resolved in our courts.” In the *Scherk* and *Mitsubishi* cases, while the majority opinions presented the issue strictly as choice of forum, the dissenters suggested that the selection of an arbitral forum implicated choice of law as well. In *Mitsubishi*, for instance, the dissenting opinion noted that the decision amounted to a choice not to invoke applicable U.S. regulatory law, characterizing the remedy available to Soler in arbitration as “uncertain.” This concern is well-founded. Since arbitrators are not bound by the substantive rules of the private law of the jurisdiction most connected with the transaction, they can not be counted upon to apply even the mandatory law of that jurisdiction. The question in the cases involving arbitration, then, may not be merely where the U.S. regulatory laws would be applied, but whether they would be applied. Taken together, the cases thus suggest that the policy in favor of party autonomy in international agreements might prevail, even where the domestic regulatory interests at stake would not be effectuated.

A series of cases involving the Society of Lloyd’s, an English insurance underwriting market, explicitly expanded the *Bremen* presumption to reach choice-of-law clauses. In the Lloyd’s cases, American plaintiffs invoked U.S. securities laws in claiming that they were fraudulently induced to become members of Lloyd’s underwriting syndicates. In each of these cases, the American investors signed a “Member’s Agent Agreement” and a

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147. *407 U.S. 1, 14 n.15 (1972)* (“It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.”). Likewise, the dissenting opinion argued that the effect of the choice-of-law clause was to evade application of domestic law. *Id.* at 24 n.*.

148. *Id.* at 9. Outside the regulatory law arena, courts had in the interim read *Bremen* to apply to choice-of-law clauses as well. E.g., *Mitsubishi*, 473 U.S. 614, 629.

149. See discussion in Section IV.A supra.

150. *473 U.S. 614, 666 (1983).*


152. 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); Haynsworth v. Lloyd’s of London, 121 F.3d 956 (5th Cir. 1997); Allen v. Lloyd’s of London, 94 F.3d 923 (4th Cir. 1996); 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); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992). See generally James H. Rodgers, *Extraterritorial Jurisdiction of U.S. Securities Laws: Application to Lloyd’s of London Membership Agreements*, 5 U.C. DAVIS J. INT’T L. & POL. 1 (1999) (discussing of the Lloyd’s litigation).
"General Understanding." These agreements contained choice-of-law clauses selecting English law and forum-selection clauses prescribing litigation or arbitration in England.153 When the investors brought suit in the United States under American securities laws, Lloyd's invoked those clauses in moving to dismiss.154 In considering those motions, the U.S. courts addressed the issue as one of contract enforcement. The Seventh Circuit, in a representative opinion, held that the presumptive validity of the freely negotiated forum-selection and choice-of-law clauses had not been overcome by the alleged existence of securities fraud, citing again the need for predictability and certainty in international commerce.155 Interestingly, the court never considered separately whether the threshold for extraterritorial application of U.S. securities law had been passed. Its analysis of whether the policies underlying the securities laws would be effectuated was conducted entirely within the framework of contractual analysis, focusing on whether enforcement of the clauses would contravene the public policy of the U.S. forum.156 Although in the context of securities claims—unlike in antitrust cases—the court had to overcome a clear statutory mandate against ex ante waiver of rights under the applicable laws,157 it held that enforcement of the choice-of-law clauses was reasonable.158 In extending the Bremen approach beyond forum selection to choice-of-law clauses, the Lloyd's cases thus provide further illustration of the recent weakening of the public regulatory interest in the face of international commercial developments.159

In 1999, the Ninth Circuit issued a decision in which it extended the reasoning of the Lloyd's cases to the antitrust context.160 In that case, Simula, the U.S. inventor of an automotive air bag system, sued Autoliv, a Swedish supplier of automotive components.161 The action was based on a development and licensing agreement that had been executed by the two companies. Among Simula's claims were allegations that the licensing

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153. E.g., Bonny, 3 F.3d at 156, 158.
154. Id. at 157.
155. Id. at 160.
156. Id.
158. 3 F.3d at 160. The court's decision was premised on the similarity of U.S. and U.K. regulations with respect to the conduct in question. The courts felt that while the Lloyd's plaintiffs might not be entitled to exactly the same relief under U.K. law as what they would receive under U.S. securities regulations, the relief would be close enough. Id. at 161-62. But see the suggestion of the dissent in the Ninth Circuit Lloyd's case that the protections provided by the U.K. laws were in fact "markedly inferior" to those available under U.S. securities law. Richards v. Lloyd's of London, 135 F.3d 1289, 1299 (9th Cir. 1998).
159. Paul B. Stephan, The Futility of Unification and Harmonization in International Commercial Law, 39 Va. J. Int'l L. 743, 791 (1999) ("The tendency to prefer contractual choices over regulatory norms exists, even if it has not blossomed into an unequivocal commitment.").
161. The action also named Autoliv's U.S. subsidiaries. Id. at 716.
agreement restrained trade in the automotive air bag industry and that Autoliv possessed monopoly power in one segment of that market. Autoliv in turn moved to compel arbitration under the agreement, which included a provision selecting arbitration pursuant to International Chamber of Commerce procedures. The court affirmed the district court's decision to grant Autoliv's motion, holding that Simula's antitrust claims were fully arbitrable. Unlike in Mitsubishi, however, the court in this case explicitly addressed the possibility that U.S. antitrust law would not be applied to the dispute.

The agreement between Simula and Autoliv appears not to have included an explicit choice-of-law clause. Thus, the court could not assume that the arbitrators would apply U.S. law to the antitrust claims. Nevertheless, it rejected as mere "dictum in a footnote" the Supreme Court's suggestion in Mitsubishi that the operation of choice-of-law clauses to waive a party's right to pursue statutory antitrust violations would be void on public policy grounds. It then went on to consider the potential applicability of Swiss law rather than U.S. law to the antitrust claims. It held the matter to be governed by the test it had articulated in the Lloyd's case from that circuit: "[T]he applicable standard should be whether the law of the transferee court is so deficient that the plaintiffs would be deprived of any reasonable recourse." It concluded that even if Swiss law were applied to the antitrust claims, Simula had not established that it would not receive sufficient protection.

Like the Lloyd's cases, this decision casts additional doubt on the fundamental importance of the role played by regulatory policy—here, antitrust policy—in international commerce. By applying the Bremen presumption to validate not just a forum-selection clause but an agreement that might result in the complete displacement of U.S. antitrust law, the court valued party autonomy above the regulatory interest expressed in that law.

B. The Role of the Private Attorney General in International Contract Cases

The increased strength of party autonomy values in cases involving regulatory law manifests itself in the domestic arena as well as the international one. Though the Scherk case emphasized the international aspect

162. Id. at 721.
163. Id. at 720.
164. Id. at 723.
165. The decision refers to the arbitration clauses, each of which stated that "[a]ll disputes arising in connection with [this agreement] shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said rules." Id. at 720.
166. Id. at 723.
167. Richards v. Lloyd's of London, 135 F.3d 1289, 1296 (9th Cir. 1998), cited in 175 F.3d at 723.
168. Simula, 175 F.3d at 723 n.4.
of a securities agreement in deciding to enforce the arbitration clause, the overall trend reflects a gradual change in the status of regulatory law generally. But in the area of international contract law, where that trend began and where the arguments in favor of party autonomy are perhaps strongest, the effect of those developments is particularly striking. The forum selection cases, and in particular the growth in international commercial arbitration that they foster, have significantly reduced the number of situations in which U.S. regulatory law might be invoked by a private litigant.

1. Arbitration and the Public Role of the Private Attorney General

Because the private attorney general asserts his individual interests as well as those embodied in the law on which his claim is based, the effectuation of antitrust policy in private cases must always coincide with the fair resolution of an individual dispute. When the parties have chosen arbitration, however, the policy goals served by private attorney general lawsuits play a markedly subordinate role in the dispute resolution process. The downplaying of public interests in arbitration results from certain aspects of the arbitral process itself. The goal of arbitrators is to resolve the dispute presented in a manner responsive to the interests of the parties. Unlike judges, arbitrators need not, and generally should not, consider broader public interests as well. This focus on the resolution of the individual dispute has particular consequences for the private attorney general. For instance, once a dispute enters arbitration, it is unlikely that the treble damage awards permitted by the Clayton Act will be granted. Therefore, the incentives designed to generate substantial private enforcement of the antitrust laws are diminished. In addition, the private nature of arbitral decision-making, and of many arbitral awards themselves, means that arbitrations are less powerful deterrents than traditional litigation. Thus, even when an arbitrator does

169. See supra note 137 and accompanying text.
170. In the domestic context, of course, deferring to party autonomy will not change the choice of substantive law. Even permitting the arbitration of regulatory claims, however, weakens the fundamental nature of their character. See Subsection V.B.2.b infra.
171. Sterk, supra note 151, at 508 (noting the coexistence of "antitrust concerns" and the need for "justice between the parties").
172. McConnaughay, supra note 132, at 495-96 ("[P]rivate arbitrators properly define their responsibilities exclusively in terms of the interests of the parties appearing before them.").
173. Arbitrators are not bound by the regulatory law of the jurisdiction whose law has been chosen, and they are unlikely to award treble damages partly because they depend on "the acceptability of their awards to the parties." Carrington & Haagen, supra note 128, at 346. Interestingly, though, arbitration clauses including explicit waivers of the plaintiff's right to seek punitive damages may be struck for overreaching. E.g., Graham Oil Co. v. Arco Products Co., 43 F.3d 1244, 1247-1248 (9th Cir. 1994) (refusing to enforce an arbitration clause that included the waiver of statutory rights to exemplary damages and attorneys' fees).
174. While some arbitral procedures require the arbitrators to issue a statement of reasons along with the award, e.g., International Chamber of Commerce Rules of Arbitration, Art. 32 (1988), others, such as those promulgated under the U.S. Federal Arbitration Act, do not even require that. While this serves the privacy goal of arbitration, it lessens the deterrence value of arbitral awards.
choose to apply the regulatory law of the United States in a particular controversy, certain aspects of the private attorney general mechanism are not being served. The arbitrator’s emphasis is on compensating an individual for the harm he has suffered and not on supporting the role played by that individual in the antitrust enforcement scheme.

2. The Arbitrability of Statutory Antitrust Claims

Although the arbitral process inherently emphasizes private dispute resolution over the assertion of public law interests, international contract cases involving antitrust law might have moderated this effect by recognizing the dual role of the private attorney general. In fact, though, most of the decisions in the line of cases following Bremen do not characterize the parties invoking U.S. regulatory laws as private attorneys general at all. When that role is mentioned, it is de-emphasized. The Mitsubishi court, for instance, explicitly downplayed this aspect of the litigation. Although it recognized the fundamental importance of U.S. antitrust laws to American democratic capitalism and conceded the centrality of the private cause of action to enforcing those laws, the Court proceeded to minimize the public aspect of the private attorney general’s role:

Notwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable an injured competitor to gain compensation for that injury . . . . And, of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit . . . . And the private antitrust plaintiff needs no executive or judicial approval before settling one.

In a subsequent case involving claims brought under the Racketeer Influenced and Corrupt Organizations Act, the Supreme Court again characterized the enforcement function of the private cause of action in antitrust law as subordinate to its remedial function. In the cases involving contract enforcement, the courts in this way focus on the compensatory aspect of the cases, overshadowing the role of the private cause of action in effectuating fundamental regulatory policy. This is important in light of two facts: first, many regulatory violations are alleged by private attorneys general in cases involving a contractual element; and second, courts will not sever the

176. Id. at 635-36 (citations omitted). The dissenting opinion criticized this characterization, noting that the Court had “always attached special importance to [the role of the private attorney general] because ‘[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress.’” Id. at 654 (citations omitted).
177. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 240 (1987). Although it chose to emphasize the remedial function of the private right of action in antitrust, the Court did acknowledge the importance of its enforcement function, as well, in order to distinguish it from the even more private right embodied in RICO, 18 U.S.C. §§ 1961-1968. Id. at 241 (“Antitrust violations generally have a widespread impact on national markets as a whole, and the antitrust treble-damages provision gives private parties an incentive to bring civil suits that serve to advance the national interests in a competitive economy.”).
private and public aspects of such an action by permitting statutory claims or counterclaims to be lodged separately from the contractual ones.

Many cases turning on the private enforcement of regulatory laws involve a contractual relationship between plaintiff and defendant.\textsuperscript{178} In \textit{Mitsubishi}, for example, the dispute arose out of a distribution agreement between Mitsubishi and Soler;\textsuperscript{179} in \textit{Scherk}, out of a purchase contract between Scherk and Alberto-Culver;\textsuperscript{180} in \textit{Simula}, out of a development and licensing agreement between Simula and Autovil.\textsuperscript{181} While this aspect of the cases has perhaps assisted courts in characterizing them more as disputes between private parties than as vehicles for the assertion of domestic regulatory policy, these two roles are not mutually exclusive.

One solution to this duality would be to sever the statutory claims from the contractual ones; for instance, an agreement to arbitrate might be enforced as to contractual claims without barring the plaintiff from asserting related statutory claims in a court.\textsuperscript{182} This approach did in fact prevail for some time, during a period in which U.S. antitrust policy was viewed as more important than the policy favoring arbitration.\textsuperscript{183} However, in \textit{Mitsubishi} itself and in subsequent cases, courts have clarified how difficult it is for plaintiffs to separate their rights as private attorneys general—their rights to assert statutory causes of action—from their agreements to arbitrate “ordinary” contract issues. In \textit{Mitsubishi}, the Court found Soler’s antitrust counterclaims to be encompassed by the contractual arbitration clause regardless of their statutory source.\textsuperscript{184} A similar case went even further, concluding that because the alleged antitrust violations \textit{would have} also constituted a breach of the distribution agreement between the parties, the plaintiff was bound to arbitrate the entire dispute.\textsuperscript{185} In this sense, agreeing to arbitrate a contractual dispute involving antitrust issues effectively waives a plaintiff’s right, in connection with that dispute, to assert antitrust interests as a private attorney general.\textsuperscript{186} If

\begin{thebibliography}{186}
\item[178.] Allison, \textit{supra} note 31, at 396 ("It is relatively common to find a preexisting contractual relationship between the parties to a private antitrust dispute.").
\item[179.] See the discussion \textit{supra} note 139 and accompanying text.
\item[180.] See the discussion \textit{supra} note 133 and accompanying text.
\item[181.] See the discussion \textit{supra} note 160 and accompanying text. Other typical situations include franchise agreements, distributorship agreements, and technology licenses. \textit{See} Allison, \textit{supra} note 31, at 365.
\item[182.] See Sterk, \textit{supra} note 151, at 509, for a discussion of the possibility of a bifurcated approach, and id. at 510-11 for a discussion of practical implementation.
\item[183.] \textit{E.g.}, Applied Digital Technology Inc. v. Continental Casualty Co., 576 F.2d 116, 119 n.4 (7th Cir. 1978) ("We are also aware of the federal policy . . . favoring resolution of contract disputes by arbitration and the enforcement of such arbitration agreements. In our opinion, however, that favoritism must here yield to the more dominant policy."); Sam Reisfeld & Son Import Co. v. Eteco, 530 F.2d 679 (5th Cir. 1976) (approving an order under which antitrust claims were to be litigated and the remaining contractual claims referred to arbitration).
\item[185.] High Strength Steel, Inc. v. Svenskt Stal Aktiebolag, No. 85C1070, 1985 WL 2546, at *3-4 (N.D. Ill. 1985).
\item[186.] This is true not only with respect to rights “created entirely by the contract,” Carrington and Haagen, \textit{supra} note 128, at 360, but to all related rights, Simula, Inc. v. Autoliv, Inc. 175 F.3d 716,
the antitrust claims are based on the same facts as the contract claims, they will be subject to the arbitration.\textsuperscript{187} Again, since the contract context is one in which many such violations will be alleged, the result is a limitation on the private enforcement of regulatory laws in international cases.

C. Conclusion: The Marginalization of the Private Attorney General

Developments in international commercial law have lessened to a significant degree the utility of the private attorney general mechanism. Beginning with \textit{Bremen}, courts in international contract cases have emphasized not the important public policies manifested in the various regulatory laws in question, but rather the importance of party autonomy. The need for certainty and predictability in international commercial arrangements—private-law values\textsuperscript{188}—overcame the specific public interests involved in the respective cases.\textsuperscript{189} This focus on party autonomy developed to the point that, in the international context, courts came to view even disputes involving regulatory law from the framework of private contract jurisprudence. Because the parties invoking U.S. regulatory laws are less frequently viewed as asserting fundamental policies of the sovereign, they increasingly rarely act as private attorneys general in any meaningful sense.

There are, of course, various justifications for the developments summarized in this Part, and I do not mean to join the debate as to whether those justifications are valid.\textsuperscript{190} The purpose of this Article is to point out that the developments in international contract cases create certain inconsistencies with evolving extraterritoriality analysis as described in Part III. Private rights under regulatory laws, accorded the status of sovereign policy in the statutory context, are characterized as “inherently parochial” in the contract cases.\textsuperscript{191}

\textsuperscript{187} Allison, \textit{supra} note 31, at 417 (discussing Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348 (7th Cir. 1983) and \textit{La Societe Nationale v. Shaheen Natural Res.}, 585 F. Supp. 57 (S.D.N.Y. 1983), and noting that in these cases “the court[s] held that any question of contract illegality, including one arising under the Sherman Act, is for the arbitrator to decide when the governing arbitration clause is sufficiently broad to encompass such a use”).

\textsuperscript{188} Of course, these values have a public aspect as well. As one of the legal constructs underpinning our economy, freedom of contract plays a public role. Jurgen Basedow, \textit{Conflicts of Economic Regulation}, 42 Am. J. Comp. L. 423, 425 (1994) (noting that for that reason it “cannot be said to serve private goals exclusively”).

\textsuperscript{189} E.g., Mitsubishi, 473 U.S. at 629 (“[C]onsidering international comity . . . and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement.”).

\textsuperscript{190} Proponents of the arbitration movement point to the speed, relatively low cost, and certainty associated with commercial arbitrations in defending the expansion of the right to arbitrate. \textit{But see} McConnaughay, \textit{supra} note 133 (criticizing the expanded arbitrability of mandatory-law claims); Carrington & Haagen, \textit{supra} note 128 (criticizing the expanded arbitrability of mandatory-law claims).

\textsuperscript{191} Allison, \textit{supra} note 31, at 433.
V. REEXAMINING THE ROLE OF PUBLIC INTERESTS IN THE EXTRATERRITORIAL APPLICATION OF ANTITRUST LAW

As Parts III and IV of this Article have shown, the private attorney general plays a somewhat schizophrenic role in international antitrust litigation. In statutory actions, it is an expansive role, as guardian of important public interests. In contract actions, it is a minor one, overshadowed by other priorities in international commercial law. In this Part, I suggest that this duality, and the contextual considerations that created it, shed light both on antitrust litigation in particular and on the intersection between private values and regulatory interests in general. This Part turns first to the pragmatic question of what role the private attorney general can and should play in international antitrust cases. It then examines more closely the question that has to a large degree framed extraterritoriality analysis: whether private conflict-of-laws principles might profitably be imported into the area of regulatory law.

A. Rethinking the Role of the Private Attorney General

Global commerce forces us to consider how our domestic legal institutions operate internationally. In the antitrust arena, this means revisiting, in the light of recent developments, the utility of the private attorney general mechanism as compared with the hostility it generates in other countries. Especially in view of the diminishing benefits provided by the private attorney general in international commerce, the level of international friction caused by the mere existence of the mechanism gives pause.

The history of the animosity created by U.S. antitrust legislation hardly needs recounting. Other countries have for decades protested the perceived aggression with which the United States has imposed its competition laws abroad. Some of the bases of this reaction, such as broad discovery procedures or the perceived overextension of the effects test, are common to all antitrust enforcement efforts, whether private or governmental. Importantly, recent developments have improved international cooperation in

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192. See Section IV.C. supra.
193. WALLER, supra note 34, at § 4.1 (noting the "resentment against perceived American intrusion into the internal affairs of other countries").
these areas. Between 1976 and 1999, the United States entered into bilateral cooperation agreements with Germany, Canada, Australia, Brazil, Israel, Japan, and the European Communities. These agreements were designed to coordinate enforcement activities in the relevant jurisdictions in international cases. Many of them included guidelines intended to encourage the full consideration of each country’s interests in particular enforcement activities. Additionally, the adoption by the European Union of a jurisdictional basis test similar to the effects test used by U.S. courts has reduced objections based on perceived jurisdictional overreaching by the United States. As a result of these developments, it is likely that foreign hostility to the U.S. international antitrust regime has lessened in recent years.


203. Agreement Between the Government of United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, supra note 202, at Art. VI ("[E]ach Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding ... ") Article VI goes on to set forth a list of factors relevant to this analysis.

204. In re Wood Pulp Cartel, 1988 E.C.R. 5193. Echoing the language of the "substantial and intended effects" test adopted in the United States, the European Court of Justice analyzed activities of certain wood pulp producers that had the "object and effect" of impeding competition within the common market. Attempting to maintain a territorial basis for jurisdiction, the court held that the conduct had occurred not where the unlawful agreement was formed (outside the Community), but where it was implemented (within the Community). It then went on to apply EU antitrust law to the dispute. Id. at 5242; see also Spencer Weber Waller, The Twilight of Comity, 38 COLUM. J. TRANSNAT’L L. 563, 578 (2000) ("Foreign governments use extraterritoriality more frequently than ever before,
There remain, however, certain objections that are peculiar to the actions of private attorneys general and that have not been addressed by the developments outlined above. From a foreign perspective, the availability of treble damages awards in private antitrust litigation is widely considered to be one of the most unacceptable aspects of U.S. regulatory law. Foreign defendants fear unacceptably large damages awards. Moreover, not sharing the contingent fee system supported by our multiple damages provisions, they view such awards as nothing more than rank exorbitance. Resistance to this aspect of U.S. antitrust law is manifested in the blocking statutes enacted in many countries, which include provisions designed to “claw back” treble damages awards granted by U.S. courts. Unlike the objections common to government enforcement activity, these have not been addressed by the recent cooperative developments. Whether they are often or only rarely utilized, then, the mere existence of the incentive structures underpinning the private attorney general mechanism has become a locus of remaining foreign criticism of U.S. antitrust litigation.

Discussions regarding the proposed Hague Convention on jurisdiction illustrate the extent to which this issue has retained its currency. The preliminary draft of the proposed Convention provides that non-compensatory damages awards need not be recognized beyond the extent to which such taking the sting out of their occasional complaints about its misuse in the United States.”).

205. A.D. NEALE & M.L. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION 29-31 (1988). The authors note that the “[m]uch greater fear of the penal aspect of antitrust arises from the fact that... alleges illegal conduct may lead to private actions for punitive, that is, treble, damages.” Id. at 29.

206. Id. at 29-30.


208. It is important to note that it is the incentive structures, not the availability of a private right of action per se, that generate most of this remaining hostility. In a report on cooperation between the European Commission and national courts within the European Union, the Commission made note of judicial decisions supporting the existence of private rights under EU antitrust law. Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, 1993 O.J. (C 39) 6. Similarly, the recent proposal for reform of the EU antitrust enforcement system speaks of “promoting private enforcement through national courts.” Proposal for a Council Regulation, 2000/0243 (CNS), Sep. 27, 2000, at http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0582.pdf. These statements reflect some level of consensus internationally on the acceptability of private enforcement actions.

209. NEALE & STEPHENS, supra note 205, at 31 (pointing out that the degree of concern might in fact be greater than actual litigation experience would warrant).

damages could have been awarded in the enforcing state.\textsuperscript{211} Thus, enforcing States under the Convention would have the discretion to enforce only the compensatory portion of any antitrust award granted in the United States. This issue could have been dealt with as a matter of each contracting state's public policy—in other words, the Convention could have provided that states choosing to refuse enforcement of multiple-damages awards must rest that decision on the general public policy exception.\textsuperscript{212} The decision of the drafters instead to address the issue explicitly emphasizes its continued importance.\textsuperscript{213}

More generally, the Convention discussions also demonstrate that the stakes in international regulation have been raised by the movement in favor of harmonizing substantive and procedural international law. The stance of the United States on the question of extraterritoriality has long caused friction, playing a part in generating some unproductive legislation.\textsuperscript{214} In a global age, it does more. As the debate surrounding the Convention illustrates, that stance might become a sticking point in a multinational treaty process and thereby affect chances for increased cooperation on a larger scale.\textsuperscript{215}

Commentators have in the past suggested that treble damages should simply not be available in private antitrust litigation, thus eliminating the specter of punitive damages awards.\textsuperscript{216} This argument is in certain respects even more compelling in light of the inability of courts after Hartford Fire to consider the interests of other countries in private cases.\textsuperscript{217} For several reasons, permitting U.S. courts to resolve private international antitrust actions

\textsuperscript{211} Article 33(1) of the Draft Convention refers to “non-compensatory, including exemplary or punitive, damages.” Council Memorandum No. 1 (November 19, 1999) at 15, as submitted to the American Law Institute.

\textsuperscript{212} Russell J. Weintraub, \textit{How Substantial is Our Need For a Judgments-Recognition Convention and What Should We Bargain Away to Get It?}, 24 \textit{BROOK. J. INT’L L.} 167, 204 (1998). Article 28 of the Draft Convention provides that “recognition or enforcement of a judgment may be refused if . . . manifestly incompatible with the public policy of the State addressed.” Draft Convention, supra note 210, at Article 28(1)(f).

\textsuperscript{213} CATHERINE KESSEDJIAN, \textit{INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS} (1997) at ch. III, sec. 3, § 2H (discussing various specific proposals on the question of non-compensatory damages).

\textsuperscript{214} WALLER, supra note 34, §§ 4.14-4.18 (discussing blocking statutes and other measures adopted in response to the U.S. approach).

\textsuperscript{215} Patrick J. Borchers, \textit{A Few Little Issues for the Hague Judgments Negotiations}, 24 \textit{BROOK. J. INT’L L.} 157, 160 (1998) (suggesting that “the concessions that the United States will have to make may be so large in relation to the benefit to domestic interests as to doom the possibilities of ratification [of the proposed Judgments Convention]”).

\textsuperscript{216} Floyd, supra note 23, at 5. \textit{See also TREBLE-DAMAGES REMEDY, AMER. BAR ASS’N SECTION OF ANTITRUST LAW MONOGRAPH 13, 50-65 (1986) (summarizing proposals to change the treble-damages rule). Related proposals have suggested that government agencies play a greater role in private litigation, assisting in the evaluation of U.S. and foreign interests. WALLER, supra note 34, § 21.24 (discussing the benefits of increased participation in private litigation by U.S. agencies). Yet others suggest abolishing private actions in the international setting altogether, requiring would-be plaintiffs instead to obtain government representation. Earl A. Snyder, \textit{Foreign Investment & Trade: Extraterritorial Impact of United States Antitrust Law}, 6 \textit{VA. J. INT’L L.} 1, 36-37 (1965).}

\textsuperscript{217} This is especially true because, lacking mechanisms for private antitrust enforcement, other countries rely on the fact that their government agencies can and do exercise their discretion to stop antitrust investigations if they perceive foreign conflict. Basedow, supra note 188, at 436 (discussing this aspect of antitrust prosecutions in Europe). While U.S. agencies do the same, \textit{see supra} notes 109-110 and accompanying text, the failure to impose similar checks on private plaintiffs seems unwarranted to foreign observers.
without so considering the foreign interests involved is problematic. First, the majority of private antitrust cases are not "follow-on" cases—which would benefit from the interest balancing conducted in antecedent government actions—but suits brought independent of prior government enforcement. Because private suits are intended partly to catch conduct that would not warrant the attention of U.S. government agencies, it is possible that such litigation would be initiated counter to the general antitrust enforcement goals of the United States. Second, and relatedly, private suits may be initiated in situations in which the government had in fact considered enforcement, but after analyzing the competing interests involved had declined to act. Here, indeed, such litigation might be counter even to the express policy interests of the government. Third, it is in private actions, not enforcement actions, that treble damages may be awarded. The imposition of treble damage awards generates much of the foreign opposition to our international antitrust regime. Thus, the notion that such awards may be granted without consideration of the foreign interests involved may exacerbate the extraterritoriality conflict.

Were the antitrust interests asserted by private attorneys general in international cases of paramount importance to the U.S. regulatory scheme, foreign dissent generated by the aspects of private litigation described above might be tolerated as the necessary cost of effectuating those interests. (Indeed, the approach Hartford Fire mandates in private statutory cases seems to view potential foreign conflict as just such a cost.) The increasing marginalization of the private attorney general effected in the international commerce cases, however, suggests that antitrust interests are not in every circumstance of paramount importance, and if that is true, then the use of private litigation in international statutory cases deserves at least a second look.

218. *See supra* note 27 and accompanying text for a discussion of follow-on cases.

219. *Waller*, *supra* note 34, § 13.39 ("Private parties, . . . with the incentive of treble damages, may sue even for violations that the government would find too trivial or localized in nature.").

220. This particular possibility was addressed in the Third Restatement. Comment (g) to section 415 states that "if the enforcement agency chose not to assert jurisdiction, courts hearing a private action may consider that fact significant in weighing the interest of the United States against conflicting interests of other states." *Third Restatement, supra* note 66, § 415. If judicial interest balancing is rejected, there is no room for such analysis.

221. *See supra* notes 202 through 205 and accompanying text for a discussion of the foreign reaction to this aspect of U.S. antitrust policies.

222. This adds weight to Justice Scalia's objection to the creation of "sharp and unnecessary conflict with the legitimate interests of other countries . . ." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 820 (1993).

223. As the foregoing discussion suggests, I suspect that a strong case could be made for eliminating the availability of treble damages awards in the international context. Making that case, however, would necessitate an analysis of the private attorney general's continuing role in the domestic arena that is beyond the scope of this Article.
B. Rethinking the Framework for Extraterritoriality Analysis

Comparing the treatment of the private attorney general in statutory and contractual antitrust cases helps define the role the private attorney general plays in global commerce. Beyond that, it provides a lens through which to examine more closely the emphasis placed on the public nature of the regulatory interest in international antitrust law. This section discusses the effects of that emphasis on extraterritoriality analysis, suggesting that this focus on the inherently public nature of antitrust policy is today misplaced.

1. The Public/Private Dichotomy

As the statutory cases discussed in Part III demonstrate, a dominant issue in recent extraterritoriality jurisprudence concerns the propriety or necessity of judicial interest balancing. This question has been framed in broader terms as whether tools developed for resolving conflicts of law in private disputes are useful in analyzing conflicting claims of regulatory jurisdiction in international cases. Presented in these terms, the debate draws on the conceptual separation between public and private law, and courts adopting the comity approach have typically described their analysis in terms of that separation. The notion of putting private-law concepts to public-law use was perhaps most sharply focused during the drafting of the Third Restatement. The drafters noted explicitly that the balancing test included in Section 403 of the Third Restatement was influenced by the role of similar tests in the resolution of private conflicts. Specifically, elements of the Restatement (Second) of Conflict of Laws were incorporated into the

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224. See sources cited supra note 10. A court engaging in conflicts-of-law analysis in a private dispute is of course choosing which law it will apply in deciding the case, whereas a court engaging in extraterritoriality analysis is simply choosing whether to hear or dismiss the case. Because no court will apply the regulatory law of another country, the inquiry in an extraterritorial case is therefore not strictly speaking a choice of law. Maier, supra note 4, at 290. But the concerns relevant to a decision as to which state's law applies to a private case resemble those relevant to a decision as to which state's regulatory law applies to a public one. Trautman, supra note 10, at 602 ("In much the same way that the conflict of laws has grown out of problems of competing judicial jurisdiction, there may be emerging a kind of conflicts thinking for the division of legislative competence in matters of economic regulation.").

225. See supra note 2 for a discussion of the public/private distinction.

226. E.g., Timberlane Lumber v. Bank of Am., 549 F.2d 597, 609-10 (1976) (discussing "limitations which generally correspond to those fixed by 'the Conflict of Laws'") (citing United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

227. Section 6(2) provides that:
When there is no [statutory directive on choice of law], the factors relevant to the choice of the applicable rule of law include
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.
Third Restatement, bringing private law-based analysis into the public sphere. In this way the Restatement debate reinforced the conceptualization of the issue in terms of a public/private dichotomy despite the Third Restatement’s advocacy of interaction between the two spheres.

Perhaps because the viability of interest-balancing methods in regulatory cases was framed in these terms, much of the criticism directed at those methods also traded on distinctions between public and private interests. One important source of reluctance to apply private-law-conflicts thinking to regulatory cases, for instance, is a belief that the interests considered in regulatory cases are qualitatively different from those considered in private tort or contract disputes. On this view, the public regulatory interests are so strong—such pure expressions of sovereign will—that they simply cannot be weighed against competing interests in a case calling for their application. (In other words, under a jurisdictional basis test, in a case in which they could be applied, they must be applied.) A related argument is that regulatory interests, as legislative policies, can never appropriately be weighed by the judiciary. This view also turns on a characterization of regulatory interests as uniquely important, arguing that any such consideration would interfere with executive decision-making. Overall, the more “public” and therefore unweighable the character of the regulatory interest, the less fitting a private-law based analysis would seem.

228. THIRD RESTATEMENT, supra note 66, § 403, rpt. no.10 (“The factors set forth in the present section . . . adopt the factors listed in § 6 of the Restatement, Second, of Conflict of Laws.”). The Introductory Note to the Revised Restatement’s subchapter on prescriptive jurisdiction states further: courts and other decision makers, learning from the approach to comparable problems in private international law, are increasingly inclined to consider various interests, examine contacts and links, give effect to justified expectations, search for the ‘center of gravity’ of a given situation, and develop priorities. This Restatement follows this approach . . . . See also Lowenfeld, supra note 10, at 329 (setting forth an alternative list of criteria for legislative jurisdiction that borrows liberally from the Restatement’s guidelines).

229. Weintraub, supra note 10, at 1818 (“The sovereign’s interest in enforcing its regulatory rules is of a different order than the ‘interest,’ meaning the social policy, underlying the rules of torts and contracts”). See also Maier, supra note 4, at 289 (“A government always has a direct interest in the outcome of a regulatory case, even when the governmental viewpoint is represented by [a private attorney general].”).

230. Laker Airways v. Sabena, 731 F.2d at 955 (“Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association.”).

231. Id. at 949 (“It is the crucial importance of these policies which has created the conflict. A proclamation by judicial fiat that one interest is less ‘important’ than the other will not erase a real conflict.”). But see Lowenfeld, supra note 3, at 53 (“That position seems to me thoroughly unsound, because it treats an issue of law as if it were an issue of politics.”).
Lessons From the Private Attorney General

Limits of the Public vs. Private Distinction

There is no inherent difference between the regulatory interests asserted in statutory litigation and those asserted in contract litigation. In either context, the plaintiff seeks reparation for an injury caused by a violation of domestic antitrust law. As the fate of the private attorney general in antitrust litigation demonstrates, however, the setting in which those interests are raised matters. The form in which the antitrust claims arise might dictate whether the court would treat the controversy as a private dispute, ignoring the role of the private plaintiff as enforcer of an important government policy, or would instead insist on the near-automatic effectuation of that policy. Yet the setting of an antitrust action is somewhat manipulable. In certain circumstances, the same behavior might support either an action for enforcement of a contractual clause or a straightforward statutory action under the Clayton Act.

One recent case illustrates the artificiality of this distinction. In Metro Industries v. Sammi Corporation, the Ninth Circuit addressed a dispute between Metro Industries, a U.S. importer of kitchenware products, and Sammi Corporation, a Korean trading company. After conducting business together for over three years, Metro and Sammi entered into an arrangement involving the supply of stainless steel steamers. Metro provided Sammi with the models for these products and Sammi then registered the designs with the appropriate Korean trade association. Sammi agreed to supply Metro with the steamers for export. Less than two years later, Metro’s supply of steamer deliveries was disrupted, and Metro eventually turned to another Korean company for the product. Metro subsequently brought suit in United States District Court alleging various violations by Sammi of U.S. antitrust law. Although this was an international business transaction of the sort typically considered in the contract context, the business arrangement appears not to have been memorialized by agreement. Thus, no forum-selection or choice-of-law clauses were involved. Metro simply brought a statutory action, asserting its right as a private attorney general to invoke domestic antitrust law in seeking recovery from Sammi, and the court concluded that jurisdiction obtained. Presumably, if a contract had existed and Sammi had moved to enforce a choice-of-law provision contained therein

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232. Parts III and IV supra.
234. Id. at 841.
235. Id.
236. Id. at 841-42.
237. Id.
238. In any event, the case did not involve a contractual claim based on any such agreement.
239. Id. at 847. The court went on to hold that Metro had failed to establish an antitrust injury under the Sherman Act. Id. at 848-49.
in favor of foreign law, Metro would have been foreclosed from asserting that
same right as a counterclaim.240

b. Questioning the Paramount Importance of Regulatory
Interests

More generally, the treatment of the private attorney general in contract
cases calls into question the characterization of antitrust interests as
unweighable. The line of cases following Bremen has demonstrated that
regulatory interests are, in fact, routinely weighed against competing interests.
In the forum-selection cases, courts found the policy of facilitating
international commerce (and, specifically, the pro-arbitration policy) more
compelling than the policy in favor of reserving regulatory disputes for
adjudication in U.S. courts. The language of those decisions reflects the
courts' awareness that they were indeed engaged in balancing the disparate
interests involved. The Mitsubishi Court, for instance, stated that it would
"weigh the concerns of American Safety [i.e., domestic antitrust policy] against
a strong belief in the efficacy of arbitral procedures for the resolution
of international commercial disputes and an equal commitment to the
enforcement of freely negotiated choice-of-forum clauses."241 This does not
mean that the Court is weighing U.S. antitrust policy against the antitrust
policy of another country; rather, it is weighing U.S. antitrust policy against
competing U.S. policies that serve the needs of international commerce.242
However, that process reveals the possibility of balancing domestic antitrust
policy against other domestic interests—in other words, it shows that antitrust
policy is not of an order that is inherently unweighable.

Although the Mitsubishi Court spoke of weighing domestic antitrust
concerns, of course, the Court was addressing only the question of where U.S.
antitrust law would be applied, not whether it would be applied.243 In this
sense, the Court's opinion reflected a certain downgrading of the regulatory
interest—it was no longer considered so critical that it could be asserted only
in a judicial forum—but not a judgment that U.S. antitrust laws might be
circumvented altogether. Indeed, the Court reserved on this question, noting
that choice-of-law clauses that operated as a prospective waiver of rights
under the antitrust laws would be unenforceable as against public policy.244

240. This follows the Ninth Circuit's reasoning in the recent Simula case, discussed at supra
notes 160-168 and accompanying text. If only a foreign arbitration clause were at issue, Metro
would have been forced to take its chances that its U.S. antitrust claims would be considered in the foreign
arbitral process. Subsection IV.A.1 supra (discussing the enforceability of arbitration clauses despite the
presence of regulatory law issues).
242. Cf. Maier supra note 4 (discussing the importance of international system needs to a
weighing analysis).
243. 473 U.S. at 635 ("The importance of the private damages remedy, however, does not
compel the conclusion that it may not be sought outside an American court.").
244. Id. at 638-40.
Yet the applicability of domestic regulatory law is unclear when jurisdiction is ceded to an arbitral forum, particularly in cases in which there is controversy regarding the governing law. The *Scherk* Court seemed to acknowledge this uncertainty, rejecting in dicta the view that only “United States laws and United States courts should determine this controversy in the face of a solemn agreement... that such controversies be resolved elsewhere.” Thus, many critics of the trend permitting arbitration of regulatory claims suggested that a decision to enforce arbitration clauses amounted to acknowledgment that U.S. law might not be applied at all.

In the subsequent *Lloyd’s* cases, the courts explicitly accepted the substitution of foreign regulatory law for domestic securities rules—a substitution that effected a waiver of precisely the kind contemplated in *Mitsubishi*. The Ninth Circuit’s decision in *Simula*, similarly, enforced a contractual agreement while recognizing that doing so might result in the displacement of U.S. antitrust law. These cases thus go even farther than the forum-selection decisions in balancing the interests reflected in regulatory statutes against interests of party autonomy. If contractual forum-selection and choice-of-law clauses may operate to prevent the application of regulatory statutes, the interests those statutes serve can no longer properly be described as unweighable. And if that is true, then many of the arguments against the use of interest balancing in statutory cases seem less plausible, as private conflict-of-laws tools already are used to consider regulatory policies.

3. Revisiting Extraterritorial Regulation

This Article suggests that the view of regulatory law grounding the interest-balancing debate does not reflect accurately the current status of regulatory interests. One might argue, though, that the judiciary has simply gone astray in extending the *Bremen* presumption to cases involving regulatory law and then to the enforcement of choice-of-law clauses. This argument would suggest that the character of regulatory law as pure sovereign policy remains relevant and that the mandatory nature of that law should be restored in the contract setting. That action would, in effect, eliminate the

245. Sterk, *supra* note 151, at 491 (arguing that in such a situation “an arbitration clause is akin to a clause that provides... also for the application of a particular forum’s laws”).


248. Interestingly, unlike the securities laws of the United States and the United Kingdom, which are quite similar in most respects, the antitrust regimes differ substantially.

249. This argument is analogous to an argument that those laws are no longer mandatory in the international setting, as they can be derogated from in contract. McConnaughay, *supra* note 132, at 477 (analyzing the traditional assumption that "contractual choice of law does not displace otherwise applicable mandatory law.

250. For expositions of this argument, see Borchers, *supra* note 131; Carrington & Haagen, *supra* note 129.

251. Professor McConnaughay has recently made such an argument, proposing the resurrection of the "public law taboo" preventing contractual derogation from certain mandatory law. McConnaughay, *supra* note 5.
inconsistencies identified in this Article in favor of the approach currently taken in statutory antitrust cases.

I believe that this argument faces the same difficulty encountered in the debate over extraterritorial regulation in the statutory cases. In adopting a kind of essentialist characterization of antitrust law, focusing on the inherent nature of antitrust policy, it under-emphasizes the real distinctions between different sorts of antitrust claims. As commentators have noted, the contractual arrangements of private parties often present no "threat to the public welfare." That is true not because of the fundamental nature of the statutory claim being asserted, but because of the overall context in which it is asserted. While the antitrust laws serve public goals, those goals are not implicated to the same degree in every case raising antitrust claims. In other words, the difference between a regulatory claim asserted in what is essentially a contract dispute between private parties and one asserted in a case involving widespread harm to U.S. markets should not be obscured by reliance on the public character of the antitrust law itself.

Importantly, however, these distinctions are not located only in the presence or absence of a contractual relationship between the litigants. Even the statutory cases reveal differences in the degree to which public antitrust interests are implicated in international litigation. The following section therefore returns to those cases in order to examine more closely the nature of the antitrust interests they address.

a. A Second Look: Public and Private Interests in the Statutory Cases

In the cases advocating interest balancing, the anti-competitive conduct seems to have been directed exclusively at individual competitors. While the cases did involve adverse effects on U.S. markets, those effects were characterized as flowing from the injuries suffered by the individual plaintiffs rather than the other way around. In Mannington Mills, for instance, the action was based primarily on conduct by the defendant directed at the plaintiff;

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252. E.g., McConnaughay, supra note 132, at 495 (suggesting that "mandatory law claims are more likely than contract or elective law claims to implicate the rights of underrepresented third parties or the public"); Sterk, supra note 151, at 486 (seeking to distinguish cases in which "the statute or case law principle at issue has aims other than promoting justice between the parties"). These formulations ascribe a single set of characteristics to claims under particular statutes, regardless of the context in which those claims might be asserted.


254. Mannington's complaint alleged that the defendant, Congoleum, had fraudulently procured certain foreign patents and was enforcing them by means of infringement suits. 595 F.2d 1287, 1290 (3d. Cir. 1979).
indeed, although the complaint suggested that defendants' conduct restricted not only the plaintiff's foreign business but also that of "other American competitors," that conduct seemed to be largely the continuation of an ongoing licensing dispute between the two companies. In discussing the alleged antitrust violations, the court noted that "[I]f an American company is excluded from competition in a foreign country . . . , then our national interests are adversely affected." In *Timberlane*, similarly, the plaintiffs alleged that defendants had conspired to bar their exports of Honduran lumber, "thus directly and substantially affecting the foreign commerce of the United States." Again, the conduct was characterized as action directed at the plaintiff which then has a correlative effect on the overall market. In the *Montreal Trading* case, the court discussed more explicitly the balance between injuries to an individual and effects on the public market. It noted that a price-fixing conspiracy may injure both its direct victims, who purchase the goods in question at an inflated price, and also the market generally, through its effect on non-purchasers. It then disposed of the non-purchasers for lack of standing, however, stating, "[T]hat leaves us with the alleged concerted refusal to sell to [the plaintiff]." Again, then, the antitrust claims appeared to be based on a primarily private harm.

As these cases demonstrate, of course, even conduct intended to affect a particular competitor can have enough of an effect on U.S. markets generally to create a basis for regulatory jurisdiction. Thus, the private attorneys general initiating such cases do serve a public interest as well as their own private goals. However, in these cases the private interests at stake appear relatively strong compared to the public antitrust interests asserted.

In contrast to the cases discussed above, those in which the interest-balancing approach was rejected focused primarily on the public aspects of the litigation. The *Laker* case, for instance, was initiated by a private litigant in much the same circumstance as the plaintiff in *Timberlane*. Laker Airways argued that the defendants' unlawful conduct had excluded it from the air-travel market. However, the court in *Laker* cast the alleged conspiracy as one directed more against the U.S. market than against the individual plaintiff, noting the impact of the conspiracy on U.S. consumers. In addition,
emphasizing the issuance of competing anti-suit injunctions, the court characterized the entire litigation as resulting from "a clash between two governments," noting also the direct involvement of the U.K. government in the litigation. Finally, the court’s primary concern throughout the litigation was protecting its jurisdiction—an entirely public focus. Because public interests were at the forefront of the case, the litigation was in important respects quite unlike the primarily private disputes considered in the cases adopting interest balancing.

In the Uranium litigation, too, the interests of the respective governments were explicitly made part of the case. In Laker, the foreign courts involved had issued anti-suit injunctions designed to bar Laker’s action in the United States. In the Uranium litigation, similarly, foreign governments had enacted blocking legislation designed to render useless the production orders issued in the United States. In other words, the dispute directly implicated competing sovereign actions. It was shaped more by the dispute at the government level than by the private injuries suffered by the plaintiff. Hartford Fire did not involve governmental action in this direct sense. Nevertheless, the litigation implicated antitrust policy to a greater degree than the interest-balancing cases. The court described the effects of the defendants’ conduct in broad market terms, depicting the conduct not as behavior aimed primarily at the plaintiffs, but as “unlawful conspiracies [intended] to affect the market for insurance in the United States.”

The inclusion of nineteen states in the plaintiff group—representing not the interests of domestic insurance companies injured by the conduct, but the interests of consumers—highlight the market emphasis. Overall, then, these cases emphasized the public regulatory interests asserted by the private attorneys general rather than the private harms those litigants suffered.

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265. Id. at 921.
266. Late in the litigation process, an order was entered pursuant to the British Protection of Trading Interests Act preventing Laker from proceeding against the British counterparties. As the Zenith court noted, the “intimate involvement of instrumentalities of foreign sovereigns” changes the complexion of private antitrust cases. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1181 (E.D. Pa. 1980).
267. Laker, 731 F.2d at 939 (“[T]he violation of public policy vitiating comity is not that the evasion of United States antitrust law might injure United States interests, but rather that United States judicial functions have been usurped, destroying the autonomy of the courts.”). Indeed, the court took up the extraterritoriality analysis only in order to reach that question. Supra note 79 and accompanying text.
269. Indeed, the foreign cartel was formed with the encouragement of other governments as a response to the U.S. government’s decision to close the U.S. uranium market to foreign producers. Kestenbaum, supra note 86, at 320.
b. Refocusing the Inquiry

As these decisions reflect, the public interests implicated in statutory antitrust litigation may appear in relatively strong or in relatively weak form. The assertion of antitrust claims should therefore not operate as an "off" switch barring consideration of the other interests implicated in the litigation. Unlike contract actions, statutory antitrust actions do not directly raise the competing policy in favor of enforcement of contract or the policy in favor of arbitration. But they do implicate the interests of the United States in facilitating international commerce and in creating a foundation for the coordination of economic regulation among sovereigns. Using an unnuanced characterization of antitrust interests as sovereign policies in order to render those interests unweighable prevents courts in statutory antitrust litigation from considering the full range of U.S. interests at stake.

VI. CONCLUSION

The role played by the private attorney general in international antitrust litigation is important in its own right. Nearly all of the cases used to explore the parameters of U.S. regulatory jurisdiction were initiated by private plaintiffs rather than government agencies, and antitrust enforcement in general continues to depend heavily on the contribution of private actors. In addition, as this Article has argued, litigation initiated by private attorneys general has become a focal point for what foreign resentment remains regarding U.S. antitrust law. In an era marked by increased cooperation and, arguably, some degree of convergence with respect to substantive antitrust standards, the availability of treble damages to private plaintiffs under the Clayton Act provokes opposition. For that reason alone, a new look at the means by which such conflict might be minimized is desirable.

Perhaps more importantly, the role played by the private attorney general is a useful analytical tool. Because it implicates both public and private interests, analyzing its operation helps to identify points at which the traditional separation between public and private becomes unproductive. In antitrust, I have suggested, this conceptual separation encourages courts in international cases to apply regulatory law in a manner inconsistent with the role such law plays in the international commercial arena. More generally, this exercise also illustrates the growing divergence between the legal bases of international cases to apply regulatory law in a manner inconsistent with the role such law plays in the international commercial arena. More generally, this exercise also illustrates the growing divergence between the legal bases of

271. The same is true, of course, in international contract cases that raise regulatory concerns. In the Scherk case, a "private" contractual dispute, the dissent argued that it was not merely a private dispute impacting Alberto-Culver, but one in which the interests of the public, represented by the shareholders of that company, were implicated. Scherk v. Alberto-Culver Co., 417 U.S. 506, 526 (1974). It thus believed the policy interest reflected in the securities regulations to be relatively strong in that situation.

272. Westbrook, supra note 6, at 92 (noting generally that "forum courts are apt to give too much weight to the nation's interest in various local policies and too little weight to its interest in the international values").

273. Supra Section V.A.
private economic activity and the theoretical framework we use to consider questions of economic regulation.

Norms based on the principle of party autonomy shape every aspect of international commerce, from the formation of economic transactions to the submission of disputes arising from those transactions for resolution. The way in which countries compete for regulatory control over international commerce, however, is highly nationalistic.\textsuperscript{274} This is understandable, as our vision of economic regulation builds on foundations of territoriality and sovereignty, but it need not be inevitable. Reexamining certain assumptions that underpin our regulatory approach can reveal alternative methods of addressing the conflicts generated by global commerce.

\textsuperscript{274} Dam, supra note 47, at 371 ("In this modern age of nationalism, every nation is extraordinarily sensitive to other countries' assertions of jurisdiction that seem to impinge on the sacred domain of national sovereignty. The irony is that the modern world also generates its own, almost unavoidable, conditions of jurisdictional conflict.").