Winter 2010

National Jurisdiction and Global Business Networks (Earl A. Snyder Lecture in International Law)

Hannah Buxbaum

Indiana University Maurer School of Law, hbuxbaum@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ijgls>

Part of the [International Law Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Buxbaum, Hannah (2010) "National Jurisdiction and Global Business Networks (Earl A. Snyder Lecture in International Law)," *Indiana Journal of Global Legal Studies*: Vol. 17 : Iss. 1 , Article 8.

Available at: <https://www.repository.law.indiana.edu/ijgls/vol17/iss1/8>

This Lecture is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Global Legal Studies by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.

JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

National Jurisdiction and Global Business Networks

HANNAH L. BUXBAUM*

On November 1, 2007, Professor Buxbaum delivered the ninth annual Snyder Lecture at the University of Cambridge in the Lauterpacht Centre for International Research.

It is a great honor for me to deliver the ninth Snyder Lecture. I have had the pleasure of attending many of the previous lectures delivered in Bloomington by members of the Cambridge faculty. I have also had the pleasure of hearing from those of my students who were given the opportunity to conduct research at the Lauterpacht Centre as Snyder Fellows. Our faculty is very grateful for Earl Snyder's generosity in supporting these intellectual exchanges between our schools, and I personally am very grateful for this opportunity to address you.

I will speak today about the exercise of jurisdiction by U.S. courts over global business networks. There are many ways in which the activities of U.S. courts intersect, and have long intersected, with international business activity, and so this topic calls up in part the procedural issues that are the bread and butter of international civil litigation. U.S. courts regularly assert personal jurisdiction over foreign corporations on the basis of their activities in the United States; they apply U.S. law to foreign conduct that is seen to harm certain interests within the United States; they enforce agreements that send cross-border contract disputes over into the transnational arbitration system.

But while some of those practices are mundane and, at least in theory, unobjectionable, others are problematic, and from time to time a specific case or group of cases will trigger a resurgence of attention to the role that U.S. courts play in the international arena. I would point

* Executive Associate Dean for Academic Affairs and Professor of Law, Indiana University Maurer School of Law—Bloomington. This is a lightly edited and footnoted version of the ninth annual Snyder Lecture. Many thanks to Fred Aman, Christiana Ochoa and Hari Osofsky for their helpful comments on an earlier draft.

to the Uranium litigation of the mid-1970s¹ and the spate of Alien Tort Claims Act cases that began in the mid- to late 1990s² as examples of this. In this first decade of the 21st century, litigation involving international competition and securities regulation has further fueled concern regarding that role. The current wave of cases suggests that the context of cross-border economic litigation has changed in several important ways. First, as a result of the continuing increase in cross-border business activity, there is simply much more pervasive involvement of domestic courts in the regulation of international business, even in the ordinary functions such as establishing personal jurisdiction over a foreign defendant or recognizing a foreign judgment. Second, with the recent proliferation of non-national courts—regional, ad-hoc, international, and also arbitral tribunals—there are new points of overlap and conflict between their roles and the role of domestic courts. Third, as I will argue, many of the economic injuries arising from business activity today are properly situated at the global level. By this I mean that they are not merely aggregations of individual localized harms, but are enabled by the increasing connectedness and interdependence that characterize our economic markets. Finally, both litigants and judges are increasingly conscious of the impact that local litigation has on global regulatory processes—and attentive to the advantages and disadvantages of using such litigation as an instrument of regulation.

What I would like to explore is whether these changes—particularly the increasingly global aspect of business networks and the harms they can cause—demand a shift in, or augmentation of, the paradigm that we use to think about and articulate the proper role of domestic courts. I will not argue that the global nature of business networks requires a correspondingly global view of jurisdiction in domestic courts. Rather, I will argue that it requires a more textured view of those courts' sphere of engagement. In order to establish a conceptual framework for the discussion, I borrow some concepts—in particular, the idea of scalar analysis—from the literature on political geography.³ That work

1. For a discussion of this litigation, see ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW* 157-66 (1996).

2. See generally Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 406-08 (2001).

3. I use the word "borrow" advisedly. What follows is not an account of political geography; it simply draws on that discipline's treatment of globalization and scale as a useful way of situating an analysis of legal jurisdiction. For an entry into political geography, see KEVIN R. COX, *POLITICAL GEOGRAPHY: TERRITORY, STATE, AND SOCIETY* (2002); into critical legal geography, see NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* (1994).

provides a lens through which to consider “how the territorial extent of a legal entity does and should compare to the scale of the problems that it considers.”⁴ Political geographers therefore deal in part with the re-scaling of problems in the globalized world: addressing, for instance, ways in which “issues can potentially be rearticulated at larger scales to mobilize political leverage.”⁵ Much of this work deals with the phenomenon of scaling *up*. In other words, it looks at how actors interested in achieving particular local political or social ends take advantage of new spaces of engagement at the transnational/global level—perhaps by mobilizing the support of nongovernmental organizations, or advocating regional legislation, or even by interesting the international press—to secure them.⁶ But particular issues can also be scaled *down*—that is, a global problem can be recast in local terms, in order to take advantage of local political or social resources. The concept of scale is therefore a useful analytical tool in examining how global economic misconduct is situated before the courts of one particular country. In addition, the concept of scale can be used as a starting point in considering the exploration of “new political spaces outside the constructed boundaries of the state system.”⁷ Here, my project is to examine the political space that U.S. domestic courts occupy when, through the exercise of judicial and legislative jurisdiction, they assert regulatory control over events and conduct that cross geographic areas.

I will proceed as follows. First, I will discuss certain patterns of global business activity and explain how they generate what can fairly be described as global economic harms. I will then describe the current paradigm that we use to define the role of domestic courts in regulating international business and identify why in my view that paradigm requires reexamination. Next, I will consider some particular situations in which arguments are being made for re-envisioning the engagement of domestic courts and analyze how these arguments, whether expressly or implicitly, manipulate scale. Finally, I will attempt to draw some conclusions about the conditions under which the global engagement of domestic courts might be successful.

4. Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas From Property and Criminal Law*, 53 VILL. L. REV. 117, 148 (2008).

5. Håvard Haarstad & Arnt Fløysand, *Globalization and the Power of Rescaled Narratives: A Case of Opposition to Mining in Tambodgrande, Peru*, 26 POL. GEOGRAPHY 289, 293 (2007).

6. See Kevin R. Cox, *Spaces of Dependence, Spaces of Engagement and the Politics of Scale, or: Looking for Local Politics*, 17 POL. GEOGRAPHY 1, 7 (1998).

7. Haarstad & Fløysand, *supra* note 5, at 293.

I. CROSS-BORDER BUSINESS NETWORKS AND GLOBAL ECONOMIC HARM

The phrase “business network” can be used to describe many different constellations of activity. These include the range of operations conducted by the typical corporate conglomerate through a web of affiliated companies; business activities carried out on the Internet, to invoke perhaps the archetypical network example; and a cartel network formed by a series of price-fixing agreements among companies. I use the word “network” to indicate the web of contact points with multiple jurisdictions that such activity entails, with respect both to the conduct that constitutes it and to its consequences.

To a significant degree, the problem of regulating business networks has become global in scale. Consider the activities of a price-fixing cartel, in which companies from a number of different countries enter into pricing arrangements that artificially elevate the price of their goods in markets around the world. It is possible, and I will return to this point, to characterize the result simply as an aggregation of many localized harms (overcharges in the United States, overcharges in England, overcharges in each market in which transactions took place). Yet it is the global aspect of the cartel’s strategy that makes it successful. Where the goods in question are fungible, the price-fixing must take place on all markets; otherwise, it could be avoided through arbitrage. It is therefore the networking of the cartel’s actions at the global level that enables the scheme, and so, I would argue, it is the networking that a successful regulatory strategy must address.

Consider also the insolvency of a multinational corporate enterprise, with assets, debtors and creditors scattered around the world. It is possible to address that insolvency through an aggregation of local bankruptcy proceedings conducted under national bankruptcy laws—one in each country in which assets of that enterprise are located. Yet without a global plan to identify all assets and to ensure that all creditors are treated similarly, no fair distribution can take place—and certainly the reorganization of that enterprise would be difficult. Here, then, the goal of equitable distribution of an insolvent enterprise’s assets has shifted up to the global level.

What these examples are intended to illustrate is simply that the fact of globalization in the business world enables certain harms and creates certain regulatory challenges that are situated at the global level. This argues for scaling the regulation of such networks up to the global level as well.

Within the legislative arena, in thinking about how to regulate global economic activity, the idea of scale is already deployed in very

explicit ways—most prominently through the principles of subsidiarity (in the EU) and federalism (in the United States). Article 5 of the Treaty Establishing the European Community, for instance, states that

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.⁸

Protocol 30 to the EC Treaty, in fleshing out this principle, dictates attention to whether “the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States,” and, again, to whether “action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.”⁹ Similarly, under the principles of economic federalism that guide regulatory approaches in the United States, regulation is expected as a general matter to take place at the most decentralized level possible, unless particular externalities demand that it be shifted up to a more centralized level.¹⁰

Now, in both the United States and the European Union the relevant concept is often used with the protection of *local* prerogatives in mind. In other words, under both subsidiarity and federalism, the preference is to maintain regulation at as decentralized a level as possible. But in view of the shifting scale of economic conduct and effects, the tendency in practice has been to move up levels of regulation through increased federal regulation in the U.S. (where, certainly, the deference that economic federalism has created to the central government is substantial) and through increased Community regulation in Europe. That tendency can be seen elsewhere as well—in multilateral standardizing instruments such as international accounting and disclosure standards, in multilateral treaties (such as TRIPs), or in the mandate of the World Trade Organization.

8. Consolidated Version of the Treaty Establishing the European Community, *reprinted in* Consolidated Versions of the Treaty on the European Union and of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 42.

9. Protocol (No. 30) on the Application of the Principles of Subsidiarity and Proportionality (1997), 2006 O.J. (C 321) 309.

10. See generally Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, 11 J. ECON. PERSP. 43, 45 (1997).

Beyond these general precepts of legislative structure, the question of scale also receives attention in particular substantive contexts. In environmental regulation, for instance, there is a robust literature on “jurisdictional mismatch.”¹¹ Some advocates promote the matching principle, which maintains that “in general, the size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution.”¹² The principle of scale is thus often offered as an argument for *restraining* federal regulation, but, with reference to certain cross-border harms like climate change, it is turned by some to justify shifts of regulation to higher, or multiple, levels.¹³

By contrast, the concept of scale does not figure as explicitly in analysis of the role of *courts* in regulating global activity.¹⁴ Instead, in my view, that analysis is conducted within one very specific paradigm: an international relations paradigm.

II. COURTS AS GLOBAL REGULATORS AND THE INTERNATIONAL RELATIONS PARADIGM

The dominant paradigm used to consider the role of domestic courts does not focus on how the activity of those courts relates to the scale of the problems they address. Rather, it focuses on how the activity of national courts as governmental actors relates to the activity of *other* governmental actors—in other words, it focuses on whether the exercise of jurisdiction by a particular court interferes with the authority of courts or governments in other jurisdictions.

This orientation is reflected in the narrative that has emerged as U.S. courts engage in the global arena—a narrative that has United States courts involving themselves more and more aggressively in international matters, and other countries attempting to assert their own sovereignty in order to check that aggression. This story plays out in analysis of virtually every aspect of judicial engagement. So, for instance, with the obtaining of evidence abroad: the story is of aggressive pretrial discovery orders by U.S. courts that violate the

11. For a framing of the problem in those terms, see William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 23 (2003).

12. Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POLY REV. 23, 25 (1996).

13. See Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789, 1800-01 (2005), and sources cited at note 36 therein.

14. Apart from one limited context: in connection with the creation of the few supranational courts that address particular international issues such as human rights.

“judicial sovereignty” of other nations. So also with the assertion of personal jurisdiction over foreign companies, not just in lawsuits arising out of their specific contacts with the forum, but also on the basis simply that they do a certain level of business there. So also with the application of U.S. economic law to conduct taking place in other countries. (This is a narrative that hardly needs explication here; England has been a perennial objector to the activity of U.S. courts in the area of international antitrust enforcement.)¹⁵ Thus, whatever the specific jurisdictional question at stake—and some relate to legislative jurisdiction, some to enforcement jurisdiction, some to personal jurisdiction over foreign entities—when we consider the action of a domestic court and its role in interpreting and applying particular jurisdictional standards, we see it through the lens of international relations, looking at the authority of the court vis-à-vis that of other states.

That paradigm is one that aims at containment and confinement—at bounding the exercise of judicial authority. This is of course consistent with its theoretical foundation, which is in the notion of territorial sovereignty as not only the source of power but also the constraint on power that ensures an orderly and fair distribution of authority within the international arena.¹⁶ For that reason, and to restate this orientation in terms of scale, the paradigm has a very localizing focus, intended to keep domestic courts embedded within the national political system. In my view, this orientation does not capture very well the reality of the much messier interactions between national courts and global business networks. I therefore wish to examine the assumptions underpinning the international relations paradigm, and their consequences for how we view the regulatory activity of domestic courts, by bringing scale more explicitly to the forefront.

If we consider, as directed by this paradigm, whether U.S. domestic courts are acting within the sphere of their authority, how should we define that sphere? What is the political (governmental) space within which U.S. courts operate?¹⁷ It is bounded, first, by federalism. Constitutional and statutory rules define a certain sphere for federal courts as apart from state courts (in the form partly of their limited

15. See A. Vaughan Lowe, *Extraterritorial Jurisdiction: The British Practice*, 50 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* [RABELS J. FOREIGN & INTL. PRIVATE L.] 157 (1988).

16. See Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *RECUEIL DES COURS* [COLLECTED COURSES] 1, 30 (1964-I).

17. I will answer that question with respect to federal courts, as many cases involving citizens of different countries, and most cases brought under economic regulatory laws, are heard in the federal system.

subject-matter jurisdiction, in contrast to the unlimited jurisdiction of state courts). They are also very connected to the states in which they sit, because they are required, in many cases, to apply the substantive law of those states. In addition, their space of engagement is bounded by doctrines flowing from the separation of powers. Although judicial authority to decide cases or controversies properly presented is not constitutionally eliminated when those cases touch on foreign relations, the political question doctrine and doctrines of deference to the executive in matters of foreign affairs are tools that are used to limit judicial activity in such cases. Thus, speaking generally, the constitutional separation of powers defines a certain sphere for U.S. courts as set apart from other U.S. actors—other branches of the federal government. These limitations in sum can be seen as creating the political space of engagement of domestic courts.

Even with respect to their engagement with international law, U.S. courts take their frame of reference from the domestic Constitution. U.S. domestic courts do of course act as part of the international legal order—for instance, by interpreting and applying treaty rules—but in the U.S. system international law is seen, as reflected in its positioning within the Restatement of Foreign Relations Law, as part of foreign affairs, which is constructed as a matter of domestic law.¹⁸ For that reason, as to this aspect of their engagement, U.S. courts do not share a common frame of reference with courts of other countries.

I draw two conclusions from this review. First: the international relations paradigm, particularly as it is filtered through U.S. constitutional law, is a very locally directed one. Second, and following from the first, the vision of scale it supports is one in which domestic courts handle only domestic problems, to avoid infringing on the authority of other nations. Thus, presumably, we would need regional courts to address regional problems, and international tribunals to address international problems. However, lacking such institutions to deal with the regulation of global business networks, and despite the construction of the political space of operation for the federal courts, U.S. courts are nevertheless being drawn into a different space of engagement by the various forms of global business that generate litigation. This suggests the need to rethink our conception of the proper role for domestic courts.

18. See Hannah L. Buxbaum, *Territory, Territoriality and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 643-52 (2009) (describing the minor role played by international law in the U.S. approach to legislative jurisdiction in the antitrust context).

III. EXPANDING THE ENGAGEMENT OF U.S. COURTS

In considering changes in the scope of domestic courts' engagement, I would like to mention but then set aside one strand of the relevant literature, which addresses how U.S. courts themselves increasingly see their activity as taking place within a larger cooperative network.¹⁹ What I will focus on instead is how *other* actors—those who are engaged in global business networks or harmed by them—are forcing the expanded engagement of domestic courts. That is, I want to look at how the various actors invested in the goals of global business regulation, including activists, legislative reformers, and plaintiffs seeking recovery for harm suffered, are attempting to create a broader area of engagement for domestic courts through methods that rescale regulatory challenges. I will do that by exploring examples of litigation in three different areas: competition, insolvency, and securities regulation.

A. *Litigation to Enforce Competition Law*

In a series of cases culminating in one heard by the U.S. Supreme Court in 2004,²⁰ U.S. courts considered private actions arising out of the conduct of global price-fixing cartels. The cartels in question had affected U.S. markets, and U.S. purchasers had already sued on the basis of the resulting harm. However, these particular actions were initiated by foreign plaintiffs, who had purchased the price-fixed goods on foreign markets. Their arguments that U.S. courts should nevertheless have jurisdiction over these claims, and that U.S. antitrust law should apply to them, hinged on the global nature of the harm caused by the cartels.

In the case that eventually reached the Supreme Court, which involved the activities of a global vitamins cartel,²¹ the aim of the proposed regulatory strategy emerged particularly clearly in some of the amicus briefs submitted to the Court.²² These suggested that the cartel's cross-border arrangements required cross-border regulatory solutions. That argument was cast in very scale-sensitive terms; it noted that the

19. See, e.g., Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1113-15 (2000); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 491-97 (2005).

20. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

21. *Id.*

22. See, e.g., Brief for Joseph E. Stiglitz & Peter R. Orszag as Amici Curiae Supporting Respondents, *F. Hoffmann-La Roche*, 542 U.S. 155 (No. 03-724).

economic markets for certain products are not separable along geographic lines, and drew the conclusion that regulatory efforts too must be directed at a more broadly defined market. *Amici* argued that permitting foreign plaintiffs to sue in the United States—not only for harm suffered in U.S.-based transactions, but also for harm suffered in foreign purchase transactions—would achieve optimal global deterrence levels. This conclusion rested on the proposition that the treble damages available in U.S. litigation would raise the total damages payable by the cartel to an amount sufficient to achieve deterrence.²³

This argument quite consciously considered the regulatory benefit to all markets—to global markets—that would result. For example, the economic data supporting the plaintiffs' argument drew on the regulatory gaps created by the situation in developing countries, where insufficient antitrust regimes may leave anticompetitive conduct entirely unregulated.²⁴ The arguments specifically noted that the benefits of enhanced deterrence would ensure better regulation of markets everywhere. In other words, they perceived the proposed regulatory solution as one that would enhance the enforcement of a shared standard of conduct for the benefit of consumers worldwide.²⁵

To this point, the argument looks like one that is scaling *up*, by highlighting the global nature of the regulatory challenge. But there is no global competition law, and no supranational competition tribunal. Thus, in order to engage U.S. domestic courts, the argument had to be scaled *down*, because under the relevant competition law, the plaintiffs could sustain their claims only if they brought the conduct within the legislative jurisdiction of the United States by establishing that it had caused harm there.²⁶ Therefore, they argued that global under-deterrence would cause harm *within the United States*, because it would lead to continued cartel activity there, thereby triggering a local regulatory interest. The Supreme Court rejected this argument. It assumed that the cartel's effects on U.S. markets were independent of those it caused on foreign markets.²⁷ It then held that because the harm suffered by foreign purchasers arose from the conduct's foreign effects, and not from its domestic effects, the claims did not meet the law's jurisdictional requirements.²⁸

23. *Id.* at 8.

24. *Id.* at 11-12.

25. *Id.* at 9-13.

26. 542 U.S. at 158 ("The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury.").

27. *Id.* at 164.

28. *Id.* at 159.

What interests me about this litigation is how the court retreated into its “natural” space of engagement, as shaped by the international relations paradigm. It did not really engage the substance of the plaintiffs’ argument regarding global under-deterrence; rather, it cited the need to avoid interference with the sovereign authority of other nations.²⁹ It also cited the need to avoid inadvertent interference with the actions of the U.S. executive pursuant to amnesty programs designed to expose cartels.³⁰ In other words, in the end, the strategy of scaling the problem down—attempting to bring this issue within the ambit of national jurisdiction in order to mobilize U.S. judicial resources—was not a productive approach. In my view, it failed in part because, by recasting what was clearly a global problem (global under-deterrence) as a local one (harm to U.S. markets),³¹ it came up against the fundamental restraint of the international relations paradigm—the notion that local courts should focus on local issues. It did not successfully create an alternative framework within which the court might have seen local harm as intertwined with global harm, and seen its own task as sharing in a coordinated scheme of enforcement rather than competing with foreign courts or governments.

B. International Insolvency

National bankruptcy laws, which are applied by domestic bankruptcy or general courts, are most effective in resolving the insolvency of firms whose assets and creditors are located in a single jurisdiction. In bankruptcy proceedings contained entirely within one country, the local policies reflected in rules on priority of distribution, the enforceability of security interests, and so forth do not come into conflict with competing policies. The increase in multinational enterprises, however, and the corresponding increase in bankruptcies with cross-border dimensions, has shifted the challenge of addressing many business bankruptcies beyond the local plane. Domestic courts struggle with their inability to enforce local law against a company’s foreign assets, or with the consequences of applying disparate distribution rules to similarly situated creditors based simply on their location. The predominant method for dealing with such challenges in practice has been “territoriality,” an approach under which multiple local proceedings may be opened, one in each of the jurisdictions in

29. *Id.* at 164-65.

30. *Id.* at 169.

31. A recasting necessitated by the FTALA; see *supra* note 26.

which assets of the insolvent company are located.³² That approach is consonant with the international relations paradigm, as it seeks to avoid one court's exercise of authority in ways that would undermine foreign interests.

In recent years, however, there has been movement toward expanding the space of engagement for local courts, prompted not by litigants, but by legislatures. Most prominent among reform efforts is the 1997 UNCITRAL Model Law on Cross-Border Insolvency.³³ This instrument does not replace local bankruptcy law, but draws courts' attention to insolvency as a global issue. Article 25 of that model law states that "[a bankruptcy] court shall cooperate to the maximum extent possible with foreign courts or foreign representatives," and provides that the court is entitled to communicate directly with them. The law goes further in putting "hard" forms of cooperation in place as well: in Article 27 it states that "Cooperation...may be implemented by any appropriate means, including...coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation by courts of agreements concerning the coordination of proceedings; [and] coordination of concurrent proceedings regarding the same debtor."

This legislation thus scales bankruptcy administration *up*, expanding the space of engagement for domestic bankruptcy courts. It invites them to consider insolvency regulation as a global process rather than one that focuses on the local treatment of local assets, and it creates room for cross-border creditor groups to argue for the most globally effective strategy of distribution or reorganization. Within this framework, courts have in some cross-border cases entered into joint protocols with their counterparts in other jurisdictions, creating the foundation for shared plans of distribution that reconcile inconsistent laws on the treatment of particular claims in bankruptcy.³⁴ To take an English example, consider the Maxwell Communications bankruptcy.³⁵ There, the Justice presiding over Maxwell Communication

32. See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2219 (2000).

33. U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf>.

34. For an up-to-date summary of such cases, see Draft UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings, United Nations Commission on International Trade Law Working Group V, Thirty-sixth session, March 13, 2009, at 93-108.

35. See Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT'L L. 23, 36 (2000) (describing the Maxwell bankruptcy process).

Corporation's full insolvency in England, and the U.S. judge hearing full reorganization proceedings in the United States, with the assistance of the administrators and the examiner they respectively appointed, formulated a Protocol intended to guide the bankruptcy administration. That Protocol provided the framework for reconciling the U.S. plan of reorganization and the U.K. scheme of arrangement in a way that harmonized inconsistent provisions of the two countries' laws. Thus, the new paradigm enabled the courts to look beyond the local, in a way that enhanced rather than overstepped their authority.

Although some such cases, including the Maxwell Communications case, were decided before the final adoption of the Model Law in 1997, it is clear that even those were shaped by preliminary work on that instrument, which in turn built on previous legislative efforts to coordinate the work of courts in handling international bankruptcies. In the insolvency example, then, the expansion of the scale of judicial engagement was grounded in legislation, in the form of local laws implementing the UNCITRAL model. That is, courts were granted specific authority to engage with actors outside their own jurisdiction in order to solve the global aspects of cross-border insolvencies. In this regard, of course, it differs significantly from the competition law example, where the potential exercise of authority by U.S. courts was seen as highly problematic. Thus, one tentative conclusion consistent with the "natural" sphere of engagement of U.S. courts, shaped by deference to the executive branch and to the competing policies of other countries, might simply be that a formal, bilaterally or multilaterally *negotiated* space of global engagement is required in order to legitimate the expansion of judicial authority.

To complicate that conclusion, though, I would like to address one last example, from the area of securities litigation.

C. Securities Litigation

Like competition law, U.S. securities law may be applied by domestic courts only to conduct that triggers a U.S. regulatory interest—because it occurs within the United States, for instance, or because its effects are felt there. Yet much securities activity is global: companies list their securities on multiple markets, and investors seek out foreign as well as domestic opportunities. As a result, much securities fraud has a global aspect, since the public release of information in one country can, by virtue of the linked capital and information markets, affect prices in multiple jurisdictions simultaneously. Increasingly frequently, then, U.S. courts must consider claims with significant cross-border aspects, as well as the

nature of their own role in addressing a problem of global scale.

Although not always consistently, U.S. courts have on the whole remained within a local sphere of engagement in this area, as the jurisdictional standards they apply are tied to the points of contact between the fraud in question and the United States. As in the competition context, however, they have been pushed toward a more global frame of reference by litigants seeking access to U.S. courts, including foreign investors seeking compensation for losses suffered in connection with foreign investment transactions.³⁶ And, unlike in the competition context, courts have shown more willingness to engage in new ways with efforts to regulate this kind of global securities fraud. I will discuss as an illustration of this shift the issue of personal jurisdiction over certain secondary defendants such as accounting firms. Because establishing personal jurisdiction over a particular defendant is the gateway to potential application of U.S. securities laws in litigation against it, the approach of domestic courts to this question is an indicator of their willingness to participate in the regulation of securities fraud on the global plane.

Establishing personal jurisdiction over foreign secondary defendants in U.S. securities litigation is often much more difficult than establishing personal jurisdiction over a foreign issuer, as those defendants may not have engaged in activity within, or directed toward, the United States sufficient to satisfy our due process requirements. The acts that would constitute fraud by such entities typically occur outside the United States, making specific jurisdiction unavailable.³⁷ And general jurisdiction over a foreign legal entity can be maintained only if it has engaged in systematic and continuous business activities within the United States,³⁸ which is unlikely in the case of foreign secondary defendants such as accounting firms or underwriters. Thus, traditional jurisdictional analysis would tend to situate securities litigation against such entities at the local scale. In some cases, however, courts have extended general jurisdiction over foreign entities by adopting a theory of the global enterprise.

In a few recent cases, courts have addressed the question whether foreign accounting firms can be subject to personal jurisdiction in the

36. For a treatment of such cases, see Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14 (2007).

37. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (transactions in the forum state are sufficient to establish specific jurisdiction in claims arising out of those transactions).

38. See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (discussing the systematic nature of business activity within the forum necessary to support general jurisdiction).

United States as a result of their membership in a global enterprise. In one representative case, plaintiffs alleged that several Bermuda entities, including local affiliates of Ernst & Young, had engaged in securities fraud through their actions as fund administrators and auditors.³⁹ This required the court to consider personal jurisdiction over those firms, which is the gateway to applying U.S. securities law to the claims against them. The firms stressed the absence of contacts with the United States, noting that they had no business offices, employees or bank accounts there, and suggested that they interacted only sporadically with U.S. sister offices.⁴⁰ The court rejected this characterization on the basis of an extensive review of the business model adopted by Ernst & Young worldwide. It described the group's strategy of global integration; its advertising strategy; and, at length, the group's marketing materials, which suggested that by using Ernst & Young's Bermuda affiliates a client would obtain the expertise of the global Ernst & Young group.⁴¹ In sum, the court concluded, "each of [the Bermuda] defendants functions as an integrated member of the international Ernst & Young enterprise." Thus, it held, the plaintiffs had established a *prima facie* showing of general jurisdiction over each of the entities.⁴²

This and similar cases reflect a scaling up of the jurisdictional analysis in response to the global scale of the enterprises themselves. Another court described this shift in scale particularly clearly, in a case involving the KPMG accounting group:

There can be no doubt that KPMG offices are integral parts of a single global enterprise that conducts business in the United States. That KPMG UK deliberately markets and promotes itself as part of an integrated global network severely undercuts its present attempt to divest itself of a relationship with that network in order to defeat the exercise of personal jurisdiction.⁴³

That move in turn opens a channel for the involvement of domestic courts in regulating the conduct of those enterprises through the application of U.S. law.

39. *Cromer Finance Ltd. v. Berger*, 137 F. Supp. 2d 452, 462 (S.D.N.Y. 2001).

40. *Id.* at 476-77.

41. *Id.* at 475-79.

42. *Id.*

43. *Rocker Management, L.L.C. v. Lernout & Hauspie Speech Products N.V.*, 2005 WL 3658006, *7 (D.N.J. 2005). The court concluded that general jurisdiction could be sustained over KPMG UK.

IV. CONCLUDING REMARKS

I began by suggesting the need to explore whether changes in global business activity demand a shift in, or augmentation of, the paradigm that we use to think about the role of national courts in the global arena. There has been implicit in this discussion, I hope, a normative inclination toward encouraging a wider sphere of engagement for national courts. I would like to conclude by making that explicit.

I have great sympathy for the international relations paradigm as used to shape the behavior of domestic courts, and would like to quote one of my favorite passages on this point, from Richard Falk (writing in 1964):

No service is rendered to international law when officials act upon the pretense that a shared community of policy, interest, and value underlies the contemporary network of global relations and is hence available for implementation by each national actor. This pretension supports the treatment of national policy, interest, and value as if they were universal. Such behavior invites retaliation, engenders distrust, and undermines those actual and potential claims of international law to make stable the relations among the entire community of states.⁴⁴

But is it always a pretense to suggest that we have a shared community of policy, interest and value, particularly in the area of economic regulation? In a world in which the ongoing incidence of securities fraud is seen to jeopardize the value of billions of dollars in pension funds; in which the activities of price-fixing cartels not only harm consumers worldwide but threaten the economic growth of developing countries;⁴⁵ in which national laws, self-regulation and nonbinding codes combined are still perceived as inadequate to stem the misconduct of multinational enterprises? I think that point deserves reconsideration. I would not suggest that we leap toward a fully global vision of jurisdiction in domestic courts. The values of fairness and stability that are so central to the international relations paradigm, and that oftentimes stand in opposition to regulatory exigencies, must be

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

45. *See generally* OECD, *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation*, available at <http://www.oecd.org>.

preserved even as new regulatory strategies emerge.⁴⁶ Rather, I suggest that we must consider more carefully the ways in which larger spaces of engagement are already opening for domestic courts, and explore more fully the conditions under which their occupation of those spaces might become productive.

46. I discuss this tension in greater detail in Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 297-305 (2006).