Conflict of Economic Laws: From Sovereignty to Substance

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Conflict of Economic Laws:
From Sovereignty to Substance

HANNAH L. BUXBAUM*

TABLE OF CONTENTS

I. Introduction ................................................................................ 932
II. Territory and Sovereignty in International Economic Law ...... 934
   A. Forms of Conflict of International Economic Laws ........... 934
   B. Territory and Sovereign Power ........................................... 936
      1. Conflicts in International Contract Cases: Limits of Party Autonomy ..................................................... 938
      2. Conflicts of Legislative Jurisdiction .......................... 939
         a. The role of territory in establishing bases of legislative jurisdiction ...................................................... 939
         b. The role of territory in limiting legislative jurisdiction ......................................................................... 940
III. Globalization and the Receding State ..................................... 942
   A. More Regulatory Choices Made at Non-sovereign Level.. 944
      1. The Role of Private Actors .......................................... 944
      2. Growing Role of Supranational Organizations and NGOs ................................................................. 945

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Private international law, the system of rules used by courts to resolve conflict of laws in the international context, is based on principles of territorial sovereignty and equality among sovereigns. It assumes that each state has the authority to regulate persons and activities within its borders, and that the laws and actions of one state can have no direct effect in another. Private international law rules applicable in the particular context of regulatory law reflect this orientation, positioning conflict of economic laws as a matter of

I. INTRODUCTION

1. In using the term "system of rules," I do not intend to indicate uniformity: conflicts law in the United States is anything but uniform. For an overview of the diverse approaches used by U.S. courts, see, e.g., Symeon C. Symeonides, Choice of Law in the American Courts in 2000: As the Century Turns, 49 AM. J. COMP. L. 1 (2001). The competing theories of conflicts law do, however, share this theoretical foundation.
relations among sovereign states. Those rules operate, however, within the larger framework of economic regulation in the international arena. There, the increase in transnational business activity has generated various legal initiatives that specifically contemplate incursions into state sovereignty as traditionally understood. Ranging from measures aimed at developing transnational law to measures intended to facilitate the coordination and application of bodies of national law in the cross-border context, these proposals in practical terms contemplate a diminution of the absolute power of a state to subject relationships within its borders to its own positive law.

The globalization of economic markets, and attendant changes in cross-border regulatory strategies, therefore challenge the foundational principles of private international law. In part, these developments simply present with particular immediacy a familiar problem: how to regulate cross-border business activity in a system that defines regulatory sovereignty as a territorial prerogative. They do more, however. By challenging the conception of regulatory power as grounded in the territorial authority of sovereign states, and by reshaping the process of international economic regulation and the role of national law in that process, these developments have directly affected private international law itself. They have caused a shift within conflicts jurisprudence from traditional, sovereignty-based models of conflict resolution to a substantivist model.

In a traditional model of conflicts analysis, based on territorial sovereignty, the primary means of protecting domestic regulatory interests in a situation of conflict is the application of domestic law. In other words, a state concerned in a conflict of economic laws will seek to effectuate its regulatory interests by applying its own law to the dispute. On a substantivist view, however, economic policy interests may be protected simply through assurance that the substance of

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3. See JARROD WIENER, GLOBALIZATION AND THE HARMONIZATION OF LAW 8 (1999) (defining the power “to exercise supreme authority over a territory carved on the physical map of the world” as a primary aspect of sovereignty).


5. See infra Part IV.

6. Alternatively, if one state’s laws do not prohibit the conduct in question, that state might seek to assert its regulatory power by blocking the application of another state’s law.
applicable law—whether the law of a foreign country, *lex mercatoria*,
or supranational law—is sufficiently similar to that of the concerned
state. Such a system has one important advantage: because it does not
cast conflicts of economic laws as competitions for regulatory authority
among sovereigns, it reduces the potential for friction in the area of
foreign relations. This Article suggests, however, that the shift in U.S.
conflicts law from sovereignty to substantivism is problematic.
Analyzing the interaction between the private international law rules
applicable to economic activity and the larger regulatory environment
within which those rules operate, it identifies two disadvantages of a
substantivist approach: first, the potential for over-application of U.S.
law in international contract cases; and second, the danger that the
negotiating process by which substantivist solutions are created will
lead to procedural unfairness in the resolution of economic conflicts.

Part II of this Article examines the foundation of territorial
sovereignty on which solutions to conflict of economic laws have
traditionally been built, tracing its influence in two areas of the conflict
of laws. Part III turns to the regulatory context in which conflicts rules
operate. Analyzing regulatory trends in the areas of securities, antitrust,
and bankruptcy law, it discusses the globalization of economic activity
and the waning importance of territorial sovereignty in the development
of cross-border regulatory strategies. Part IV then analyzes the shift
from sovereignty to substantivism, examining the mechanisms by which
U.S. economic policy is protected under each approach. Finally, Part V
assesses the cost of a focus on substantivism. It criticizes the increased
emphasis on substantive similarity of economic laws, identifying two
particular disadvantages of a purely substantive system. The Article
concludes by suggesting that territorial factors be re-integrated into this
new system.

II. TERRITORY AND SOVEREIGNTY IN INTERNATIONAL ECONOMIC
LAW

A. Forms of Conflict of International Economic Laws

This Article addresses two different types of conflict of economic
laws. The first, relevant in the setting of international contract litigation,

7. The history of blocking statutes, adopted in some countries in response to perceived over-
aggressiveness by others in applying their antitrust law, illustrates the potential consequences of
such friction. The application of such statutes is discussed in the FOREIGN RELATIONS
RESTATEMENT, supra note 2, at § 442, Reporters' Note 4.
8. See infra Part V.
is resolved through direct application of traditional choice-of-law rules. The second, relevant in cases addressing the extraterritorial application of U.S. regulatory laws, does not raise choice-of-law questions in the strict sense of that term; nevertheless, traditional choice-of-law jurisprudence is often used to analyze the extraterritorial reach of regulatory laws. While the principles used to resolve conflicts in these categories therefore coincide, in certain situations the procedural context of a conflict has an impact on its resolution. It is therefore worth pausing to clarify the distinctions between these forms of conflict.

International contract litigation often raises the question whether the parties' choice of a foreign forum (whether judicial or arbitral) or foreign law may operate to exclude application of U.S. regulatory statutes. For example, in a dispute between a U.S. distributor and a foreign manufacturer arising out of a distribution agreement, a court might consider whether a forum-selection clause or a foreign governing-law clause in that contract should be enforced, preventing the distributor from raising a claim, or counter-claim, under U.S. antitrust law. Similarly, in a dispute between a U.S. investor and a foreign issuer arising out of an investment contract, a court might consider whether choice clauses should be enforced whose application would preclude a claim under U.S. securities laws. The enforceability of forum-selection and governing-law clauses is an issue falling within the scope of conflict of laws, and the conflicts that arise in such litigation are in that sense "regular" choice-of-law conflicts.

A different form of regulatory conflict involves not choice of law, but rather the question of legislative jurisdiction. In this context, conflicts arise when one sovereign seeks to apply its economic laws to conduct that occurs in another state, or when more than one sovereign seeks to regulate the same activity. For example, a court may be called upon to

9. See infra Part V.A infra, discussing different stages of analysis in the Lloyd's cases.
11. See, e.g., Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d. Cir. 1993).
14. Also known as prescriptive jurisdiction. See FOREIGN RELATIONS RESTATEMENT, supra note 2, § 401 (classifying the categories of jurisdiction as jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce).
determine whether U.S. securities laws apply to a sale of securities to a U.S. purchaser when the sale itself occurs in a foreign jurisdiction, or whether U.S. antitrust laws apply to anti-competitive conduct that occurs abroad. In considering a claim that particular cross-border conduct violates U.S. regulatory law, a court does not choose between forum regulatory law and foreign regulatory law; rather, it chooses either to apply forum regulatory law or to dismiss the claim. In such cases, then, the issue is simply defining the scope of U.S. regulatory law—that is, determining whether the relevant U.S. statute reaches the conduct in question. Principles borrowed from traditional choice-of-law analysis are often used to assist that inquiry, however. Similarly, cross-border insolvency proceedings raise issues resolved by recourse to traditional choice-of-law analysis. For instance, a U.S. bankruptcy court may be asked to decide whether to distribute assets located within the United States to U.S. creditors—under U.S. bankruptcy law—or to remit those assets for distribution in a foreign proceeding, in which foreign bankruptcy law would apply. In making that decision, it will apply choice-of-law principles.

Although these forms of conflict differ, extraterritoriality jurisprudence shares with choice-of-law jurisprudence a theoretical foundation in notions of territorial sovereignty.

B. Territory and Sovereign Power

Traditional private international law theory is situated within a framework of allocation of power, where the fundamental inquiry is how to locate the sovereign whose claim to regulate particular activity is superior to competing claims by other sovereigns. Such claims to

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17. Donald T. Trautman, The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation, 22 OHIO ST. L.J. 586, 617 (1961); see also Philip J. McConnaughay, Reviving the "Public Law Taboo" in International Conflict of Laws, 35 STAN. J. INT'L L. 255, 262 (1999) (tracing this principle to "the centuries old refusal of nations to enforce the penal or revenue laws of other nations").
18. See discussion infra at notes 47-53 and accompanying text.
19. That is, insolvencies involving creditors and/or assets in more than one country.
22. For a recent discussion of this framework in the context of economic law, see Joel Trachtman, The International Economic Law Revolution, 17 U. PA. J. INT'L ECON. L. 33, 40 (1996) (describing the central issue within private international law as determining which state will be allocated the legal power to regulate a certain transaction).
regulate have in turn depended largely on the territorial aspect of sovereignty: the absolute right of a sovereign to regulate economic affairs within its borders. The general maxims of conflicts law set forth by Justice Story, regarded as the father of private international law theory in the United States, reflect this premise. His influential treatise on private international law sets forth these basic propositions: First, that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory;" second, that "[he], or those, who have the sovereign authority, have the sole right to make laws;" and, consequently, that "whatever force or obligation the laws of one country have in another, depends solely on the laws, and municipal regulations of the latter . . . and upon its own express or tacit consent." 

The orientation of this model around territorial authority to regulate has shaped traditional approaches toward international conflicts. Techniques for resolving conflicts of economic law of both kinds—conflicts between forum law and law chosen by contracting parties and conflicts created by overlapping regulatory jurisdiction—have historically been grounded in notions of sovereign authority. The following section discusses those techniques and the emphasis on territory they create.

23. While the concept of sovereignty is of course multi-faceted, it is this territorial aspect that grounds private international law analysis. For further discussion of territorial sovereignty, see Wiener, supra note 3; see also Daniel Philpott, Sovereignty: An Introduction and Brief History, 48 J. INT’L AFFAIRS 353, 356-57 (1995) (“A final necessary ingredient is territoriality. Sovereignty is authority within a discrete land, bounded by borders . . . Sovereignty is supreme legitimate authority within a territory.”) (emphasis in original).


I. Conflicts in International Contract Cases: Limits of Party Autonomy

As described above, one form of conflict arises when a court is asked to enforce a forum-selection or governing-law clause contained in an international contract, and thereby to preclude application of forum law to the conduct in question. Historically, conflicts created by the parties’ choice of a competing forum or law were resolved by reference to the exclusive authority of the sovereign to regulate within its territory. To put it another way, attempts by private actors to affect applicable law were hardly viewed as creating conflict at all. Forum-selection clauses were deemed invalid as “attempts to oust the forum court of its jurisdiction,” and choice-of-law clauses were deemed invalid as inconsistent with the absolute right of a sovereign to apply its law to persons and conduct within its territory. With respect to governing-law clauses, this absolutist approach was succeeded relatively early by a more flexible jurisprudence that recognized the right of private parties to choose the law governing certain activity. Later, the ability of parties to choose the forum in which eventual litigation would be heard was recognized as well.

Even in this more permissive environment, however, courts continued to impose additional limits on the exercise of party autonomy, reflecting the continued importance of sovereign authority, when transnational contracts implicated the regulatory laws of one or more countries. Thus, if in the course of contract litigation a claim or

26. See Carbon Black Export v. SS Monrosa, 254 F.2d 297, 300 (5th Cir. 1958) (describing this as a “universally accepted rule”).
27. See Mathias Reimann, Savigny’s Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century, 39 VA. J. INT’L L. 571, 589 fn. 75 (1999) (describing the basis of this approach in “abstract notions of the law as an expression of state sovereignty which cannot possibly be subject to the choice of private parties”).
28. CONFLICTS RESTATEMENT, supra note 12, at § 187. See also Reimann, supra note 27, at 575, tracing this development, at least in the courts, to the nineteenth century.
29. CONFLICTS RESTATEMENT, supra note 12, at § 80, providing that a forum-selection agreement “will be given effect unless it is unfair or unreasonable.” See generally Patrick J. Borchers, The Internationalization of Contractual Conflicts Law, 28 VAND. J. TRANSNAT’L L. 421, 431-32 (1995).
30. Even outside the regulatory context, certain territorial aspects were still evident in the U.S. approach. With regard to choice of law, although it is expressed differently in various legal standards, a requirement that the chosen law have some connection with the transaction or activity in question is common. See Uniform Commercial Code § 1-105(1), and Official Comment I thereto (“Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.”); see generally Borchers, supra note 29, at 434. The Restatement (Second) of Conflicts includes a “substantial relationship” test, but goes on to provide that the choice of a governing law on some other “reasonable basis” is also acceptable. CONFLICTS RESTATEMENT, supra note 12, § 187(2)(a).
counterclaim was asserted under U.S. regulatory law, that law would be applied without regard to the substantive law of contract chosen by the parties or otherwise applicable under choice-of-law analysis.\textsuperscript{31} This was true both when the regulatory law in question contained an explicit anti-waiver clause (for example, securities law)\textsuperscript{32} and when it did not (for example, antitrust law). Although the theoretical basis for this limitation on party autonomy was not uniformly articulated,\textsuperscript{33} it was uniformly accepted that the right of the sovereign to shape domestic policy within its territory simply trumped party autonomy. In this sense, choice-of-law issues in contracts implicating economic regulation were dealt with through recourse to sovereign prerogative.\textsuperscript{34} Thus, although party autonomy in general has for quite some time been interpreted expansively and with little emphasis on territory, conflicts of economic laws in particular were until very recently viewed through the lens of sovereign power.

2. \textit{Conflicts of Legislative Jurisdiction}

a. The role of territory in establishing bases of legislative jurisdiction

Just as territorial sovereignty defined the limits of party autonomy in international contracts, it also defined the scope of a state’s jurisdiction to regulate economic activity. The importance of territorial boundaries in resolving conflicts of legislative jurisdiction is particularly clear in early cases holding that U.S. regulatory statutes reached only conduct occurring within the borders of the United States.\textsuperscript{35} Although later cases

\footnotesize
33. As this limitation is considered part of the “public law taboo,” one explanation offered is that parties may choose only private but not public laws. Regulatory laws do not fit neatly into traditional categories of public vs. private, however, as they govern private relationships but also establish the public economic framework. See Amir N. Licht, \textit{International Diversity in Securities Regulation: Roadblocks on the Way to Convergence}, 20 CARDOZO L. REV. 227, 255-57 and 261-63 (1998) for a discussion of the public/private distinction in the area of securities regulation. Similarly, the suggestion that the limitation derives from regulatory law’s status as “mandatory law” is less useful in a common-law regime than in civil-law jurisdictions familiar with this distinction. See McConnaughey, \textit{supra} note 17 (who also argues for a distinction between “mandatory public law” and “nonmandatory public law.”).
34. As discussed \textit{infra} at Part IV.B.1., this orientation has recently changed in the United States.
held that U.S. law also applied to certain conduct occurring outside U.S. borders, those cases based jurisdiction to prescribe on the existence of effects within the United States; in that sense, they too remain rooted in considerations of territory. The primary bases for U.S. assertion of regulatory authority therefore derive from the sovereign’s power to control the economic landscape within its borders.

b. The role of territory in limiting legislative jurisdiction

The tremendous increase in cross-border business activity created an increase in the incidence of overlapping regulatory jurisdiction. Issuers engage in securities offerings outside their home jurisdictions; corporations with substantial activities in multiple countries merge with others; multinational corporations with assets, debtors and creditors in multiple countries file for bankruptcy—in each such case, more than one state may assert prescriptive jurisdiction on the basis of conduct within its territory. Moreover, as U.S. courts and courts in other jurisdictions began to apply regulatory law to extraterritorial conduct, additional regulatory overlaps were created as countries obtained jurisdiction based on different jurisdictional tests. One state’s law might apply to conduct because it occurred within its borders, for instance,


36. Thus overcoming the “presumption against extraterritoriality.”

37. The Comments to § 402 of the Foreign Relations Restatement note that “Jurisdiction [based on effects within the United States] is an aspect of jurisdiction based on territoriality.” FOREIGN RELATIONS RESTATEMENT, supra note 2, at § 402 cmt. d. See also Buxbaum, supra note 13, for a discussion of these cases and of the different levels of effect necessary to establish jurisdiction in the antitrust area; Schoenbaum v. Firstbrook, 405 F.2d 200 (2nd Cir. 1968) for the development of these tests in the securities context. Similar developments also occurred in other jurisdictions. In the Wood Pulp case, a test analogous to the effects test—although framed in terms of “implementing conduct”—was adopted in the European Union. A. Åhlström Osakeyhtiö v. Commission of the European Communities, 1988 E.C.R. 5193 (In re Wood Pulp).

38. Section 402 of the Foreign Relations Restatement, in setting forth the bases of jurisdiction to prescribe, reflects this emphasis on territory:

(1)
(a) conduct that, wholly or in substantial part, takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory that has or is intended to have substantial effect within its territory.

FOREIGN RELATIONS RESTATEMENT, supra note 2, at § 402(1). Although nationality is also an acceptable basis of jurisdiction, “territoriality is considered the normal” and “by far the most common basis” for the exercise of jurisdiction. Id., § 402 cmts a. and b.

39. Consider, for example, a global securities offering conducted in several regions simultaneously by a multinational corporation.

40. Consider, for example, the Boeing/McDonnell Douglas or GE/Honeywell transactions.

41. Consider, for example, the failure of the Maxwell empire.
while another's might apply because of effects caused within its borders by that conduct. The primary method applied to this end—interest balancing—nevertheless retained a focus on territorial power.

The interest-balancing approach maintains that conflicts of legislative jurisdiction must be resolved in order to preserve harmonious relations among states. The method of resolving them is to fold a consideration of competing jurisdictional claims into the analysis of statutory scope: despite the existence of a jurisdictional basis as outlined above, the regulatory interests of another country may be held sufficient to preclude application of U.S. law to the conduct. The analysis therefore remains anchored in territorial considerations, as the conflict is framed as a possible infringement on the sovereignty of another state, and is resolved by determining which sovereign's authority to regulate is superior.

The origin of the interest balancing analysis in multilateralism, a choice-of-law theory, reinforces this territorial orientation.

42. Or one state's law might apply because of the nationality of the actors: cf. Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir. 1984) (deciding a conflict created when one sovereign asserted prescriptive jurisdiction based on the nationality principle, and the other on the basis of effects).

43. Not all courts did so. Some adopted a unilateralist view, on which the analysis begins and ends with the establishment of a jurisdictional basis to regulate. See, e.g., id. at 953 (declining to limit U.S. jurisdiction in a case of concurrent jurisdiction); In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (declining to balance U.S. and U.K. interests). Proponents of this view believe conflicts of regulatory authority to be inevitable and not amenable to resolution by the judiciary. For a defense of this approach, see generally William S. Dodge, Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism, 39 HARV. INT'L L.J. 101 (1998).

44. See Trautman, supra note 17, at 616 (“[T]he fact that another country also asserts jurisdiction cannot be disregarded.”).


46. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d. Cir. 1975) (“When... a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished [to]... leave the problem to foreign countries.”).

47. Whether it is appropriate to use a method developed in the area of private law to address questions of the scope of public regulatory law is a question that has generated much debate. Compare Andreas F. Lowenfeld, Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction, 163 RECUEIL DES COURS 311,
Multilateralism, an approach used to choose which law governs a particular private-law dispute, examines the connections between the relevant legal relationship and one or more fora in order to find the proper "seat" of that relationship. It therefore depends largely on an examination of points of contact between the parties and their activity and particular geographic locations. Adapted by analogy in the regulatory context in the form of interest balancing, this approach considers whether "the interests of, and links to, the United States" are strong enough—compared to those of other countries—to support extraterritorial application of U.S. law. This analysis necessarily involves an examination of geographic connections and therefore retains the territorial orientation of multilateralism.

III. GLOBALIZATION AND THE RECEDING STATE

The forces of economic globalization challenge fundamentally the traditional allocation of regulatory power among sovereign states. Both


48. MULTISTATE JUSTICE, supra note 4, at 10-27 (discussing Savigny).

49. Id. For example, a court might consider in which state a contract had been executed, in which it was to be performed, in which the parties thereto resided, and so forth.

50. As discussed above, the technique is adopted by analogy rather than directly simply because in the regulatory context the court is not choosing a law but defining the scope of domestic statutes.

51. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976). See also Lowenfeld, supra note 47, at 350 (looking for the place of the most significant relationship.)

52. The Restatement of Foreign Relations Law provides in part that:

   Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

   (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

   (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

FOREIGN RELATIONS RESTATEMENT, supra note 2, at § 403(2).

53. See Trachtman, supra note 22, at 40 (describing the central issue within private international law as determining which state will be allocated the legal power to regulate a certain transaction).

54. "Globalization" itself means different things to different people. See generally GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 2-10 (David Held et al. eds., 1999) (sketching out competing theories of globalization). I discuss here the changes underpinning the processes of globalization, such as the developments in technology and regulatory policy that have led to increased connectedness and integration of markets and economic activity.
the increased multiplicity of jurisdictional contacts of typical business activity and the (arguably) non-jurisdictional nature of cyberspace and e-commerce have profoundly disturbed a predominant aspect of what is traditionally understood as sovereignty: exclusivity of authority over events occurring within a state's borders. Globalization is for this reason seen by some as the agent of sovereignty's demise; to those who see a continuing role for the nation-state, it has been the agent for a redistribution of regulatory authority that seeks to respond to the waning importance of geographic territory.

Across many areas of government, regulatory power traditionally enjoyed by sovereign states has shifted to other levels. Some has shifted to the supranational level, as states have acceded to treaties and other instruments designed to address transnational activity; some has been ceded to private actors; and some has been transferred to informal networks constituted among sub state-level agencies in different countries. Such redistributions of authority are prevalent in the area of transnational commercial activity in particular. On the

55. Activity in cyberspace in particular raises the issue of deterritorialization, but commercial activity in general seems increasingly borderless as well. See Joel P. Trachtman, Cyberspace, Sovereignty, Jurisdiction, and Modernism, 5 IND. J. GLOBAL LEGAL STUD. 561 (1998). See also the discussion of offshore financial markets as another kind of deterritorialized activity in SASKIA SASSEN, LOSING CONTROL: SOVEREIGNTY IN AN AGE OF GLOBALIZATION xii (1996).

56. See note 23 supra; see also Louis Henkin, That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 FORDHAM L. REV. 1, 2 (1999) ("In simpler days, state sovereignty implied several key elements. Primarily, it meant political independence. It also meant territorial integrity and virtually exclusive control and jurisdiction within that territory.")

57. See, e.g., KENICHI OHMAE, THE END OF THE NATION STATE (1995); GLOBAL TRANSFORMATIONS, supra note 54, at 3-5 (discussing the diminished role of states on this view).

58. See Trachtman, supra note 55, at 562 ("It is not the state that has died, but the long-moribund theory of absolute territorial sovereignty."). See also GLOBAL TRANSFORMATIONS, supra note 54, at 7-9 for a description of this view: "While not disputing that states still retain the ultimate legal claim to 'effective supremacy over what occurs within their own territories,' the transformationalists argue that this is juxtaposed, to varying degrees, with the expanding jurisdiction of institutions of international governance and the constraints of, as well as the obligations derived from, international law." Id. at 8. See also Henkin, supra note 56, at 6: "So we have the phenomenon of globalization and everybody thinks it is doing something to sovereignty (I think it is, although I'm not sure exactly what)."


61. See Trachtman, supra note 55, at 580 ("States continue to facilitate ... private ordering by enforcing choice of law and forum clauses in private contracts.").

supranational level, for example, multinational conventions have been ratified addressing the international sale of goods\(^{63}\) and the recognition and enforcement of arbitral awards.\(^{64}\) With respect to non-national solutions to the problems presented by business activity in the global age, the call for a new lex mercatoria has gained strength.\(^{65}\) On the sub-state level, the work of state agencies in developing regulatory frameworks fluid enough to meet the challenges posed by the increased mobility of labor and capital has become increasingly important. While none of these changes necessarily heralds the end of state-centered economic regulation, they do reflect shifts in the way the allocation of regulatory authority is conceptualized.\(^{66}\) Not surprisingly, these developments have important consequences for models of conflict of regulatory laws as well.

This Part examines three major developments in the regulation of international economic activity: (1) the increased power of private actors, as well as supranational organizations and non-governmental organizations, in economic regulation; (2) the movement in favor of harmonizing laws applicable to international transactions; and (3) the trend toward regulatory cooperation and coordination among states and state agencies. Looking at various points at bankruptcy, antitrust and securities law, it analyzes ways in which these developments have de-emphasized the role of sovereign authority in resolving conflicts of economic laws.

A. More Regulatory Choices Made at Non-sovereign Level

1. The Role of Private Actors

The goal of achieving predictability and certainty in international commerce has historically been viewed as a private-law value relevant more to individuals than to states.\(^{67}\) In recent decades, however, it has assumed more significance as a regulatory goal in and of itself: One expression of this development is in the rise in arbitration, through

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66. See Trachtman's comparison of "conclusory" vs. "contingent" sovereignty. Trachtman, supra note 55, at 564.
67. See Harold Maier, supra note 47.
which the dispute resolution mechanism for use in cross-border business transactions has been largely privatized and international commercial transactions "effectively denationalize[d]." Much more recently, some commentators have gone further, proposing a more systematic expansion of autonomy principles as a means of addressing the challenges of regulation in the international arena. Professors Choi and Guzman, for instance, have suggested a system under which companies would be free to select the securities regime of any country (not only the country in which their securities were sold or traded) to govern their securities dealings. Similarly, Professor Rasmussen has proposed a bankruptcy system under which companies would choose, from a menu of insolvency options, the bankruptcy regime that would apply in the event of their insolvency.

These proposals mark a significant shift away from traditional conceptions of prescriptive jurisdiction: indeed, they effectively decouple the links between territory and regulatory authority. Under Choi and Guzman's proposal, the law of one country might apply to a sale of securities that took place entirely in another country and did not involve the chosen country's nationals; similarly, under Rasmussen's, a country's bankruptcy regime might apply to the insolvency of a company with neither assets nor creditors within that country's borders. In fact, Professor Rasmussen's proposal goes even further: his ideal menu of insolvency options consists of a single unified set of options rather than a series of options each of which was proposed by a sovereign state. Thus, the chosen law might not even have a sovereign source. While these proposals take private choice further than legislators are likely to go, they reflect the trend in favor of private solutions to conflicts of economic regulation.

68. Friedrich K. Juenger, The Need for a Comparative Approach to Choice-of-Law Problems, 73 TUL. L. REV. 1309, 1329 (1999) (noting also that "[t]his preferred method of dispute resolution allows parties to frustrate the governmental interests that supposedly control multistate transactions.").


71. Id. at 26 n.120.
2. Growing Role of Supranational Organizations and NGOs

While some regulatory authority has devolved on private actors, some has also shifted to supranational organizations and to non-governmental organizations. This development is evident when one considers the role such actors have played in efforts to harmonize or coordinate regulatory laws.\(^7\) In bankruptcy, for example, early efforts focused on treaties or conventions negotiated at the state level, such as the draft treaty between the United States and Canada\(^7\) and the Council of Europe's draft multilateral Convention.\(^7\) In recent years, however, the larger share of reform efforts has been carried out primarily by supranationals or NGOs. A Cross-Border Insolvency Concordat was drafted under the auspices of the International Bar Association,\(^7\) as, earlier, was the Model International Insolvency Cooperation Act;\(^7\) the American Law Institute recently completed its North American Transnational Insolvency Project;\(^7\) and the United Nations Committee on International and Trade-Related Law (UNCITRAL), a supranational organization, was responsible for drafting the Model Law now being considered by member nations.\(^7\) Additionally, the International Monetary Fund and the World Bank have played an important role in the convergence of bankruptcy law by requiring bankruptcy reform in developing countries as a condition of loan support.\(^7\)

In other fields as well, international efforts have involved such organizations. In securities law, not only coalitions of regulatory
commissions but also non-governmental groups have been instrumental in reform efforts. The International Accounting Standards Committee, a private organization, was responsible for much of the work in the development of international accounting standards for use in cross-border offerings. In antitrust, similarly, the Competition Law and Policy Committee of the Organization for Economic Cooperation and Development has played a role in the development of international antitrust policy. In addition, the World Trade Organization has proposed a pre-merger notification system for use in cross-border transactions.

International, regional and non-governmental organizations—rather than treaty negotiations between sovereigns—have thus played an increasingly important role in the development of law applicable to transnational activity. This development too reflects a move away from a territorial sovereignty-based view of economic conflict, as non-state entities are less concerned with protecting regulatory turf in a territorial sense than agencies or other state actors. This is not to say that such entities don’t further certain interests, some of which may coincide with the interests of particular sovereign states—but the context in which they operate shifts the regulatory focus away from sovereign authority within particular borders.

B. Harmonization Movement

Broadly speaking, one might identify two general trends in the movement described generally as harmonization of international economic law. The first is convergence or unification, which would favor the development of uniform regulatory law worldwide. This

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81. The IASC is a private entity, formed in 1973 by accounting entities from the United States and other countries. For a thorough description of the IASC and its mission, see Licht, supra note 33, at 231-32.


85. Or at least in particular geographic regions.
strand of harmonization contemplates perhaps the most fundamental disturbance of the role of sovereignty in economic regulation, in that it would replace entirely the domestic laws of individual sovereign states.\textsuperscript{86} The second strand is the development of harmonized rules for use in cross-border cases. Although such systems would not replace domestic law for use in domestic cases, they would nevertheless constitute a move away from sovereignty-based conflicts analysis in that they would obviate the need to select one sovereign's law over another's for application in cross-border cases.\textsuperscript{87}

While wholesale unification of economic law remains a very distant possibility,\textsuperscript{88} substantial steps toward convergence have been taken in discrete areas. In the securities area, for example, insider-trading laws patterned after (though weaker than) U.S. regulations have been adopted in a large number of countries.\textsuperscript{89} Anti-competition laws, too, have become more widespread.\textsuperscript{90} As the literature in this area reflects, a continued emphasis on this form of harmonization can be expected.\textsuperscript{91}

Harmonization in the second sense—the adoption of harmonized
rules for application in cross-border transactions—has also made progress. An excellent example of such developments is found in the area of securities regulation: the adoption of international accounting standards and international disclosure standards for use by issuers engaged in cross-border securities offerings and exchange listings.\textsuperscript{92} The Securities Exchange Commission’s long-standing approach required foreign issuers either to present their financial statements in accordance with U.S. generally accepted accounting principles, or to provide a reconciliation to those principles;\textsuperscript{93} similarly, it required foreign issuers to meet essentially the same non-financial disclosure standards as those applied to domestic issuers.\textsuperscript{94} In the mid-1980s, seeking to increase the number of public foreign-issuer offerings in the United States, the Commission began an intensive effort to develop a set of international accounting standards and disclosure requirements for use in cross-border offerings. Working with the International Accounting Standards Committee\textsuperscript{95} and the International Organization of Securities Commissions, the Commission assisted in the development of standardized rules. IOSCO finalized a set of international rules in 1998,\textsuperscript{96} and in 1999 the Commission amended its disclosure requirements in conformity with the IOSCO standards.\textsuperscript{97} While approval of the financial standards proposed by the IASC is not yet finalized, the Commission in 2000 issued a concept release endorsing the project.\textsuperscript{98}

\textsuperscript{92} See generally Steinberg and Michaels, supra note 80, at 236-38 (discussing steps taken toward the development of harmonized rules for use in global securities offerings, and highlighting the distinction between standardized rules for cross-border offerings and reciprocal recognition rules for accepting disclosure based on other countries’ standards).

\textsuperscript{93} The Commission did make a few accommodations to foreign issuers: cash flow statements, for instance, could be made pursuant to International Accounting Standards rather than U.S. accounting principles. See \textit{Cash Flow Standards}, IAS #7 (1992).

\textsuperscript{94} In 1982, the Commission adopted the integrated disclosure system for use by non-domestic issuers. Adoption of Foreign Issuer Integrated Disclosure System, Securities Act Release No. 6437 (1982). While this system facilitated the registration process, however, it did not relax substantially the traditional disclosure requirements. See Edward F. Greene, Daniel A. Braverman & Sebastian R. Sperber, \textit{Hegemony or Deferece}, 50 BUS. LAW. 413, 422 (1995) ("Although foreign private issuers were recognized as a class, deference to their home country disclosure requirements was minimal."). Concessions in terms of disclosure include, for example, the ability to disclose management compensation on an aggregate rather than an individual basis.

\textsuperscript{95} See supra note 81.

\textsuperscript{96} The requirements are available at http://www.iosco.org/docs-public/1998-intnl-disclosure-standards.html.

\textsuperscript{97} International Disclosure Standards, Securities Release No. 33-7745, 34-41936 (Sept. 28, 1999). Form 20-F, the combined registration and annual report form used by foreign private issuers under the Exchange Act, was altered to incorporate the International Disclosure Standards, and parallel changes were made in various related rules.

With these changes, the Commission thus took a major step toward its goal of promoting regulatory harmonization.\footnote{International Disclosure Standards, supra note 97.}

As solutions such as these are developed, the instances of regulatory conflict that would require application of a particular sovereign’s internal law will become less frequent.\footnote{See Steinberg and Michaels, supra note 80, at 236 (“In an increasingly global economy, it may not be beneficial to regulators in every country where an offering occurs to demand access to information and exercise the powers needed to achieve the perceived regulatory goals of that jurisdiction...”).} Taking the securities example: once standardized rules have been adopted across jurisdictions, an issuer engaging in a cross-border offering must simply comply with those rules.\footnote{While the format in which such rules are adopted in each relevant jurisdiction might differ, the substance will be uniform.} No analysis is necessary of whether a particular sovereign’s laws should be deferred to, or of which jurisdiction is most affected by the transaction. A continued emphasis on the development of harmonized rules for use in transnational business activity will therefore result in a concomitant de-emphasis on the scope of sovereign authority.

C. Coordination/Cooperation

Efforts focused on enhancing regulatory coordination and cooperation in the international arena have taken place simultaneously with the harmonization movement.\footnote{Cooperative measures are sometimes posited as an alternative to harmonization rather than as a parallel development. In the area of antitrust regulation, for example, commentators have noted that while the European Union favors a true harmonization approach, the United States continues to pursue a system of cooperative enforcement of national laws. See Russell J. Weintraub, Globalization’s Effect on Antitrust Law, 34 NEW ENGL. L. REV. 27, 34 (1999); Spencer Weber Waller, An International Common Law of Antitrust, 34 NEW ENGL. L. REV. 163, 163 (1999) (noting that the debate over the direction of future international antitrust efforts is “generally portrayed as a dichotomous choice” between these positions).} These efforts involve a lesser degree of intrusion on sovereignty than does harmonization in that they seek to develop mechanisms for the more efficient application of domestic laws in the cross-border context and therefore promote national interests.\footnote{See Marney L. Cheek, The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime, 33 GEO. WASH. INT’L L. REV. 277, 279 (2001) (suggesting that such cooperative networks “do not include the gradual ceding of sovereignty to a central policymaking authority.”).} Even these solutions, however, affect territorial sovereignty in that they resolve jurisdictional conflicts by cooperation rather than by privileging one state’s authority over another’s. Their implementation affects conflicts across all areas of

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jurisdiction—judicial, legislative, and enforcement—and lessens reliance on a balancing of the interests and power of individual states.

One particularly successful manifestation of the tendency toward cooperation is the bilateral memorandum of understanding between regulatory agencies, used in enforcing both antitrust and securities regulations. Early agreements of this sort functioned primarily as information-sharing agreements, intended to overcome the difficulties regulatory agencies encountered in obtaining documents and testimony from abroad. Later agreements, however, both expanded the scope of mutual assistance available and institutionalized what is referred to as "positive comity," a principle under which agencies in one jurisdiction may take action to protect the interests of another state. Prior to the development of these agreements, the enforcement of national antitrust and securities laws in cross-border cases raised issues of conflict between sovereigns. To engage in investigations or other enforcement activity within the territory of a foreign state would be viewed as an intrusion on that state's sovereignty; thus, any requests for cooperation in such matters were handled within a framework of competing sovereign authority. The newer generation of bilateral agreements, by contrast, contemplates a system of regulatory enforcement that appears more as shared sovereignty. Although the goal of such agreements might be the protection by national regulators of their regulatory capability, the mechanisms put in place by such

104. Legislative authority enhancing regulatory capacity to enter into such agreements was granted in the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-12 (antitrust) and in the Insider Trading and Securities Fraud Enforcement Act of 1988, H.R. Rep. 100-910 (securities).

105. I discuss this generation of agreements at greater length in Hannah L. Buxbaum, Cooperative International Regulatory Enforcement and the Privilege Against Self-Incrimination in the United States, 43 GERMAN YEARBOOK INT'L L. 171 (2000).


108. Buxbaum, supra note 105, at n.47.

109. See Commission Report to the Council and the European Parliament on the Application of the Agreement Between the European Communities and the Government of the United States of America Regarding the Application of their Competition Law, COM (96) 479 (October 8, 1996) (describing the positive comity provision in the Agreement as enabling "either Party [to] invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anticompetitive behaviour implemented on its territory and which affects the important interests of the requesting Party.").

110. See Enrico Colombatto & Jonathan R. Macey, A Public Choice Model of International Economic Cooperation and the Decline of the Nation State, 18 CARDOZO L. REV. 925 (1996) for a public-choice argument that securities regulators enter into cooperation agreements in order to protect their own interests.
agreements "could only be achieved by internationalizing regulatory agencies, thereby rupturing the internal sovereignty of the State."111

A similar trend is evident in the area of merger regulation. Regulatory agencies in more than one country may seek to review and regulate a particular cross-border merger.112 While a traditional approach to such a conflict might seek to allocate regulatory authority to a single country based on the relative strength of the sovereigns' interest in the transaction, there has developed (at least between the United States and the European Union) some level of tolerance, among regulators as well as multinational corporations, for joint review.113 The bilateral agreements provide for cooperation in this regard,114 as does the WTO's proposed notification system.115 Accepting a sort of shared jurisdiction obviates the need for one country to assert its sovereignty against the other.

Cooperation—in this case, at the judicial level—has also become a pillar of international bankruptcy reform. It was central to initiatives such as the Cross-Border Insolvency Concordat116 and the European Insolvency Convention,117 both of which emphasized the need for active collaboration by bankruptcy judges. Perhaps the most important recent proposal in this area, the Model Law on Cross-Border Insolvency,118 includes provisions requiring cooperation by judges in different jurisdictions addressing international bankruptcy cases.119 It is believed that improving channels for communication and cooperation among bankruptcy judges will enable those judges to resolve complex

112. E.g. Boeing/McDonnell Douglas: the United States would seek to regulate the transaction on the jurisdictional basis of nationality (both companies were U.S. nationals), and the European Union because the transaction would impact the common market.
113. See Sall K. Mehra, Extraterritorial Antitrust Enforcement and the Myth of International Consensus, 10 DUKE J. COMP. & INT'L L. 191 (1999) (discussing the Boeing merger and pointing out that no comity analysis was conducted in an effort to allocate regulatory jurisdiction to a single country before the European Union blocked the merger). This is not to say that no friction is caused by such joint reviews—this very merger is a good example of one that raised considerable antagonism—but merely that regulators and regulated entities now perceive joint review as commonplace.
115. See Fiebig, supra note 83.
116. See supra note 75.
118. See supra note 78.
119. Id., Articles 25 through 27.
transnational bankruptcies in an equitable manner despite inconsistencies between the individual bankruptcy rules of different jurisdictions involved.\textsuperscript{120} In fact, the Model Law in that respect merely reinforces a trend toward ad-hoc cooperative decision-making that is evident in reorganizations and asset distributions concerning multinational corporations.\textsuperscript{121} In many cases, courts have developed protocols for the resolution of bankruptcy proceedings, acceptable to the parties involved, that harmonize inconsistent bankruptcy laws\textsuperscript{122} rather than choose the application of one country’s law over another’s.\textsuperscript{123} This approach therefore uses cooperation to avoid conflicts between the domestic bankruptcy policies of different sovereigns.

\textbf{D. Conclusion}

The trends outlined above illustrate the growing importance in international economic law of solutions to regulatory conflict that transcend sovereignty.\textsuperscript{124} Consistent with the broader movements that are part of globalization, these solutions look both to the supranational\textsuperscript{125} and the subnational\textsuperscript{126} level for alternatives to traditional analyses grounded in territorialism. None of this is meant to suggest that

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\textsuperscript{120} See, e.g., In re Brierly, 145 B.R. 151, 164 (Bankr. S.D.N.Y. 1992) (“...it is critical to harmonize the proceedings in the different courts lest decrees at war with one another result”); see also Evan D. Flaschen & Ronald J. Silverman, \textit{Cross-Border Insolvency Cooperation Protocols}, 33 \textit{TEX. INT’L L.J.} 587, 600 (1998) (“Only [through cooperation] will available resources be used to maximize the economic return to the parties involved, instead of being consumed in jurisdictional disputes.”).


\textsuperscript{122} While much of the harmonization is accomplished on the procedural level, extraregulatory decision-making does involve the harmonization of substantive bankruptcy law as well. See Evan D. Flaschen & Ronald J. Silverman, \textit{The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation International Insolvency}, in \textit{CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW} 621, 626 (Jacob Ziegel ed., 1994) (describing the role of examiner in bankruptcy proceedings as that of a facilitator seeming “to achieve the same goals sought by ADR techniques in general”). See also 6A \textsc{William L. Norton, Jr.}, \textit{Norton Bankruptcy Law and Practice} 2D § 152:48 (2002), discussing the Maxwell proceedings and the points at which inconsistent law was harmonized.

\textsuperscript{123} Robert B. Chapman, \textit{Judicial Abstention in Cross-Border Insolvency Proceedings: Recent Protocols in Simultaneous Plenary Cases}, 7 \textit{INT’L INSOL. REV.} 1, 1 (1998) (noting that in some concurrent proceedings a question left unanswered “was which insolvency proceedings was to predominate over the others”). For a recent discussion and list of such protocols, see Evan D. Flaschen, Anthony J. Smits & Leo Plank, \textit{Foreign Representatives in U.S. Chapter 11 Cases: Filling the Void in the Law of Multinational Insolvencies}, 17 \textit{CONN. J. INT’L L.} 3, 7-12 (2001).


\textsuperscript{125} In the case of harmonization.

\textsuperscript{126} In the case of party autonomy.
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sovereign states have no role left to play—after all, they still possess the power to enforce legal norms, and notions of sovereignty and territory remain relevant in many instances of conflict of international economic laws. When, for example, a case raises directly a question of the extraterritorial scope of U.S. regulatory law, the Supreme Court's decision in *Hartford Fire* suggests the applicability of an analysis strongly rooted in territorialism.\(^{127}\) And while international disclosure standards may be used in cross-border offerings, liability in the securities area is still evaluated under U.S. domestic standards. But in the new regulatory framework described above, more and more potential instances of regulatory conflict will be averted through such solutions, and the issue of power over territory will diminish in significance.\(^{128}\)

IV. FROM SOVEREIGNTY TO SUBSTANTIIVISM IN THE PROTECTION OF U.S. ECONOMIC POLICIES

The preceding Part analyzed changes, prompted largely by the forces of globalization, to the framework within which conflicts of regulatory law are conceptualized and resolved. In this Part, I examine how private international law rules work within this new framework to protect domestic regulatory interests. I begin by discussing the traditional mechanisms used in territorial sovereignty-based systems to ensure the effectuation of the policy interests reflected in U.S. economic law, and then analyze the alternative approaches that have developed in the substantivist system.

A. Protecting U.S. Economic Policies in a Territorial-Sovereignty System

Traditional methods used by courts to resolve conflicts between U.S. and foreign economic laws view such conflicts through the lens of sovereign power within a particular territory.\(^{129}\) Consequently, those methods seek to effectuate U.S. economic policies through territorial means: the application of U.S. domestic law.\(^{130}\) Considerations of the

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127. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813-14 (1993). *See infra* note 171 and accompanying text for a discussion of this case. In addition, for instance, the Model Law in many contexts privileges local over foreign proceedings, recognizing the primary authority of each sovereign over assets found within its territory.


129. *See supra* Part II.

substance of competing laws—in service of an inquiry into whether U.S. policies might be effectuated through application of non-U.S. law—have played a distinctly secondary role.

1. International Contract Cases: Protecting Interests by Limiting Party Autonomy

Because a sovereign's right to regulate economic activity within its borders was traditionally seen to trump party autonomy, application of domestic economic laws in cases raising regulatory issues was simply automatic. A consideration of whether the substance of the law chosen by the parties might vindicate U.S. policies was unnecessary—no alternative law could be chosen, as the forum could not be divested of its power to apply domestic law when regulatory issues were raised. Thus, in international contract litigation, U.S. economic policies were protected in a direct, territorial manner: through the automatic implementation of domestic law.

2. Legislative Jurisdiction Cases

Both the jurisdictional bases for prescriptive jurisdiction and potential limiting factors relevant to the scope of that jurisdiction are analyzed within a framework of territorial authority. Under that analysis, U.S. economic policies are again protected by the preservation of the United States' right to apply its own economic law to certain transnational activity. The unilateralist approach (under which U.S. economic law will be applied if a jurisdictional basis exists for the assertion of that law) illustrates this territorialism most clearly. A unilateralist court would not consider either the competing interests of another sovereign in regulating the relevant activity or the substance of competing laws. Rather, U.S. policy interests raised by conduct that occurs or has effects within U.S. territory would be effectuated through application of domestic law itself: through the automatic assertion of its power to

problem is... zero sum—where the values of two countries conflict, one must be chosen at the expense of the other. The value of assets whose distribution is affected by the choice of law regime represents the loss of sovereignty of one country in favor of that of another.”

131. See discussion supra Part II.B.1.
132. See Baade, supra note 107, at 472 ("[Antitrust law] is necessarily mandatory, and at least in its own terms not subject to indirect avoidance by contractual choice of law.").
133. See supra Part II.B.2.
134. See supra note 43.
135. It remains an open question whether such factors may be considered in a situation in which the law of a foreign state had compelled the activity in question. See Hartford Fire Ins. Co v. California, 509 U.S. 764, 799 (1993).
The interest-balancing approach to resolving questions of prescriptive jurisdiction also addresses the protection of domestic economic policies from a territorial standpoint, although—unlike unilateralism—it does contain the seeds of a more substance-oriented analysis. After establishing a jurisdictional basis to regulate certain activity, a court using this approach must consider the reasonableness of an exercise of jurisdiction by evaluating certain factors. While some are completely territory-based, others include a substantive component in that they seek to assess the interest of each state in regulating the activity. Nevertheless, the inquiry is into the interest of each state in regulating the conduct, not in a comparative evaluation of the substance of each state’s laws. Any consideration of the content of those laws is therefore a complement to, not a substitute for, a territorial, jurisdiction-selecting analysis.

B. The Shift to Substantivism

Because substantivism is a particular school of thought in conflicts theory, it is important to pause for a moment to discuss terminology. The prevalent choice-of-law approaches, unilateralism and multilateralism, may be characterized as substance neutral; they focus simply on locating the appropriate jurisdiction as a source of law. Analysis of the substance of competing laws is concededly part of those approaches. Unilateralists, for example, consider the substantive content of potentially applicable law—but only to determine whether the law is 


137. See, e.g., FOREIGN RELATIONS RESTATEMENT, supra note 2, at § 403(2)(a) (1987) ("[T]he link of the activity to the territory of the regulating state."); id. at § 403(2)(b) ("the connections, such as nationality, residence, of economic activity, between the regulating state and the person principally responsible for the activity to be regulated").

138. See, e.g., id. at § 403(b)(2)(c) ("[T]he importance of regulation to the regulating state... and the degree to which the desirability of such regulation is generally accepted."); id. at § 403(2)(f) ("the extent to which the regulation is consistent with the traditions of the international system"); id. at § 403(2)(h) ("the likelihood of conflict with regulation by another state.").

139. Consider Timberlane Lumber v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976); a “difference in law or policy” might be relevant, but mainly because of foreign relations repercussions. Cf. Manning Mills v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979), referring to the availability of a remedy abroad as one relevant factor in the analysis.

140. See MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE 110-11 (1995) (discussing the substance neutrality of multilateralism). See also David F. Cavers, A Critique of the Choice-of-Law Problem, 47 HARV. L. REV. 173, 178 (1933): “So long as deduction from territorial postulates could indicate only one jurisdiction as a source of law in a given case, the content of that law would be logically irrelevant.” As discussed in Part II.A, unilateralism and multilateralism are also used by analogy to resolve conflicts of prescriptive jurisdiction.
indeed applicable, and therefore only as part of an inquiry into the reach of the rule. Multilateralists, similarly, must consider to some extent the substantive content of competing laws in assessing the relative interests of each jurisdiction in regulating the particular conduct; again, however, this consideration of content takes place in the context of a jurisdiction-selecting approach. Substantive analysis therefore plays a decidedly secondary role in systems using these approaches. The term substantivism, by contrast, is used to describe a choice-of-law methodology whose goal is to select the better law in any given case. Under this approach, the analysis of substantive content is central and not merely an aspect of an otherwise territory- or sovereignty-based approach. Under this approach, in other words, a court faced with a choice-of-law problem will resolve it by choosing a law rather than a jurisdiction.

In the international context, the substantivist approach has been used as the basis of a theory under which special rules would be developed to address cross-border transactions that cannot be satisfactorily regulated by rules developed for purely domestic use. Professor von Mehren has suggested three situations in which the development of substantive rules would be appropriate:

In the first type of situation, the forum considers that two legal orders are sufficiently concerned with a given situation that the rules of both should be given effect, but the domestic rules do not lend themselves to cumulative application. . . . The second general class comprises situations which, because of their

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142. See REIMANN, supra note 140, at 110-11.
143. In the case of multilateralism, substance plays an additional role in connection with the public-policy escape mechanism. Once the proper jurisdiction has been identified, courts may consider whether application of the chosen law would violate the public policy of the forum state. If so, they may invoke the "public policy exception" in deciding instead to apply forum (U.S.) law. Id. at 111; see also Cavers, supra note 140, at 183-84, for a discussion of the public policy exception. This stage of the analysis therefore requires a look at the substance of competing laws.
145. See Leflar, supra note 144, at 295-96, 302.
multistate characteristics, involve considerations which do not have particular significance in comparable domestic settings. . . . A third class of situations is presented only by cases of true conflict, that is to say, situations in which two or more legal orders have legitimate reasons to regulate the dispute that has arisen, but hold mutually inconsistent views respecting the form such regulation should take.  

In each of those situations, then, the particular form of cross-border conflict calls for a resolution technique that centers on substance rather than territorial linkages. In the following section, I analyze ways in which the developments outlined above have brought considerations of substance to the forefront in the protection of U.S. economic policies. The new substantivism is evident both in a change in private international law doctrine itself and in a shift in the focus of conflict resolution away from private international law rules.

1. Substantivism in International Contract Litigation: Expanding Party Autonomy

As discussed above, one aspect of economic globalization is an expansion of the role of private actors in the regulatory arena. In the area of international contract law, this expansion is manifested in a direct change to private international law rules—an elimination of previous limitations on the enforceability of private choice regarding economic law. In the place of those limitations, courts have turned to substantivism as a means of protecting U.S. regulatory interests.

Party autonomy in the selection of forum and governing law in international contracts was traditionally restricted by the characterization of regulatory law as an extension of sovereign authority. The well-known Supreme Court decision in *Bremen v. Zapata*, however, began a gradual erosion of the importance of sovereignty-based analysis in defining the enforceability of choice clauses. While *Bremen* itself did not concern the potential application of regulatory law, the strong endorsement in that case of party autonomy in international contracts generally was soon adopted in regulatory

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149. *See discussion supra* Part IV.A.1.
150. 407 U.S. 1 (1972). The decision established a presumption in favor of enforceability of forum-selection clauses in international agreements. *Id.* at 15.

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
Following Bremen, the Supreme Court enforced foreign arbitration clauses in international contracts where the relevant litigation involved claims under U.S. securities laws and antitrust laws. These cases addressed only the agreement of the parties to arbitrate; at least at the stage of enforcing the arbitration clauses, the Court in each case believed it had no reason to assume that U.S. regulatory law would not be applied in the arbitrations themselves. Nevertheless, by holding that the weight of the sovereign's interest in application of its economic laws did not necessarily mandate consideration of claims under those laws exclusively in domestic courts, the decisions reflected a shift away from the territory-based approach to resolving conflicts in international contracts. Indeed, these decisions explicitly referred to the importance of arbitration (a non-sovereign and non-territorial institution) to the resolution of international commercial disputes generally.

In a critical move toward substantivism, more recent decisions took the final step of endorsing party autonomy even in the selection of governing law in international contracts raising regulatory issues. In a series of cases arising out of the collapse of the Lloyd's insurance market, eight federal appellate courts enforced forum-selection and choice-of-law clauses in favor of the United Kingdom contained in investment agreements signed by U.S. investors. Unlike earlier...
arbitration cases, these decisions explicitly accepted the displacement of U.S. securities laws; they held that the choice clauses were enforceable even though the U.S. parties would then be unable to assert claims under U.S. securities laws. The cases therefore did not view territorial sovereignty as determinative; instead, they considered the question of applicable economic law in light of whether the law chosen by the parties was reasonable in light of U.S. policies.

Once the automatic supremacy of regulatory law over party autonomy was eliminated in the context of international agreements, the means by which U.S. regulatory policies were protected shifted as well. Rather than being immune to party choice—and therefore applied as a matter of territorial prerogative—they were protected by the back-up mechanism of the public policy exception. In cases addressing the enforceability of forum-selection and choice-of-law clauses, this exception is invoked when application of the law chosen by the parties (or of the law that would be applied in the forum selected by the parties) would violate a public policy of the forum in which enforcement of the clauses is sought. This analysis is by definition substantive; a court must examine the substance of the chosen law to determine the effect of its application. Its implementation in cases involving regulatory law has therefore led to the protection of U.S. policy interests through a condition of substantive similarity between domestic and chosen law. U.S. law might not, as before, be applied as a matter of course; but if the chosen law is similar enough to U.S. law, then domestic economic policies will be served even upon application of that foreign law.

In the Lloyd's cases discussed above, the courts held that the application of U.K. rather than U.S. securities laws to fraud claims brought by U.S. investors was acceptable precisely because of the

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159. See McConnaughay, supra note 17, at 280-83.
160. See further discussion infra Part V.A. See also Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999), for a case extending this approach to the antitrust context. This development in the international arena is also consistent with the shift, brought about by the "conflicts revolution," from a focus on territorial links to a focus on state interest. Reimann, supra note 27, at 584.
161. See McConnaughay, supra note 17, at 265, for a discussion of the difference between the inapplicability of choice-of-law analysis in certain areas (those governed by mandatory law) and the operation of the public policy exception within choice-of-law analysis.
162. The exception is also available to prevent application of the law that would otherwise have been the result of choice-of-law analysis absent party choice.
163. See Cavers, supra note 140, at 183 (describing the invocation of the public policy exception as "a frank discarding of the blindfold" imposed by traditional jurisdiction-selecting conflicts rules).
substance of those laws. The first circuit court to address the Lloyd's situation spoke only to a very general fairness requirement, essentially verifying merely that a fraud claim against Lloyd's was actionable in the United Kingdom.\textsuperscript{164} The decisions that followed, however, engaged in detailed analysis of the substance of U.K. securities laws in comparison with those of the United States. On the basis of that analysis, the courts concluded that the economic policies underpinning U.S. securities laws would be effectuated even upon application of U.K. law.\textsuperscript{165} A subsequent Ninth Circuit case applied this approach in the antitrust context, concluding that the application of foreign antitrust law would not necessarily offend the policies reflected in U.S. antitrust statutes.\textsuperscript{166} In the manner in which they effectuate U.S. regulatory policies, these decisions reflect a shift in focus from sovereignty to substantivism. The primary concern is not the authority of the United States to apply domestic law to the plaintiffs' regulatory claims, but rather the substantive similarity of the chosen law to that of the United States.\textsuperscript{167}

In the bankruptcy arena, interestingly, this attention to substantivism developed earlier: in cases of conflict between U.S. and foreign bankruptcy law, courts considered among other things the substance of the foreign law.\textsuperscript{168} Consider, for example, a situation in which a U.S.

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\begin{enumerate}
\item[164.] Riley, 969 F.2d at 958.
\item[165.] See Roby, 996 F.2d at 1365-66 (concluding that "there are ample and just remedies under English law" and that the "well-developed English law of fraud and misrepresentation" would not offend U.S. policies); Bonny, 3 F.3d at 161-62 (discussing the similarity of the two laws and concluding that "several remedies in England vindicate plaintiffs' substantive rights"); Shell, 55 F.3d at 1230-31 (following Roby, Bonny and Riley); Allen, 94 F.3d at 929 (stating that U.S. anti-fraud policy would not be subverted because "British law not only prohibits fraud and misrepresentation as do the United States securities laws, but also affords [plaintiffs] adequate remedies in the United Kingdom"); Haynsworth, 121 F.3d 956, 968-70 (while stating broadly that foreign remedies need not "duplicate those available under American law," noting the protections afforded by English law and concluding that "plaintiffs' remedies in England are adequate to protect their interests and the policies behind the statutes at issue"); Richards, 135 F.3d at 1294-95 (enforcing the choice clauses in part "because English law provides the [plaintiffs] with sufficient protection"); Lipcon, 148 F. 3d at 1299 (citing Bonny, 3 F.3d at 162, and concluding that "available remedies and potential damage recoveries suffice to deter deception of American investors[,] to induce [disclosure], and to provide redress" and therefore serve U.S. policies).
\item[166.] Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 723 (9th Cir. 1999).
\item[167.] For an argument that the laws were not in fact similar enough to protect U.S. policies, see Courtland H. Peterson, \textit{Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases}, 60 \textit{La. L. Rev.} 1261, 1273-74 (2000); Richards, 135 F.3d at 1299 (Thomas, J., dissenting).
\item[168.] Perhaps substantivism was integrated into bankruptcy analysis earlier because bankruptcy, in contrast to antitrust and securities law, involves aspects of private as well as regulatory law. 6A \textit{William A. Norton, Norton Bankruptcy Law and Practice} 2d § 152:14 (1997).
\end{enumerate}
\end{footnotesize}
court is called upon to decide whether assets of the insolvent located within the United States should be distributed to U.S. creditors under U.S. distribution rules, or should instead be remitted for distribution in an ongoing foreign proceeding, under foreign law. The U.S. Bankruptcy Code sets forth a list of relevant factors to assist courts in making this decision; one of these factors is whether distribution of assets under the foreign bankruptcy regime would take place "substantially in accordance" with the order in which assets would be distributed under U.S. law. This factor thus introduces a substantive element into the analysis: the implication is that U.S. interests can be protected not only by the exercise of sovereign power (application of domestic law) but also by means of a substantive solution (application of another law whose substance is acceptable to the U.S. court). Again, the focus is not on sovereign authority but on substantive comparability of the relevant laws.

2. **Substantivism and Solutions to Overlaps of Prescriptive Jurisdiction**

Private international law on prescriptive jurisdiction has not explicitly embraced substance-oriented solutions. Quite to the contrary, the Supreme Court's most recent decision in this area adopted a decidedly territorialist approach. Although globalization has not directly affected private international law jurisprudence in this area, it has, however, had a substantial effect on the scope of application of private international law. Where successful, both harmonization and coordination efforts reduce the need to apply traditional private international law analysis; their purpose is to minimize the likelihood that one sovereign's law needs to be chosen over another's. Thus, the development of harmonization and cooperation solutions has shifted many conflicts outside the province of private international law rules. Because such solutions are themselves so dependent on substantive

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170. Although individual courts have accorded disparate weight to this particular factor, many have viewed it more or less as a condition to deference. See, e.g., In re Toga Mfg., 28 B.R. 165, 168 (Bankr. E.D. Mich. 1983) (refusing to defer to a foreign proceeding on the ground of lack of similarity); see also Rasmussen, supra note 70, at 20 n.92 ("Proponents of modified universalism contend that a U.S. bankruptcy court should defer to a foreign proceeding only when the foreign law is similar to U.S. law.").

171. In **Hartford Fire Ins. Co. v. California**, 509 U.S. 764 (1993), the Court rejected interest balancing and emphasized the absolute right of a sovereign to regulate conduct occurring or having effects within its borders.
considerations, the result is that the territorial-sovereignty focus found in traditional prescriptive jurisdiction analysis has been largely replaced by a focus on substantive solutions.

a. Harmonization

A focus on the substance of competing rules is an inevitable aspect of the movement toward harmonization of economic laws, whether by means of the convergence of national laws, the development of supranational law, or the creation of uniform rules for use in cross-border cases. Where the goal is the development of substantive uniform law, work must necessarily begin with a substantive examination of existing national laws. The focus is not merely on substance, moreover, but on similarity of substance. As is often observed, the project of harmonization is only viable when the laws to be harmonized are not too far apart to begin with. In the antitrust area, for example, commentators point to the growing emergence of similar anti-competition prohibitions across jurisdictions as a sign that the unification process might become possible. The success of the limited harmonization measures in international securities law, likewise, depended largely on the basic similarity of pre-existing approaches to disclosure and accounting standards. In areas in which the corresponding laws of various jurisdictions lack sufficient similarity, harmonization efforts founder. In bankruptcy, fundamental inconsistencies across jurisdictions in both bankruptcy and related laws make harmonization appear unattainable; similarly, inconsistencies in the antitrust enforcement processes in certain countries have been identified as potential barriers to the harmonization process in that

172. See supra Part III.B. for a description of these varieties of harmonization efforts.

173. See Trautman, supra note 17, at 591 ("The need for unitary regulation is plainer in those areas where the regulatory policies of various countries conflict, and yet it is probably in those areas that there is the least hope for any kind of international judicial or executive cooperation.").

174. See generally Basedow, supra note 88, at 1046-48 (noting this argument and discussing the future of harmonization given different degrees of convergence).

175. See James D. Cox, Regulatory Duopoly in U.S. Securities Markets, 99 COLUM. L. REV. 1200, 1211 (1999). There is, of course, an independent policy reason for "fram[ing] the debate solely in terms of the comparability of IAS measurement standards vis-a-vis U.S. GAAP," id., which is that the key to securities disclosure is the ability of investors to compare issuers seeking capital. Id. at 1211-17.

176. See Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 CORNELL L. REV. 696 (1999). But see Westbrook, supra note 79, at 2291 ("G[lobal economic integration is driving convergence of law at a surprisingly fast pace and this trend will make it possible to achieve a workable international bankruptcy system much sooner than had been thought.").
area. U.S. harmonization efforts are therefore focused in areas where domestic regulatory policies are least at risk because the harmonized standards will be sufficiently similar to domestic law.

b. Cooperation

Because coordination mechanisms are designed merely to facilitate the application of national laws in cross-border situations, they may be viewed primarily as procedural developments that do not alter the way in which U.S. policies are effectuated. While they may have made the enforcement process less territory-driven, in other words, they do not alter the fact that U.S. policies are implemented through application of U.S. law. Nevertheless, such mechanisms are to some degree part of the move toward substantivism.

Early memoranda of understanding were overtly substance-oriented in that they conditioned enforcement assistance on substantive similarity of the relevant laws; a regulatory agency would not initiate investigative or enforcement activity at the request of its partner agency unless the conduct in question violated regulatory laws in its own jurisdiction as well. To this extent, as some have argued, even cooperation at the level of enforcement—as opposed to cooperation in unifying underlying law—requires a common understanding of regulatory goals. Later agreements dispensed with this requirement, incorporating instead provisions that require assistance even absent shared violations. In the

177. Daniel K. Tarullo, Norms and Institutions in Global Competition Policy, 94 AM. J. INT'L L. 478 (2000); see also DIANE P. WOOD, U.S. DEP'T OF JUSTICE, THE 1995 ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS: AN INTRODUCTION 3 (1995): "The commitment of other countries to antitrust rules and enforcement practices that are compatible, even if not identical, with those of the United States opens up exciting possibilities for cooperative efforts that we are just beginning to explore."

178. See discussion supra Part III.C. of the diminishing role of territory in regulatory enforcement actions.


181. See Principles for Memoranda of Understanding, Technical Committee, International Organization of Securities Commissions 1991, Principle 1 ("MOUs should provide that investigatory assistance will be granted without regard to whether the type of conduct under investigation would be a violation of the laws of the Requested Authority."); Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, 37 I.L.M. 1070, at Article III, providing that a request for assistance "may be made regardless of whether the activities also violate the Requesting Party's competition laws...." See generally MICHAEL ABBELL AND BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE
case of these later memoranda of understanding, however, a focus on substance comes from another source: the use of such agreements as a means to achieve the end of harmonization. Because cooperation in enforcement is viewed as creating a foundation for later cooperation in the development of uniform substantive standards, bilateral agreements are part of the effort to unify regulatory policy across different jurisdictions. In this sense, they invite attention to the substance of the regulatory law in partner jurisdictions.

Cooperation in international bankruptcy, in the form of coordinated joint proceedings, also reflects an emphasis on substantive similarity in addressing conflicts of competing policies. In crafting joint solutions to cross-border bankruptcies, bankruptcy judges do not necessarily implement the bankruptcy laws of one jurisdiction or another. Instead, they develop ad-hoc agreements between debtors and creditors that seek to harmonize those laws. Like legislative harmonization, this process necessarily presupposes some basic compatibility of the policies underpinning the rules concerned. If the basic policies served by the competing rules are close enough in substance, a bankruptcy court may develop a protocol that eliminates the need to select one jurisdiction's policy over another's. Additionally, with respect to the legislative proposals addressing transnational insolvency law, efforts even at...

(CRIMINAL), § 12-3-8 (1997).

182. Paul G. Mahoney, Securities Regulation by Enforcement: An International Perspective, 7 YALE J. ON REG. 305, 320 (1990) ("Internationalization has also provided the SEC with opportunities to use its enforcement powers as a lever to press for greater cooperation and uniformity among the world's securities regulators."); Weintraub, supra note 102, at 35 (1999) (discussing antitrust regulations). But see Spencer Weber Waller, National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law, 18 CARDOZO L. REV. 1111, 1119 (1996), suggesting that cooperation is chosen as a method precisely because it will defeat any move toward an international antitrust system.

183. See Zaring, supra note 62, at 284.

184. See discussion of extra-regulatory decision-making, supra Part III.C.

185. Flaschen & Silverman, supra note 123, at 629 (discussing the Maxwell protocol and noting that "the Order and Protocol... constitutes something of a bilateral treaty on the international insolvency of MCC, created to facilitate the harmonization of the United States' and Europe's respective insolvency systems for the benefit of MCC and its creditors").

186. See Flaschen & Silverman, supra note 122, at 599, discussing protocols: Perhaps where the relevant fora have common legal traditions... Protocols can be more specific and detailed about the substantive rules that will govern the proceedings. Where the relevant fora utilize legal systems that are less common,... Protocols may need to focus more on process, serving more as a framework for communication and cooperation...

187. Id. at 600 (in supporting such proceedings, urging a focus on the policy common to virtually all systems: "that the essence of insolvency law... is the maximization of value for all concerned").

188. See discussion of the Model Law and other transnational initiatives, supra notes 75-78
improving procedural coordination are viewed as a means to the end of substantive harmonization. As in the areas of antitrust and securities, then, these efforts invite a focus on similarity of laws.

3. Conclusion

As methods for resolving conflicts of regulatory authority have moved away from territorial notions of sovereignty to more substantive solutions, they have also caused a shift in how we conceive of the implementation of domestic regulatory policy in the international arena. Rather than viewing the matter as an exercise of sovereign authority—of the right of the United States to set policy with regard to conduct occurring within its territory—the question more frequently is whether the substantive solution proposed comes close enough to effectuating domestic policy.

V. THE COST OF SUBSTANTIVISM

Adopting methods that emphasize substance over territorial authority in the regulation of cross-border economic activity, and in litigation arising from that activity, is in many respects advantageous. Such methods quite properly challenge what Professor Juenger characterized as the unstated assumption concealed in the phrase ‘choice of law’: “that the only way to resolve multistate problems is to select one or the other from among two or more ‘conflicting’ municipal laws.” These methods take account of the globalization of economic markets and the continually decreasing importance of territorial boundaries in the conduct of international commerce. In addition, they permit the protection of U.S. regulatory policies without requiring insistence on the application of U.S. domestic law. At the same time, however, substantivism in the resolution of regulatory conflicts imposes certain costs. In this Part, I analyze two particular risks: the potential over-application of U.S. law, and the potential for process-related unfairness in the resolution of economic conflicts. I conclude by arguing for continued attention to territorial authority in international economic law.

and accompanying text.

189. Harold S. Burman, Harmonization of International Bankruptcy Law: A United States Persepctive, 64 FORDHAM L. REV. 2543, 2561 (1996) ("Attempting to achieve limited but key procedural targets such as access and recognition, and foregoing the temptation to deal with so-called substantive issues, provides a platform from which to achieve real progress.").

190. See supra Part III.A.

191. See MULTISTATE JUSTICE, supra note 4, at 5.
A. Potential Over-Application of U.S. Law

As discussed in Part IV.B. above, U.S. courts have in recent years enforced forum-selection and governing-law clauses in international contracts despite the presence of claims under U.S. regulatory law. This Part explores two reasons that this approach in contract litigation may lead to the over-application of U.S. law: first, the substantivist approach articulated in those cases may yield improper results when the selected law is not substantially similar to that of the United States; and second, that approach may create a hidden incentive favoring convergence toward U.S. law.

1. Operation of the Substantivist Approach When Dissimilar Law Is Chosen

In the Lloyd’s cases, the appellate courts considered whether the forum-selection and choice-of-law clauses contained in the investment agreements were enforceable despite the assertion by plaintiffs of claims under U.S. securities laws.\(^{192}\) The courts therefore began their analysis not by considering the applicability of U.S. securities laws to the transactions in question (that is, the existence of prescriptive jurisdiction), but by considering whether the policies embodied in those laws would be violated by application of the chosen law.\(^{193}\) The courts answered this question in the negative, on the basis that the chosen law was similar enough to that of the United States, and therefore never explicitly considered whether U.S. law in fact applied to the relevant transactions at all. Perhaps because they did not engage in a thorough analysis of prescriptive jurisdiction, they paid relatively little attention to the specific connections of the transactions to the United States and the United Kingdom.\(^{194}\) Most of the courts rested with the observation that the agreements were “truly international,”\(^{195}\) those that considered

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192. See supra Part IV.B.1.

193. Id. In other words, the courts treated such cases as regular international contract disputes rather than according them special treatment due to the regulatory issues involved. They therefore applied the analysis developed in Bremen v. Zapata, 407 U.S. 1, 15 (1972) (expanded, as described above, to encompass choice of law as well as choice of forum), under which enforcement of choice clauses may be denied if it “would contravene a strong public policy of the forum in which suit is brought.”

194. An analysis of these connections, at least sufficient to establish the existence of a jurisdictional basis to regulate, would have been central to a determination of whether U.S. law applied to the transactions.

195. See, e.g., Riley v. Kingsley Underwriting Agencies, 969 F.2d 953, 957 (10th Cir. 1992); Bonny v. Soc’y of Lloyd’s, 3 F.3d 156, 162 (7th Cir. 1993); Haynsworth v. Lloyd’s of London, 121 F.3d 956, 967 (5th Cir. 1997).
jurisdictional contacts focused on the number of contacts with the foreign forum,\textsuperscript{196} with few discussing the contacts with the United States other than to observe the involvement of U.S. investors.\textsuperscript{197} Only one court mentioned specifically the extraterritorial reach of U.S. securities laws, and that was to suggest that those laws did not in fact reach the investment transaction.\textsuperscript{198} (Of course, on the facts presented in the \textit{Lloyd's} cases, it seems quite possible that the courts simply concluded summarily that the contacts overwhelmingly were with the United Kingdom and therefore spent little time on the question.\textsuperscript{199})

What would the result have been, though, if the law chosen by the parties had been not U.K. law, but a law \textit{not} substantially similar to that of the United States?\textsuperscript{200} On the substantivist analysis adopted in the \textit{Lloyd's} cases, a court faced with such a situation would decline to enforce the choice clauses, on the ground that application of dissimilar law would subvert U.S. public policy. The litigation initiated in the U.S. court under U.S. securities laws would then proceed—and at that point, the court would be required to consider the reach of those laws to the conduct in question. If after examining the transactions' jurisdictional contacts with the United States\textsuperscript{201} the court determined that U.S. securities laws did not reach the defendants' conduct, the court would dismiss the case.\textsuperscript{202}

For two reasons, this method is problematic. First, an analysis of choice clauses that takes as its starting point a substantive comparison of forum law and chosen law is inconsistent with the traditional approach to such clauses. In non-regulatory cases, courts considering foreign choice clauses generally begin by examining the connections of

\textsuperscript{196} See, e.g., \textit{Riley}, 969 F.2d at 957; Richards v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998).

\textsuperscript{197} See, e.g., Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1365 (2d Cir. 1993) ("American investors... actively solicited in the United States."). \textit{But see} Allen v. Lloyd's of London, 94 F.3d 923, 929 (4th Cir. 1996) (discussing the multiple U.K. contacts and stating that "the United States nexus to the transactions involved... is thus incidental and tangential.").

\textsuperscript{198} \textit{Allen}, 94 F.3d at 930 (suggesting that applying U.S. law in the face of insubstantial contacts with the United States would "violate the most fundamental precepts of international comity").

\textsuperscript{199} In the \textit{Lloyd's} cases, the U.S. plaintiffs were sophisticated investors who had traveled to the United Kingdom to execute the investment agreements. The sales involved neither activity on a U.S. securities exchange nor substantial preparatory negotiations or other conduct in the United States.

\textsuperscript{200} That is, a law that did not provide remedies for claims such as those brought by the U.S. investors.

\textsuperscript{201} And, in some courts, after considering also the U.K. interest in regulating the conduct. \textit{See supra} notes 50 and 51 and accompanying text.

\textsuperscript{202} Because courts will not apply the regulatory law of another country, a finding that prescriptive jurisdiction is lacking will lead to dismissal rather than the application of foreign law; \textit{see} discussion \textit{supra} note 17.
the contract with the forum territory and with the chosen territory.\(^{203}\)

According to the "doctrine of relativity," as Professor Nussbaum described it, even a foreign law contrary to the public policy of the U.S. forum would be applied if the connections with the U.S. forum were remote.\(^{204}\) The initial examination of territorial contacts therefore provides the context in which the competing policies are considered.\(^{205}\)

Particularly in disputes involving regulatory claims, courts should examine territorial contacts in this manner; analysis beginning instead with substantive-law comparisons invites the criticism, frequently levied against U.S. judicial and regulatory authorities, that the United States evaluates the merits of foreign regulatory regimes by domestic standards. Although some of the Lloyd's courts may have given territorial interests short shrift simply because of the facts presented in those cases, future courts should be careful to consider them.\(^{206}\)

More importantly, and precisely because the enforceability analysis in cases involving regulatory laws is not identical to the comparable analysis in cases that do not implicate regulatory law, courts that have rejected choice clauses on substantive grounds may feel justified in subsequently applying U.S. law even where the case for its application is weak. In cases that do not involve regulatory claims, a court that declines to enforce a choice-of-law clause will then apply domestic conflicts rules to ascertain applicable law. To illustrate: the U.S. party to a contract brings suit in U.S. court, and its German counterparty moves for dismissal on the basis of a forum-selection clause in favor of a German court. The motion is denied because the contract also contains a choice-of-law clause in favor of German law, whose application would violate a U.S. policy. At that stage, the U.S. court will apply the conflicts law of the state in which it sits to determine the law governing the contract. If those conflicts rules lead back to German law, the court

\(^{203}\) See, e.g., Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905 (3d Cir. 1988) (examining relative contacts with the jurisdictions involved before analyzing policy in question).

\(^{204}\) Arthur Nussbaum, Public Policy and the Political Crisis in the Conflict of Laws, 49 YALE L.J. 1027, 1030-31 (1940) ("... a foreign law which in itself is repugnant to the forum will be accorded recognition where the repercussion of that law upon the forum is remote and unharmful ... [a]ll depends on the circumstances, or, more precisely, on the importance of the ‘contacts’ of the case with the territory of the forum.").

\(^{205}\) See Michael Mousa Karayanni, The Public Policy Exception to the Enforcement of Forum Selection Clauses, 34 DUQ. L. REV. 1009, 1025 (1996) (noting that "[i]t is often stated that a strong connection between the forum and the controversy is needed in order to justify the application of the forum’s public policy.").

\(^{206}\) In the Simula case, for instance, the Ninth Circuit did not consider territorial contacts at all, asking simply "whether law of the [selected] court is so deficient that the plaintiffs would be deprived of any reasonable recourse." Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 723 (9th Cir. 1999).
will again decline to apply it on the same policy grounds.\textsuperscript{207} It would then apply forum law to decide the case.\textsuperscript{208}

In cases involving regulatory claims, however, the analysis is different. Having declined to enforce choice clauses, a court must inquire whether U.S. regulatory law reaches the transactions—but if it does not, the court must dismiss the case. Because a court will not apply the regulatory laws of other jurisdictions, it has no other option.\textsuperscript{209} The result, then, is exactly the same as that achieved by enforcing the clauses to begin with: dismissal of the case. Courts may be reluctant in effect to undo their earlier decision not to dismiss, however, and therefore may take a broad view of the extraterritorial reach of U.S. law. In the \textit{Lloyd's} litigation itself, both the Ninth and Eleventh Circuits in fact suggested that the necessary consequence of declining enforcement of the choice clauses would be the application of U.S. regulatory law to the plaintiff's claims. The Ninth Circuit noted that "[t]his assertion [that \textit{Bremen} analysis does not apply over the statutory anti-waiver provision], if true, expands the reach of federal securities law to any and all such transactions, no matter how remote from the United States;"\textsuperscript{210} the Eleventh Circuit, that "to invalidate the choice provisions . . . in effect would be to conclude that 'the reach of the United States securities laws [is] unbounded.'"\textsuperscript{211} The courts clearly made these observations in support of strong enforcement of choice clauses—that is, as part of an argument that U.S. law should \textit{not} be applied reflexively in international transactions.\textsuperscript{212} But in situations in which the substance-oriented policy analysis does not permit application of the parties' chosen law, this linkage of non-enforcement with automatic application of U.S. regulatory law creates the potential for over-application of U.S. law; certain courts might let their reluctance to dismiss the case dictate an over-extension of prescriptive jurisdiction.\textsuperscript{213}

\textsuperscript{207} Because the public policy exception applies to law chosen through application of conflicts rules, as well as law chosen by the parties. See discussion \textit{supra} note 143.
\textsuperscript{208} The result would be similar to that which has developed in the bankruptcy arena under § 304(c) practice. A system under which U.S. law can be applied if the conflicting law is dissimilar may lead to the over-application of U.S. law; see \textit{Rethinking International Insolvency}, \textit{supra} note 21, at 66-68 (criticizing prospective substantive analysis of competing laws).
\textsuperscript{209} Thus, it cannot use forum law as a back-up.
\textsuperscript{210} \textit{Richards}, 135 F.3d at 1293.
\textsuperscript{211} \textit{Lipcon}, 148 F.3d at 1295, \textit{citing Richards}, 135 F.3d at 1293.
\textsuperscript{212} The Ninth Circuit, for instance, spoke against "expanding the operation of U.S. securities law in the international arena." \textit{Richards}, 135 F.3d at 1293-94, \textit{citing Haynsworth}, 121 F.3d at 966.
\textsuperscript{213} Such an approach might permit the reflexive application of U.S. law even in situations in which U.S. interests are relatively weak compared to the interests of a foreign jurisdiction. While substantive comparability of conflicting laws is important, it should supplement, not replace, a substance-neutral consideration of the relative interests of sovereigns involved in a regulatory
One way to avoid this anomaly would be to consider relative territorial contacts should the substantivist analysis raise policy concerns: in other words, even if the chosen law is not similar enough to U.S. law to serve U.S. policies, it should not be rejected if the United States has only a tangential interest in the transaction. \(^\text{214}\) This solution would retain the basic framework in which choice clauses are traditionally considered, while acknowledging the particular complexities involved when regulatory issues are raised. It obviously reintroduces considerations of sovereignty and territoriality into the analysis, as it looks to the regulatory authority of the United States as a factor in resolving conflicts created by the use of foreign choice clauses. \(^\text{215}\) But it is precisely those considerations that give this approach a sensitivity to such conflicts that the substantivist approach alone lacks, in that the former approach recognizes and seeks to resolve the conflict of economic laws underlying the contract question. \(^\text{216}\) It recognizes that where the links to the United States are comparatively weak, deference to the law chosen by the parties—even where that law is not similar to

\(^{214}\) In discussing the substantive approach in the context of private laws, Professor Kegel noted the continuing relevance of “the strength of the rival connecting factors.” Kegel, supra note 144, at 241. See Reimann, supra note 27, at 590, discussing, in the contract context, the need for an intermediate solution between territorial choice and state interest analysis.

\(^{215}\) This approach echoes the “shared values” analysis proposed as a mechanism for resolving conflicts of regulatory jurisdiction in extraterritoriality cases. See Bernhard Grossfeld & C. Paul Rogers, A Shared Values Approach to Jurisdictional Conflicts in International Economic Law, 32 INT’L & COMP. L.Q. 931 (1983). That approach advocated a shift in emphasis from the interests of the respective countries in regulating the conduct to the policy values reflected in their respective laws. If those values were found to be similar, then the need to apply forum law was diminished. Like the Lloyd’s cases, this analysis recognized that domestic policy interests might be served by the application of foreign law as well as through insistence on the direct application of U.S. statutes. Unlike the courts in the Lloyd’s cases, however, the proponents of that approach grappled with the question of an ongoing role for traditional jurisdiction-selection factors. They included a qualification in their analysis: if the foreign interests in regulating the conduct were insubstantial compared with those of the United States, then application of U.S. law would be considered appropriate even given similar values. Id. at 943. In considering what role territory-based analysis should play in a situation where values were not shared, one of the authors of the shared values approach suggested that in such a case interest balancing was not necessary and U.S. law should be applied. See also C. Paul Rogers, Still Running Against the Wind: A Comment on Antitrust Jurisdiction and Laker Airways v. Sabena, Belgian World Airlines, 50 J. AIR. L. & COM. 931 (1985).

In a sense, the solution described herein, for application in contract cases, reverses that qualification proposed by the authors of the shared-values approach: it suggests that if U.S. interests in regulating the conduct are insubstantial, then application of the chosen law would be appropriate even given dissimilar values.

\(^{216}\) It resolves this conflict differently, though, from those who suggest a return to the flat unenforceability of choice clauses in cases involving regulatory claims. See, e.g., McConnaughay, supra note 17.
U.S. law—may be appropriate.\textsuperscript{217}

2. **Implied Incentives Toward Convergence**

An approach to private international law that supports the predictability critical to commercial transactions only when the chosen law is close enough to U.S. law also creates certain incentives favoring convergence toward U.S. law. It suggests, first of all, that parties concerned about the enforceability of their choice of law in U.S. courts will select either U.S. law or substantively similar foreign law to govern their transactions. By influencing the outcome of party choice, U.S. conflicts rules may therefore play a role in the spread of U.S. regulatory policies in the international arena, as parties will then conform their behavior to meet those substantive standards. Such preference for “favored” systems may in turn encourage countries whose regulatory laws are not sufficiently similar to U.S. law to conform their regulations to meet U.S. standards.\textsuperscript{218} In this larger movement toward harmonization, U.S. conflicts law might in this way act as a lever forcing convergence. Because it operates outside the political process that generally structures the harmonization movement,\textsuperscript{219} its possible influence in this regard deserves careful consideration.

The potential effect of private international law rules in promoting convergence is also important because such convergence will inevitably decrease the diversity in regulatory systems.\textsuperscript{220} The benefits and disadvantages of such an effect on regulatory diversity are much debated: some commentators have suggested that a decrease will at least

\textsuperscript{217} This has been recognized in the context of prescriptive jurisdiction analysis. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir. 1975): U.S. law does not apply extraterritorially “where the United States activities are merely preparatory or take the form of culpable non-feasance and are relatively small in comparison to those abroad.”

\textsuperscript{218} See generally Wiener, supra note 3, at 134-50 (discussing more broadly the mechanisms “that could pressure other states to conform to the standards emerging across the Atlantic”). Wiener also warns of the “tyranny of sameness” that may accompany transnational harmonization of laws. Id. at 195, quoting DAVID HELD, MODELS OF DEMOCRACY (1996).

\textsuperscript{219} Harmonization is a “political or legislative decision to sacrifice regulatory diversity in favor of trade benefits.” Joel P. Trachtman, Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis, 34 COLUM. J. TRANSNAT’L L. 37, 121 (1995). That political process itself has been the subject of much debate, as many critics of globalization have identified lack of political legitimacy as a danger in the harmonization movement. See, e.g., Stephan, supra note 86, at 752-61; see generally articles collected in Part VII (Transatlantic Regulatory Cooperation, Democracy, and Accountability), in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann et al. eds., 2000). It is important to recognize the role that judicially created conflicts rules might play in contributing to that danger.

\textsuperscript{220} See Zaring, supra note 62.
prevent the erosion of certain minimum standards, while others have praised diversity as central to the evolution of an optimal global regulatory framework. My intention here is not to join in this debate as to the value of global regulatory competition, but to draw attention to the role that conflicts rules may play in reducing the level of that competition. Regardless of whether a decline in regulatory diversity is perceived as a good, the possible role of a substantivist conflicts approach in contributing to regulatory homogeneity deserves explicit consideration in that debate.

B. The Development of Substantivist Solutions and Fairness in the Resolution of Economic Conflicts

A primary weakness of a private international law system based on principles of sovereignty is that each conflict of laws takes on the character of a conflict between sovereigns, as the question in each case is which sovereign will exert its regulatory power. On that view, foreign relations issues infuse even litigation between private parties. The related strength of such a system, however, is that the competing laws meet on the basis of equality—that is, the choice of law (or the decision whether to apply domestic law to extraterritorial conduct) is made not on the basis of relative power of the respective sovereigns but on the basis of connections of the transaction in question to the respective countries. By contrast, the use of harmonization and cooperation mechanisms to resolve instances of economic conflict, and the

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221. Compare Stephan, supra note 86, at 795 (1999) (arguing that an ability to insist on laws similar to domestic law may prevent a “race to the bottom.”) with Romano, supra note 69, at 2430 n.216 (arguing that it only makes sense to encourage diversity if the competition results in a race to the top, thus benefiting investors). See also James D. Cox, Regulatory Competition in Securities Markets: An Approach for Reconciling Japanese and United States Disclosure Philosophies, 16 HASTINGS INT’L & COMP. L. REV. 149, 157 (1993), for a discussion of the pros and cons of regulatory diversity.

222. See Stephen J. Choi & Andrew T. Guzman, National Laws, International Money: Regulation in a Global Capital Market, 65 FORDHAM L. REV. 1855, 1875 (1997) (describing as “welfare improving” the existence of a broad spectrum of securities regimes). While the authors do not suggest that diversity is “a good in and of itself,” id. at 1883, they argue the benefits of a market-based competitive process in which the market arrives at the amount of diversity among regimes. They argue further that too high a degree of convergence interferes with that competitive process, id. at 1907. See also Eleanor M. Fox, The End of Antitrust Isolationism: The Vision of One World, 1992 U. CHI. LEGAL F. 221 (noting the advantages of diversity across antitrust regimes).

223. See Buxbaum, supra note 13, at 251-55, for a discussion of this aspect of private litigation.

224. While a decision by a forum court to apply local rather than foreign law, or to apply regulatory law extraterritorially, may appear to be an exercise of political power, traditional conflicts analysis does not directly implicate the power of the states involved.
concomitant focus on substantive similarity across systems, makes the power of certain sovereigns more relevant.

As Saskia Sassen has noted, "some states are more sovereign than others" in steering the development of global regulatory mechanisms. The perceived trend in the various international economic law movements is toward a Western standard, and U.S. regulators in particular are often viewed as seeking to transfer U.S. regulatory models to the global arena. In the areas of securities and banking regulation, for example, many commentators have suggested that the primary goal of the United States in the harmonization process is the adoption of U.S. regulatory standards worldwide. The use of expert legal assistance in advising the drafters of economic legislation in emerging countries has been criticized as a vehicle for the achievement of that end, as has the use of networks of sub state-level agreements between regulators.

The more frequent the resolution of economic conflict through private or supranational solutions, then, the more likely that the policies embodied in the laws of a relatively small number of relatively powerful states will be implemented. The universe of situations in which competing regulatory laws might be considered has shrunk, replaced by

226. See SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 17 (1996) (“The new transnational regimes... are assuming a specific form, one wherein the states of the highly developed countries play a strategic geopolitical role. The hegemony of neoliberal concepts of economic relations... has contributed to the formation of transnational legal regimes that are centered in Western economic concepts.”)
228. See Cox, supra note 221, at 150 (“U.S. policy makers... envision [international standardization] as a game in which the other nations of the world should raise the level of their disclosure rules rather than the U.S. lowering its own disclosure requirements.”); Licht, supra note 33, at 275, noting that IOSCO harmonization has been in part “a leverage mechanism for imposing uniform disclosure rules so that [advanced markets’] hegemonic leadership would not be eroded”; see also Eric Helleiner, Sovereignty, territoriality and the globalization of finance, in STATES AND SOVEREIGNTY IN THE GLOBAL ECONOMY 144 (David A. Smith et al. eds., 1999) (describing the role of the United States in obtaining cooperation of other states during negotiation of the Basle Accord).
230. See Sol Picciotto, The Regulatory Criss-Cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 112 (William Bratton et al. eds., 1996) [hereinafter INTERNATIONAL REGULATORY COMPETITION AND COORDINATION] (discussing "the strategic interplay among regulators, for example to expand the scope of their jurisdiction by creating a forum they can influence...”).
the more frequent use of standardized solutions based on Western models. Although the municipal laws of those countries may not be applied directly, their values will be reflected in the product of the harmonization and coordination process. Under the substantive approach, in other words, the relative power of sovereign states may play a large role in determining the outcome of regulatory conflict.  

Independent of the content of standardized solutions, this process may be criticized on foreign relations grounds in that it replaces "neutral" consideration of competing laws in the individual case with the application of law reflecting non-neutral values. The danger in a substantivist system is that because global regulatory standards reflect a bias toward the approach of certain states, that bias will be reflected in each instance of their application, regardless of whether the conduct subject to regulation bore any connections with those states at all.

Recent rulemaking in the area of tender offer regulation may in this regard provide a useful counter-example. In dialogue concerning the procedural problems posed by cross-border tender offers, one proposed solution was the development of global standards regulating disclosure and dissemination of information to security holders. In any such discussion, the approval of U.S. regulators—as supervisors of the world's largest capital market—would play an important role. Some commentators therefore anticipated a situation in which the United States would simply insist on some version of required disclosure that strongly resembled current U.S. rules, a solution that would have met with criticism abroad. Instead, however, a solution was developed that incorporated elements of territorial sovereignty-based jurisdiction. The Securities and Exchange Commission put in place a sliding scale of exemptive relief for tender offers for the securities of foreign private issuers. When less than ten percent of the subject securities are held

231. Even under a system of rules founded on sovereign equality, states may of course have unequal power. Because business activity takes place in particular locations and its economic impact is felt in particular markets, territorial linkages will necessarily lead more often to the application of certain countries' laws. See Henkin, supra note 56, at 13 ("[S]ingle states still have jurisdiction over pieces of that global activity which can be localized in its territory or with which it has links of nationality and of money—and some states have quite a lot of links of nationality and money.") But in such a system, a decision as to regulatory authority is made for each transaction on a power-neutral basis.


by U.S. security holders, bidders need only file and provide to investors an English version of the disclosure prepared under foreign law.\textsuperscript{234} When more than ten percent but less than forty percent are held by U.S. security holders, disclosure must be made according to U.S. rules, but relief is available from a variety of procedural requirements.\textsuperscript{235} Only when more than forty percent of the securities are held in the United States would the full panoply of U.S. tender offer rules apply.\textsuperscript{236} This solution, in other words, looks to a proposed tender offer’s links with the United States as a relevant factor in determining the applicability of U.S. standards. In situations where the linkage to the United States is weak, it accepts foreign law on disclosure—whether or not that regulation is similar in substance to U.S. regulation.\textsuperscript{237} The approach thus declines to impose a U.S. vision of tender regulation across the board. It has for that reason been viewed as more acceptable in other jurisdictions than a U.S.-styled harmonized rule might have been. In other regulatory areas as well, such attention to territorial linkages may help avoid the often extreme criticism to which global solutions are subject.\textsuperscript{238}

VI. CONCLUSION

A move away from the notions of territorial sovereignty underpinning traditional private international law analysis has long been considered an appropriate response to changes in the international commercial climate. Because territory-based conflicts approaches parcel out regulatory authority along geographical lines, it is evident that they are in many respects ill-suited to resolve conflicts in a world of cross-border activity. That these notions of territorial sovereignty have to a great extent already been replaced by other principles, however, has

\textsuperscript{234} Id. at II.A.2. The bidder must also ensure that U.S. security holders participate in the offer on an equal footing with foreign security holders.

\textsuperscript{235} Id. at II.B. The Tier II exemption is primarily aimed at minimizing procedural conflicts with foreign regulatory law that discourage foreign bidders from extending offers to U.S. holders.

\textsuperscript{236} Id.

\textsuperscript{237} See id. at I.A. One major criticism of the approach is that it did not go far enough in this direction. By insisting that U.S. antifraud rules continued to apply to foreign tender offers, the release may have made it difficult for foreign bids not to incorporate U.S. disclosure standards. See id. at I.A., discussing the argument that “liability will remain a hurdle to including U.S. security holders, particularly in view of the amount of litigation in the United States...”

\textsuperscript{238} For an example of such criticism, see Yves Dezalay, Between the State, Law, and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 60, supra note 232: “In exporting or imposing a mode of economic governance which it can dominate all the better for having been its inventor, the North American ruling class is giving itself the means of extending its hegemony over the whole of the planet.”
been insufficiently examined. Through an analysis of two interdependent systems—private international law and the regulatory environment in which that law operates—this Article identified a move to substantivism in the resolution of conflicts of economic laws. It then went on to analyze this substantivism, concluding that it is in certain respects problematic.

The new emphasis on substantive similarity of laws is reflected both in changes to certain private international law rules themselves and in the diminished scope of application of private international law generally. I have suggested that this emphasis creates two significant risks: the over-application of U.S. law in international contract cases, and unfairness, stemming from power imbalances, in the resolution of economic conflicts. For these reasons, the Article advocates re-integrating considerations of territorial sovereignty into private international law analysis.