Jurisdictional reasonableness under customary international law: The approach of the Restatement (Fourth) of US Foreign Relations Law

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1. *Introduction*

In 1987, the American Law Institute published the *Restatement (Third) of Foreign Relations Law*.[1] Sections 402-404 of the *Restatement (Third)* covered the customary international law governing jurisdiction to prescribe, and Section 403 set forth a requirement of jurisdictional reasonableness that called for weighing a number of factors in each case. Section 403 built on the practice of some US courts in antitrust cases. It asserted that their approach to jurisdictional reasonableness was required under customary international law. Although it was questionable whether Section 403 accurately reflected customary international law in 1987, its conception of jurisdictional reasonableness might have developed into a rule of customary international law if national courts had subsequently followed it out of a sense of legal obligation.

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[1] *Restatement (Third) of the Foreign Relations Law of the United States* (Am Law Inst 1987). The American Law Institute (ALI) had published an earlier restatement of the subject in 1965. See *Restatement (Second) of the Foreign Relations Law of the United States* (Am Law Inst 1965). The 1965 restatement was the ALI's first attempt to restate foreign relations law. It was designated the *Restatement (Second)* because it was part of the second generation of ALI restatements. The ALI is a nongovernmental organization. Its restatements have no binding force, but they have been highly influential, particularly with courts in the United States.

As it happened, however, national courts did not follow Section 403's approach to jurisdictional reasonableness. The European Court of Justice applied EU competition law to pricing agreements that were implemented in the European Union without weighing other factors.[2] The US Supreme Court also refused to consider Section 403's factors in determining the application of US antitrust law,[3] and the Court later characterized the case-by-case approach as 'too complex to prove workable'.[4] Instead, US courts limited the geographic scope of US law by applying a presumption against extraterritoriality, and sometimes a principle of reasonableness in interpretation as well. US courts applied these principles of statutory interpretation as a matter of domestic law, without any sense of international legal obligation.

Faced with a lack of state practice and *opinio juris* supporting the *Restatement (Third)*'s approach to jurisdictional reasonableness, the *Restatement (Fourth) of Foreign Relations Law* adopted a different approach. The *Restatement (Fourth)* gives effect to a principle of reasonableness by requiring a 'genuine connection' between the subject of the regulation and the state seeking to regulate under customary international law.[5] But the *Restatement (Fourth)* does not set forth a customary international law rule for choosing among competing jurisdictional claims. Instead, it recognizes that States seek to reduce the likelihood of conflicts by limiting the reach of their regulations as a matter of domestic law although they have no international obligation to do so.

2. *Determining customary international law*

It has long been acknowledged that the exercise of jurisdiction by States is subject to customary international law.[6] International law recognizes three categories of jurisdiction: jurisdiction to prescribe (the authority to make law), jurisdiction to adjudicate (the authority to apply

[2] Joined Cases 89, 104, 114, 116, 117 and 125-129/85, *A Ahlström Osakeyhtiö v Comm'n ('Wood Pulp')* [1988] ECR 5193 para 17.

[3] *Hartford Fire Ins Co v California*, 509 US 764 (1993) 797.

[4] *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155 (2004) 164.

[5] *Restatement (Fourth) of the Foreign Relations Law of the United States* § 407 (Am Law Inst 2018).

[6] *Case of the SS Lotus (France v Turkey)* [1927] PCIJ (Ser A) No 10, 18-19.

law), and jurisdiction to enforce (the authority to compel compliance with law).[7] The customary international law rules of jurisdiction are different for each category. Jurisdiction to prescribe requires a 'genuine connection' with the State seeking to regulate.[8] Jurisdiction to adjudicate is limited by customary international law rules of immunity,[9] but not otherwise.[10] Jurisdiction to enforce is territorial and may not be exercised in the territory of another State without the consent of the other State.[11] The principle of reasonableness is almost always discussed in connection with prescriptive jurisdiction.

The methods used for identifying customary international law rules of jurisdiction are the same as those used for identifying other rules of customary international law.[12] As recently summarized by the International Law Commission: 'To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'.[13] The same test of State practice and *opinio juris* governed when the *Restatement (Third)* was drafted. For example, the International Court of Justice (ICJ) had observed in the *North Sea Continental Shelf Case*: 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[14] As the *Restatement (Third)* summarized the test,

[7] *Restatement (Fourth)* (n 5) § 401. See also ILC, Report to the General Assembly, Annex E, para 5, UN Doc A/61/10 (2006) [ILC Report]; J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2010) 456; R Jennings, A Watts (eds), *Oppenheim's International Law* (9th edn, OUP 1993) § 136; C Ryngaert, *Jurisdiction in International Law* (2d edn, OUP 2015) 9-10.

[8] *Restatement (Fourth)* (n 5) § 407; ILC Report (n 7) para 10; Crawford (n 7) 457.

[9] See, eg, *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)* [2012] ICJ Rep para 78 (concluding that under customary international law States are immune from suit in the courts of other States for torts committed by armed forces during armed conflict).

[10] *Restatement (Fourth)* (n 5) § 422, reporters' note 1.

[11] ibid § 432(2); *Lotus* (n 6) 18-19.

[12] ILC, 'Draft conclusions on identification of customary international law with commentaries' UN Doc A/73/10 (2018) Conclusion 2, Commentary (6) ('The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of law.').

[13] ibid conclusion 2.

[14] *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* [1969] ICJ Rep para 77.

'[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation'.[15]

3. *The Restatement (Third)'s approach to reasonableness*

Section 403 of the *Restatement (Third)* set forth a principle of reasonableness as a limitation on jurisdiction to prescribe. It said that even when a State has a basis for jurisdiction to prescribe under international law,[16] it may not exercise that jurisdiction when doing so would be 'unreasonable'.[17] Reasonableness was to be determined on a case-by-case basis by weighing a non-exclusive list of factors, including links of territory, links of nationality, justified expectations, the interests of the regulating state, the interests of other states, the interests of the international system, and the likelihood of conflict.[18]

Section 403's balancing approach to extraterritoriality was based on US approaches to the conflict of laws and on cases limiting the scope of US antitrust law. The US Supreme Court had adopted a balancing approach for maritime tort conflicts in 1953.[19] The *Restatement (Second) of Conflicts* generalized this approach in 1971, asking courts to apply the law of the state with the 'most significant relationship' by evaluating specific contacts in light of overall policies.[20] In 1958, Professor Kingman Brewster had proposed a similar approach for the application of US antitrust law,[21] and in the late 1970s some US courts adopted Brewster's

[15] *Restatement (Third)* (n 1) § 102(2). See also ibid § 102 reporters' note 2 (citing *North Sea Continental Shelf* (n 14)).

[16] ibid § 402 (listing bases for jurisdiction to prescribe).

[17] ibid § 403(1).

[18] ibid § 403(2).

[19] *Lauritzen v Larsen*, 345 US 571 (1953) 583-91.

[20] *Restatement (Second) of the Conflict of Laws* § 145(1) (Am Law Inst 1971) (torts); ibid § 188(1) (contracts).

[21] K Brewster, *Antitrust and American Business Abroad* (Shepard's/McGraw-Hill 1958) 446.

approach.[22] Section 403 built directly on these antitrust decisions,[23] and borrowed its list of factors from the *Restatement (Second) of Conflicts*.[24]

Although the *Restatement (Third)* acknowledged that US courts had 'applied the principle of reasonableness as a requirement of comity', Section 403 went beyond those cases and 'state[d] the principle of reasonableness as a rule of international law'.[25] This was highly questionable. The *Restatement (Third)* conceded that '[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation'.[26] Yet Section 403 cited little state practice to support its rule beyond the practice of US courts, which had sought to restrain the application of US law as a matter of comity rather than legal obligation.[27] Observers at the time criticized Section 403 for failing to satisfy the requirements for a rule of customary international law. F.A. Mann noted that 'no support' for the interest balancing approach could be found outside the United States, and concluded that the theory 'should be firmly rejected'.[28] Karl Meessen agreed that '[n]o way exists to accept the Restatement's claim for qualifying reasonableness as a rule of international law'.[29] And Cecil Olmstead wrote, 'it seems implausible that section 403 rises to the level of . . . having "emerged as a principle of international law"'.[30]

Although Section 403 did not reflect customary international law when the *Restatement (Third)* was published in 1987, it might have

[22] See *Timberlane Lumber Co v Bank of America, NT & SA*, 549 F2d 597, 613-14 (9th Cir 1976); *Mannington Mills, Inc v Congoleum Corp*, 595 F2d 1287, 1297-98 (3d Cir 1979). But see *Laker Airways Ltd v Sabena, Belgian World Airlines*, 731 F2d 909, 948-55 (DC Cir 1984) (rejecting balancing approach).

[23] See *Restatement (Third)* (n 1) § 403 reporters' note 2 (citing *Timberlane*); ibid § 403 reporters' note 6 (citing *Timberlane* and *Mannington Mills*).

[24] ibid § 403 reporters' note 10 (noting that Section 403'adopt[s] the factors listed in § 6 of the Restatement, Second, of Conflict of Laws').

[25] See *Restatement (Third)* (n 1) § 403 comment a.

[26] ibid § 102(2).

[27] Ryngaert (n 7) 167 (noting that '§ 403 of the Restatement itself draws on almost no reasonableness-related State practice outside the United States to support its thesis that the rule of reason as articulated in § 403 constitutes international law').

[28] FA Mann, 'The Doctrine of Jurisdiction Revisited after Twenty Years' (1984) 186 Recueil des Cours de l'Académie de Droit International 9, 20.

[29] K Meessen, 'Conflicts of Jurisdiction Under the New Restatement' (1987) 50 L Contemporary Problems 47, 59.

[30] C Olmstead, 'Jurisdiction' (1989) 14 Yale J Intl L 468, 472 (quoting *Restatement (Third)* (n 1) § 403 reporters' note 2).

developed into such a rule if national courts had started to follow it from a sense of international legal obligation. But this did not happen. In 1988, the European Court of Justice (ECJ) applied EU competition law to a price-fixing agreement among foreign wood pulp producers on the basis that the producers 'implemented their pricing agreement within the common market'.[31] The ECJ found that this was sufficient to satisfy the requirements of public international law,[32] and it refused to weigh other factors in deciding the application of EU competition law even as a matter of international comity.[33]

In 1993, the US Supreme Court similarly refused to weigh Section 403's factors to determine whether US antitrust claims should be dismissed 'under the principle of international comity'.[34] Taking an approach very similar to the ECJ's, the Supreme Court said that it would consider other factors only in the case of a 'true conflict', which it defined as a situation where foreign law 'requires [the defendants] to act in some fashion prohibited by the law of the United States'.[35] A decade later in *Empagran*, the Supreme Court cited Section 403 for a general principle of reasonableness[36] but expressly rejected case-by-case balancing as 'too complex to prove workable'.[37]

To determine the geographic scope of federal statutory provisions, the US Supreme Court turned instead to the presumption against extraterritoriality.[38] The *Restatement (Third)* did not include such a presumption, which the Court had not applied since 1949. But the *Aramco* case revived the presumption against extraterritoriality in 1991,[39] and the

[31] *Wood Pulp* (n 2) para 17.
[32] ibid para 18.
[33] ibid para 22.
[34] *Hartford* (n 3) 797.
[35] ibid 798, 799.
[36] *Empagran* (n 4) 164.
[37] ibid. Some lower courts in the United States have continued to follow circuit precedent that had adopted Section 403, at least in cases presenting a 'true conflict' with foreign law. See *In re Vitamin C Antitrust Litig*, 837 F3d 175 (2d Cir 2016), *vacated on other grounds*, *Animal Sci Prods, Inc v Hebei Welcome Pharm Co Ltd*, 138 S Ct 1865 (2018).
[38] For detailed discussion of the federal presumption against extraterritoriality, see W Dodge, 'The New Presumption Against Extraterritoriality' (forthcoming 2020) 133 Harvard L R available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3429336>.
[39] *EEOC v Arabian Am Oil Co (Aramco)* (1991) 499 US 244 (applying presumption against extraterritoriality to Title VII of 1964 Civil Rights Act).

Supreme Court has since applied it to a large number of federal statutes.[40] Antitrust law was an exception. The Court did not apply the presumption against extraterritoriality in *Hartford* or *Empagran*, holding that US antitrust law should be applied when conduct abroad causes anticompetitive effects in the United States and should not be applied in the absence of such effects.[41] In *Empagran*, the Supreme Court articulated an additional rule of 'construe[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations'.[42] But neither the presumption against extraterritoriality nor *Empagran*'s principle of reasonableness requires courts to determine reasonableness based on a case-by-case weighing of factors, and neither of these principle of interpretation was adopted out of a sense of international legal obligation.

In his comprehensive study of prescriptive jurisdiction under international law, Professor Cedric Ryngaert concluded that 'the insufficiency of State practice and the absence of *opinio juris* with respect to the rule of reason . . . may inexorably lead to the conclusion that there is simply no clearly discernable norm of customary international law subjecting a State's jurisdictional assertions to a reasonableness requirement'.[43] The *Restatement (Fourth)* reached the same conclusion: 'state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law'.[44]

4. *The Restatement (Fourth)'s approach to reasonableness*

The *Restatement (Fourth)* rejects Section 403's case-by-case balancing approach to reasonableness, but it certainly does not reject reasonableness. One of the reporters' notes explains:

[40] See *RJR Nabisco, Inc v European Community*, 136 S Ct 2090 (2016) (Racketeer Influenced and Corrupt Organizations Act); *Morrison v Nat'l Australia Bank Ltd* (2010) 561 US 247 (Securities Exchange Act); *Microsoft Corp v AT&T Corp*, 550 US 437 (Patent Act).

[41] *Hartford* (n 3) 796; *Empagran* (n 4) 165.

[42] *Empagran* (n 4) 164.

[43] Ryngaert (n 7) 182.

[44] *Restatement (Fourth)* (n 5) § 407 reporters' note 3.

> this Restatement gives effect to the principle of reasonableness by requiring a genuine connection between the subject of the regulation and the state seeking to regulate, while noting that states often seek to reduce conflicts of prescriptive jurisdiction through various rules of domestic law that are often motivated by international comity but are not required by international law.[45]

In other words, the Restatement (Fourth) incorporates reasonableness at the levels of both customary international law and US domestic law. As a matter of customary international law, the Restatement (Fourth) embraces a principle of reasonableness by requiring that the regulating State have a 'genuine connection' with the subject of the regulation.[46] As a matter of US domestic law, the Restatement (Fourth) includes two principles of interpretation — the presumption against extraterritoriality[47] and the principle of reasonableness in interpretation[48] — that limit the geographic scope of US law beyond what international law requires and thus avoid at least some conflicts of prescriptive jurisdiction.

4.1. *Customary international law*

Sections 407-413 of the *Restatement (Fourth)* set forth the customary international law rules governing jurisdiction to prescribe. Section 407 states the general requirement of 'a genuine connection between the subject of the regulation and the state seeking to regulate'.[49] Sections 408-413 articulate the traditional bases for jurisdiction to prescribe: territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction.[50] Professor Ryngaert has noted that jurisdiction on these traditional bases 'could on the basis of genuine connection be considered *prima facie* "reasonable"'.[51] Indeed, the *Restatement (Fourth)* views the genuine-connection requirement as reflecting a principle of reasonableness under customary international law, explaining that '[r]easonableness, in the sense of showing a genuine connection, is

[45] ibid § 407 reporters' note 6.
[46] ibid § 407.
[47] ibid § 404.
[48] ibid § 405.
[49] ibid § 407.
[50] ibid §§ 408-413.
[51] Ryngaert (n 7) 43.

an important touchstone for determining whether an exercise of jurisdiction is permissible under international law'.[52]

These 'first-level principles of reasonableness'[53] ensure that only interested states are permitted to make law to govern the persons, property, or conduct in question. But they do not preclude the possibility that more than one state might have such an interest.[54] The *Restatement (Fourth)* does not include any second-level principles of customary international law to choose among competing claims of jurisdiction because no such principles exist. Professor Ryngaert has noted that 'the international law of jurisdiction does not seem to prioritize the bases of jurisdiction' and that there does not appear to be any rule of international law 'obliging States to exercise their jurisdiction reasonably'.[55] The lack of state practice and *opinio juris* reflecting a hierarchy among the bases of jurisdiction or requiring a choice among them supports those observations. Thus, the *Restatement (Fourth)* concludes: 'International law recognizes no hierarchy of bases of prescriptive jurisdiction and contains no rules for assigning priority to competing jurisdictional claims'.[56]

4.2. *Domestic law*

The *Restatement (Fourth)* also incorporates reasonableness on the level of domestic law by restating two principles of interpretation that limit the scope of US federal statutes beyond what customary international law requires.[57] Section 404 restates the federal presumption against extraterritoriality, which provides that federal statutes 'apply only within

[52] *Restatement (Fourth)* (n 5) § 407 reporters' note 3.

[53] Ryngaert (n 7) 43.

[54] See *Restatement (Fourth)* (n 5) § 407 comment d (noting that '[c]oncurrent prescriptive jurisdiction is common under international law'); Crawford (n 7) 457 (noting that 'situations of multiple jurisdictional competence occur frequently'); Ryngaert (n 7) 4 ('The international system of jurisdiction is one of *concurrent* jurisdiction'.).

[55] Ryngaert (n 7) 143.

[56] *Restatement (Fourth)* (n 5) § 407 comment d.

[57] See *Restatement (Fourth)* (n 5) § 402 reporters' note 13 (describing these principles of interpretation as reflecting a principle of reasonableness). These principles of interpretation apply only to federal statutes, and the geographic scope of US state statutes is a question of state law. ibid § 404 reporters' note 5. For discussion of state presumptions against extraterritoriality, see W Dodge, *Presumptions Against Extraterritoriality in State Law* (forthcoming 2020) 53 UC Davis L Rev available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426241>.

the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary'.[58] The US Supreme Court applies the presumption against extraterritoriality in two steps.[59] At step one, the Court looks for a clear indication of congressional intent regarding the geographic scope of a provision.[60] If the Court finds such a clear indication, it applies the provision according to its terms. If there is no clear indication of intent at step one, then at step two the Court determines whether application of the provision would be domestic or extraterritorial by looking to the statute's focus.[61] If whatever is the focus of the provision occurred in the United States, application of the provision is considered domestic and is permitted.[62] If whatever is the focus occurred outside the United States, application of the provision is considered extraterritorial and is not permitted.[63]

Applying this presumption against extraterritoriality, the US Supreme Court has developed specific tests for applying a number of different federal statutes. The antifraud provisions of the Securities Exchange Act apply to transactions in the United States regardless of where the fraudulent conduct occurs.[64] The cause of action for human rights violations under the Alien Tort Statute applies if the claims 'touch and concern' the United States.[65] The criminal provisions of the Racketeer

[58] *Restatement (Fourth)* (n 5) § 404. The Court of Justice of the European Union appears to have applied a similar presumption to determine the geographic scope of EU data privacy law. See Case C-505/17 *Google Inc v Commission nationale de l'informatique et des libertés (CNIL)* (24 September 2019) para 62 ('[I]t is in no way apparent from the wording of [the provisions on the right to erasure] that the EU legislature would, for the purposes of [protecting personal data] have chosen to confer a scope on the rights enshrined in those provisions which would go beyond the territory of the Member States ...'). For further discussion of *Google v. CNIL* in this issue, see M Taylor, 'Reasonableness in its reasoning: How the European Union can mitigate problematic extraterritoriality on a de-territorialised internet' (2019) 62 QIL-Questions Intl L 35.

[59] See *RJR Nabisco* (n 40) 2101 (describing 'two-step framework for analyzing extraterritoriality issues').

[60] *Restatement (Fourth)* (n 5) § 404 comment b.

[61] ibid § 404 comment c.

[62] ibid.

[63] ibid. The current version of the presumption against extraterritoriality is more flexible than prior versions because it does not operate as a clear statement rule at step one and because it allows the geographic scope of a provision to be determined by its purpose at step two. See Dodge (n 38) (describing the new presumption in detail).

[64] *Morrison* (n 40) 273.

[65] *Kiobel v Royal Dutch Petroleum Co*, 569 US 108, 124-25 (2013).

Influenced and Corrupt Organizations Act (RICO) apply extraterritorially to the same extent as the predicate acts on which criminal liability is based,[66] but RICO's private right of action applies only if the injury occurs in the United States.[67]

Section 405 of the *Restatement (Fourth)* states a second principle of interpretation titled 'reasonableness in interpretation', which provides: 'As a matter of prescriptive comity, courts in the United States may interpret federal statutory provisions to include other limitations on their applicability'.[68] As the comments make clear, new Section 405 is not the case-by-case balancing approach of old Section 403.[69] Section 405 is based instead on *Empagran*'s principle of 'avoid[ing] unreasonable interference with the sovereign authority of other nations'.[70] Under Section 405, courts may supplement the presumption against extraterritoriality with other limits on the geographic scope of federal statutes 'if doing so is consistent with the text, history, and purpose of the provision'.[71] For example, one decision has held that the antifraud provisions of US securities law should not be applied, despite the transaction's occurrence in the United States, when the foreign defendant was not a party to the transaction.[72] Another decision has applied a choice of law analysis to determine whether US bankruptcy law should be applied.[73] Section 405 allows US courts to develop more finely tailored tests for the geographic scope of federal statutory provisions, but it does not give judges discretion whether to apply US law based on a case-by-case weighing of factors.[74]

The presumption against extraterritoriality and the principle of reasonableness in interpretation limit the geographic scope of US law

[66] *RJR Nabisco* (n 40) 2102.

[67] ibid 2111.

[68] *Restatement (Fourth)* (n 5) § 405.

[69] For further discussion of Section 405 and its limits, see W Dodge, 'Reasonableness in the Restatement (Fourth) of Foreign Relations Law' (forthcoming 2019) 54 Willamette L Rev, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373370>.

[70] See *Restatement (Fourth)* (n 5) § 405 reporters' note 1 (quoting *Empagran* (n 4) 164).

[71] ibid § 405 comment c.

[72] *Parkcentral Glob Hub Ltd v Porsche Auto Holdings SE*, 763 F3d 198, 216 (2d Cir 2014).

[73] *In re Picard*, 917 F3d 85 (2d Cir 2019) 103-05.

[74] *Restatement (Fourth)* (n 5) § 405 comment a ('Reasonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law'.).

beyond what is required by customary international law. The United States generally characterizes deference to other States that is not required by international law as 'international comity'.[75] The domestic laws of other States often contain similar rules, though for historical reasons continental European States generally resist characterizing such rules as based on 'international comity'.[76] The point is that customary international law is not the only level at which a principle of jurisdictional reasonableness may be incorporated into law. The US presumption against extraterritoriality and its principle of reasonableness in interpretation show that jurisdictional reasonableness may also be found in domestic law.

5. *Unilateralism and multilateralism*

Although the *Restatement (Fourth)* incorporates principles of reasonableness at the levels of both customary international law and US domestic law, its approach to reasonableness is unilateral rather than multilateral.[77] In plain English, this means that the *Restatement (Fourth)*'s principles of reasonableness limit the reach of US law without regard to whether another State's law might also apply. They do not seek to assign regulatory authority to a single State or to prioritize competing jurisdictional claims.

With respect to customary international law, the *Restatement (Fourth)*'s approach to reasonableness is unilateral simply because state practice and *opinio juris* have led to rules requiring a genuine connection

[75] ibid § 401 comment a ('International comity reflects deference to foreign states that international law does not mandate'). US law has doctrines has doctrines of international comity not just for prescriptive jurisdiction but also for adjudicative jurisdiction and for dealing with foreign States as plaintiffs and defendants in US courts. See W Dodge, *International Comity in American Law* (2015) 115 Columbia L Rev 2071 (surveying international comity doctrines).

[76] See W Dodge, 'International Comity in Comparative Perspective', in C Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 701.

[77] See W Dodge, 'Extraterritoriality and Conflict of Laws Theory: An Argument for Judicial Unilaterialism' (1998) 39 Harvard Intl L J 101, 107-10 (distinguishing unilateralism and multilateralism). See also F Juenger, *Choice of Law and Multistate Justice* (Martinus Nijhoff Publishers 1993) 6-46 (discussing unilateralism and multilateralism in historical context).

with the regulating state but not to rules for choosing among States that have genuine connections.[78] With respect to US domestic law, the reasons for the unilateral approach to reasonableness are complex, but the principal reason relates to an aspect of the US federal system. In the United States, the conflict of laws falls within the authority of the States rather than the federal government.[79] Because of this, federal courts never developed federal conflict of laws rules for giving priority to foreign law in cases of conflict. It would have been odd to make the application of federal statutes depend on state conflicts rules. And so federal courts have, since the 1940s, treated the geographic scope of federal statutes entirely as a question of statutory interpretation.[80]

Normatively, a unilateral approach to reasonableness might be thought to leave a rather substantial gap. Professor Ryngaert, for example, has written that a 'second-level reasonableness analysis may be called for', one that is 'aimed at identifying the State with the *stronger* link to the situation'.[81] But it is important to note that multilateral approaches seeking to assign jurisdiction to a single State run a substantial risk of under-regulation. Because of comparative advantage, every State will be a net exporter of some goods and services and a net importer of others. States will naturally tend to regulate more lightly industries that are net exporters and more heavily industries that are net importers. [82]

It is also important to note that when customary international law and domestic rules of statutory interpretation result in concurrent jurisdiction, potential conflicts may be addressed at a political level. As Professor Dobson notes in this issue, states may design legislation to account for the legitimate interests of other states.[83] Jurisdictional conflicts may be addressed formally by negotiating international agreements[84] or

[78] See discussion above (nn 49-56).

[79] *Klaxon Co v Stentor Electric Mfg Co*, 313 U.S. 487 (1941) 496.

[80] C Nelson, 'State and Federal Models of the Interaction Between Statutes and Unwritten Law' (2013) 80 U Chicago L Rev 657, 724-28. See also Dodge (n 57) (manuscript at 12-13).

[81] Ryngaert (n 7) 145.

[82] Dodge (n 77) 153-58. Professor Ryngaert recognizes the same dynamic. See Ryngaert (n 7) 190-91.

[83] N Dobson, 'Reflections on "reasonableness" in the Restatement (Fourth) of US Foreign Relations Law' (2019) 62 QIL-Questions Intl L 19.

[84] The United States has concluded antitrust cooperation agreements with many countries. See <www.justice.gov/atr/antitrust-cooperation-agreements>.

informally by cooperation among enforcement authorities.[85] Unilateral assertions of regulatory authority may lead to multilateral agreements that address the concerns of all interested States.[86] And unilateral assertions of regulatory authority may serve as a necessary fallback when international cooperation fails.[87] In short, attempting to assign regulatory authority to a single State is not necessarily a good idea. Multilateral approaches to jurisdiction have a number of shortcomings, and unilateralism is not always unreasonable.

6. *Conclusion*

The *Restatement (Fourth) of Foreign Relations Law* rejects the multilateral balancing approach to jurisdictional reasonableness found in Section 403 of the *Restatement (Third)*. Instead, the *Restatement (Fourth)* incorporates reasonableness at the level of customary international law by requiring a 'genuine connection' between the subject of the regulation and the State seeking to regulate. The *Restatement (Fourth)* further incorporates reasonableness at the level of US domestic law through the presumption against extraterritoriality and the principle of reasonableness in interpretation, which limit the reach of US law beyond what customary international law requires. These principles of reasonableness operate unilaterally and do not seek to assign jurisdiction exclusively to a single State. But experience has shown that concurrent jurisdiction may lead to agreement and cooperation at the political level. In other words, a unilateral approach to jurisdictional reasonableness may result in multilateral political solutions.

[85] See Ryngaert (n 7) 211 ('Because US and European regulators work together on a daily basis, there have been no major conflicts of antitrust jurisdiction since the early 1990s').

[86] See P Schwartz, 'Global Data Privacy: The EU Way' (forthcoming 2019) 94 NYU L Rev (discussing EU General Data Privacy Regulation and negotiations with non-EU States to meet its requirements).

[87] N Dobson, C Ryngaert, 'Provocative Climate Protection: EU 'Extraterritorial' Regulation of Maritime Emissions' (2017) 66 ICLQ 295 (discussing EU regulation of maritime emissions).