Infringement as Unfair Competition: A Blueprint for Global Governance?

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INTRODUCTION

The regulatory challenges of globalization can be summarized in a single sentence: Commerce is global, but law remains (largely) territorial. While international law theorists yearn for a post-Westphalian order to match the “borderless” world of communications and commerce, the realities of national sovereignty remain stubbornly anachronistic.¹

Outsourcing of production across extended global supply chains pushes problems upstream to low cost producers, who typically inhabit states with weak regulatory regimes and an absence of rule of law norms. Producers in developed countries such as the United States, who must abide by high compliance norms complain bitterly that unscrupulous rivals overseas enjoy an unfair price advantage by cutting corners and evading legal obligations. Efforts to resolve this conundrum have taken a variety of

forms: harmonization through multilateral treaties, establishment of certification regimes, transnational litigation, corporate law reforms, diplomatic suasion, economic pressure, global publicity campaigns—the list goes on and on. Yet, very little has worked. Now a new strategy is being tested in U.S. courts which goes after producers in scofflaw nations at their point of maximum vulnerability: by targeting their access to U.S. markets.

During the past three years a Thai seafood company, a Thai tire manufacturer, a pair of Chinese and Indian apparel manufacturers, a Chinese petroleum equipment manufacturer, a Chinese barbeque manufacturer, and Embraer, a Brazilian aircraft manufacturer, were all penalized in the United States for using pirated enterprise software. The copyright infringement that led to the sanctions did not occur in the United States, however, and indeed the sanctions did not arise under copyright law at all. Instead, U.S. companies and state Attorneys General have invoked domestic unfair competition laws to target intellectual property infringement in foreign markets where local enforcement is ineffective. According to proponents of these actions, unfair competition arises due to the unfair cost advantage that manufacturing goods using stolen information technology confers vis-à-vis competitors that pay to license their information technology legitimately.

Use of unfair competition law as an enforcement strategy to target overseas infringement has been endorsed by such high profile experts as David Kappos, former Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, and William Kovacic, former Federal Trade Commission Chairman. Such unfair competition actions could potentially supply a powerful tool to regulate conduct in foreign jurisdictions that are otherwise rife with enforcement challenges.

The implications extend well beyond the intellectual property context. While the actions brought thus far have all focused on use of pirated software, the same theory of unfair competition could be employed to target a variety of legal violations: from human rights abuses to

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environmental crimes to unfair labor practices. Indeed, almost any illegal manufacturing practice that yields a material competitive advantage could be deemed to result in unfair competition.

Activists have long deplored the seamy underbelly of globalization whereby multinational companies take advantage of lax enforcement in developing countries. Commentators have explored a variety of strategies to curb such abuses. However, the inability to bring such issues within the writ of a functioning legal system has hamstrung progress. Unfair competition actions offer an intriguing remedy: because the unfair competition is deemed to arise in the U.S. end market, a key benefit of this strategy is that it provides a jurisdictional hook to bring the overseas violations within the jurisdiction of U.S. courts. Moreover, by enlisting private competitors to prosecute such actions, these actions potentially bring well-resourced advocates to the cause of global regulatory enforcement.

Yet, despite the groundswell of support for this emerging enforcement model, its implications are poorly understood. Are such unfair competition actions compatible with the territoriality principle in global intellectual property law? Do they violate restraints on extraterritorial regulation recognized in customary international law? What doctrinal limits should apply to prevent such unilateral actions from being misused? And how can this model be employed to maximize the chances of effecting lasting change in the behavior of wrongdoers? This Article provides the first comprehensive analysis of these questions.

The Argument that follows proceeds thus: Part I explains how unfair competition law has been applied to this novel context against a backdrop of failures in global regulatory governance. Part II considers challenges that may arise under territoriality principles in international law: (A) based on the lex specialis of global intellectual property and (B) based on the more general principles of customary international law. Part III considers analogous applications of unfair competition law beyond the IP context and develops a jurisprudential framework to govern such actions. Part IV concludes.

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4 See infra Part II-C-3.
I. REGULATORY ENFORCEMENT CHALLENGES FROM GLOBALIZED PRODUCTION

Regulatory governance in an age of globalization poses many challenges. Countries do not always agree on common standards. Developing countries often resist regulatory harmonization, viewing it as a ploy to erode their competitive advantages. Despite such resistance, however, one can find a reasonably robust set of shared norms instantiated across much of the world in regulatory domains such as intellectual property law, environmental protection, labor, and health and safety standards. Some of these norms are embodied in multilateral treaties. In other cases, national sovereigns have enacted parallel legislation. In theory, such shared regulatory norms serve to level the playing field for global commerce.

The real challenge, however, comes with respect to enforcement. Many countries that have adopted global regulatory norms lack effective enforcement regimes. Enforcement failures can assume many different guises ranging from outright corruption to ineffective enforcement to toothless remedies. The bottom-line remains the same: regulatory standards that exist on paper are ignored in practice.

A. Enforcement Challenges in Intellectual Property Law

1. Enforcement Challenges Overseas

Such enforcement failures are especially stark in the context of intellectual property rights. In many foreign countries, intellectual property rights exist only on paper, and pirated and counterfeit products circulate freely.\(^5\) As the Register of Copyrights testified before Congress in 2005, “copyright enforcement in too many countries around the world is extremely lax, allowing staggeringly high piracy rates and massive losses to American companies.”\(^6\) Moreover, the effects of piracy are not limited to harms overseas. Rogue websites based abroad cater to U.S. customers.\(^7\) International espionage targeting American trade secrets and sensitive data

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has become front-page news, with Chinese, North Korean, and Russian hackers accused of penetrating U.S. servers to steal proprietary information.\(^8\) Enforcing global IP standards is thus a matter of grave concern to the U.S. government and economy.\(^9\)

Intellectual property protection has long been a focus of U.S. foreign policy as information and knowledge-based industries account for an ever-increasingly large share of the U.S. economy.\(^10\) Frustrated with inadequate protection abroad, the U.S. government in the 1980s began to coerce trading partners into increasing intellectual property protection.\(^11\) The U.S. employed an aggressive strategy of unilateralism, linking intellectual property enforcement to trade and wielding the cudgel of “Special 301” trade sanctions over states that did not comply.\(^12\)

The move to link global intellectual property protection standards to trade set the stage for the 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).\(^13\) The U.S.’s strategy of unilateral pressure gave way to one of global minimum standards and dispute resolution through multilateral institutions.\(^14\) Nevertheless, in its 2014 annual “Special 301” report, the USTR analyzed eighty-two countries, nearly half (thirty-seven) of which it identified as still having


\(^9\) See Rowe & Mahfood, supra note 8, at 67–69.


\(^11\) Id.

\(^12\) Id.


\(^14\) Id.
intellectual property laws or enforcement that are insufficient by international standards. The USTR singled out many important developing and emerging markets where piracy and ineffectual enforcement are endemic, including the BRIC countries (Brazil, Russia, India, and China), Bulgaria, Colombia, Indonesia, Mexico, Romania, Thailand, Turkey, and Vietnam.

Predictably, piracy rates are high in markets where copyright enforcement is weak. China, for example, has long had among the highest piracy rates in the world due to a confluence of systemic factors that impede effective enforcement, including under-resourced, poorly coordinated, and ineffective enforcement agencies; censorship and market access policies that greatly restrict legitimate distribution opportunities; and low civil and criminal penalties for infringement. For example, from 2006 to 2009 the average damages award in successful copyright lawsuits was less than $5,000. Under such circumstances, the law has little or no deterrent effect on deep-pocketed defendants. Many of the same systemic deficiencies are endemic in other countries, as are other impediments ranging from official corruption and local protectionism to overextended judiciaries whose endlessly delayed proceedings render remedies meaningless if and when they arrive decades later.

Producers of commercial software, in particular, have faced recurrent challenges enforcing their rights in many foreign jurisdictions. Indeed, a major impetus behind the expansion of unfair competition doctrine

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15 U.S. TRADE REP., 2014 SPECIAL 301 REPORT 7–8 (2014). Since 1989, the U.S. Trade Representative has monitored and reported on the adequacy and effectiveness of foreign intellectual property laws through its Special 301 process, although identified shortcomings no longer result in unilateral sanctions by the U.S.

16 See id.


19 See id.


22 See e.g., Pedro N. Mizukami et al., Brazil, in MEDIA PIRACY IN EMERGING ECONOMIES 227–29; SCARIA, supra note 13, at 161–62.
discussed above is the chronic failure U.S. software manufacturers encounter in combating piracy overseas. The Business Software Alliance (BSA) estimated in 2012 that the commercial value of global unauthorized software use exceeds $63 billion annually.\textsuperscript{23} Large businesses and manufacturing operations are often heavy consumers of enterprise software. Use of pirated software remains the norm in many major manufacturing countries, as reflected in the national estimated PC piracy rates of countries such as China (77 percent), Indonesia (86 percent), Thailand (72 percent), India (63 percent), Mexico (57 percent), and Brazil (53 percent).\textsuperscript{24}

Such alarmingly high rates of piracy persist despite an impressive push toward regulatory harmonization of global IP law. All 160 members of the World Trade Organization (WTO)—which includes all of the countries mentioned above—are obliged to adhere to TRIPS,\textsuperscript{25} which sets mandatory minimum standards of protection across each of the major intellectual property domains. In the case of copyright, both TRIPS and the Berne Convention (which TRIPS incorporates) ensure that authors automatically receive worldwide copyright protection without any formalities.\textsuperscript{26} While patent rights must be applied for separately in each jurisdiction, global applications have been streamlined through the Patent Cooperation Treaty, and countries are required to make patent rights available in all fields of technology without discrimination.\textsuperscript{27}

Obtaining substantive rights is of little value, however, in jurisdictions where enforcement of those rights is ineffective. Mindful of this danger, the TRIPS Agreement specifies a fairly broad set of enforcement measures, procedural safeguards, and mandatory remedies that Member State governments must make available to intellectual property rights-


\textsuperscript{24} Id. at 6.


\textsuperscript{26} See Berne Convention, art. 5.

\textsuperscript{27} Patent Cooperation Treaty, June 19, 1970, U.N.T.S. 231; TRIPS, art. 27.
holders.\textsuperscript{28} Despite such provisions, enforcement of IP rights remains extremely challenging across much of the developing world.\textsuperscript{29} TRIPS does not require member states to devote greater resources to enforcing IP rights than they do to other enforcement domains.\textsuperscript{30} Thus, countries with weak rule of law norms are effectively granted a pass. Two decades of litigation and pressure by the USTR has done little to alter this baseline reality.\textsuperscript{31}

2. \textit{Obstacles to Extraterritorial Application of U.S. Law}

If enforcement in the source country where the infringement occurred is ineffectual, can intellectual property right holders avail themselves of U.S. law and courts to remedy infringement that occurs abroad? Both copyright and patent law afford importation rights that empower intellectual property owners to seize infringing goods at the U.S. border. For goods that embody infringing copyrighted material or patented technology, these border measures provide an effective way to protect the intellectual property owner from injury in the United States. However, where the overseas manufacturer uses the infringing technologies solely in the \textit{process} of producing the goods, so that the end product itself does not embody the infringing material, such importation rights are inapplicable.

An example serves to illustrate the difference:

\textbf{Scenario 1:} Assume a U.S. company holds a U.S. patent on a particular hydraulic mechanism. Embraer then manufactures a jet in Brazil that incorporates the patented hydraulic technology—in the jet’s landing gear, for example—and attempts to import the jet into the United States without the patent holder’s permission. In this case, the patent holder can block the jet’s importation and sale at the U.S. border.

\textbf{Scenario 2:} Embraer instead uses the same patented hydraulics only in the production process—to raise mechanics’ work platforms, for example—and the hydraulics are not incorporated into the jet itself. The U.S. patent holder in this case would have

\begin{itemize}
  \item \textsuperscript{28} See \textit{generally} TRIPS, Part III: Enforcement of Intellectual Property Rights.
  \item \textsuperscript{29} Special 301 Report 2014, Office of the U.S. Trade Representative (documenting enforcement failures abroad).
  \item \textsuperscript{31} See Yu, \textit{supra} note 10, at 325, 354–75.
\end{itemize}
no power under U.S. law to block the jet’s importation and sale because the infringement takes place outside U.S. territory.

Applying this distinction to software, a jet that has pirated copies of proprietary software installed on its on-board computers could be blocked from importation into the U.S. However, if the pirated software was only used in Brazil to aid Embraer’s manufacturing of business process—for example, AutoCAD software used to design three-dimensional computer models of the jet, or a Microsoft Excel spreadsheet employed to track inventory—then the owners of the software copyright would have no power to block the jet’s importation and sale in the United States.

While computer programs are copyrightable everywhere as a result of harmonization through the TRIPS Agreement,32 software can also be subject to patent claims in the United States and several other countries.33 The applicability of U.S. patent law to software use by overseas manufacturers requires a more complex analysis. The U.S. Patent Act provides a limited exception to its rule of strict territoriality, by allowing infringement actions against imported products of a patented process under section 271(g).34 Where the end product directly results from a manufacturing process covered by a valid United States process patent, its importation and sale can be blocked in the United States even though the process was used overseas (where U.S. patent law otherwise would not reach). Similarly, Section 337 of the Tariff Act of 1930 grants the International Trade Commission power to block the importation of products “made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.”35

However, even so, these provisions fail to reach many situations in which an overseas manufacturer’s production process benefits from the

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32 See TRIPS, art. 10(1).
33 The patentability of software remains controversial. In Brazil, the status of current law regarding software patentability is uncertain. See BRAZIL CHAMBER OF DEPUTIES CENTER FOR STRATEGIC STUDIES AND DEBATES, BRAZIL’S PATENT REFORM: INNOVATION TOWARDS NATIONAL COMPETITIVENESS 198–206 (2013). Even in the United States, where software patents have been routinely granted for decades, the recent Supreme Court decision in Alice Banks v. CLS called into question the patentability of at least some software patents. See Alice Corp. Pty. v. CLS Bank Int’l, 134 S. Ct. 2347, 2351 (2014); Steven Seidenberg, Business-Method and Software Patents may go through the Looking Glass after Alice Decision, ABA JOURNAL (Feb. 1, 2015).
34 35 U.S.C. § 271(g).
use of a U.S. patented process. To begin with, the scope of Section 271(g) excludes products that are either (a) “materially changed by subsequent processes”; or (b) “become[ ] a trivial and nonessential component of another product.” Accordingly, use of patented production techniques that occur during intermediate stages of production fall outside the scope of the statute.\(^{36}\) Moreover, if the use of pirated software occurs as a background feature of a business enterprise for tasks that are ancillary to production (such as the Excel spreadsheet used to track inventory or copies of the Windows operating system running on employee laptops), the end products that result may not qualify even under the broader standard of section 337 as “made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.”\(^{37}\) Lastly, both section 337 and section 271(g) apply only to products of a patented process. As illustrated in scenario 2 above, use of a patented product (the hydraulic mechanism) during the manufacturing process does not trigger the right to block importation of the manufactured end product (the jet).\(^{38}\)

In such cases, plaintiffs face steep obstacles to relying on U.S. legal mechanisms to seek a remedy. First, obtaining personal jurisdiction over foreign defendants can be challenging. Many foreign companies lack the “continuous and systematic” contacts with a U.S. forum need to subject them to the general jurisdiction of a U.S. court.\(^{39}\) In one recent case in which a Chinese plaintiff sued Chinese search engine Baidu in the Southern District of New York over alleged copyright infringements that occurred entirely in China, the court declined to exercise general jurisdiction over Baidu despite Baidu’s listing on the NASDAQ stock exchange.\(^{40}\) The court emphasized the “continuous and systematic” requirement for personal jurisdiction, finding that Baidu did not have sufficient contacts with the United States to warrant such jurisdiction.

\(^{36}\) For example, the Federal Circuit has held that 271(g) exception did not apply to the use of a patented process to produce a chemical that was used as an intermediate compound in the production of a materially different drug. See Ely Lilly & Co. v. Am. Cyanamid, Inc., 82 F.3d 1568 (1996).

\(^{37}\) 19 U.S.C. §1337(a)(1)(B)(ii). A different case would arise where the software use in question forms an integral component of manufacturing process. For example, a patented software algorithm used to calculate the optimum curing time and temperature for a high-tech coating for the airplane could bring the resultant manufacture within Section 337’s “made, produced, or processed . . . by means of” a patented process standard. A more ambiguous case would be presented by the AutoCAD design software. It is unclear whether design processes fall within this “making, producing” language.

\(^{38}\) See Amgen, Inc. v. United States Int’l Trade Comm’n, 902 F.2d 1532, 1540 (Fed.Cir.1990).

\(^{39}\) A court may exercise “general” jurisdiction if it sits within the defendant’s domicile or if the defendant otherwise has such “continuous and systematic” contacts with the forum that exercise of jurisdiction would be consistent with Constitutional Due Process. See Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).
market in New York. The Supreme Court in its 2011 Goodyear decision significantly tightened the rules governing general jurisdiction, making U.S. residency a virtual prerequisite. Specific jurisdiction—the court’s power to hear specific claims arising directly out of the defendant’s contacts with the forum—is often equally difficult to establish because contacts do not arise out of the violation, which occurs upstream in the overseas production process.

Second, even assuming the availability of U.S. personal jurisdiction, plaintiffs have faced equally difficult hurdles in demonstrating substantive jurisdiction. The territoriality principle long recognized internationally and by U.S. courts generally limits a state’s power to prescribe legal rules to its own territory. Most U.S. courts therefore hold that claims for infringing conduct overseas fail to state a claim under either the U.S. Copyright Act or Patent Act because these Acts do not have extraterritorial effect.

U.S. courts have proved equally reluctant to hear claims arising under foreign intellectual property law. Traditionally, courts in common law countries have held that copyright and patent infringements give rise to “local” rather than “transitory” causes of action, which may only be brought where the subject matter of the action exists. The reluctance to exercise subject matter jurisdiction over cases of foreign infringement is particularly pronounced in the patent context, where concerns over act of state doctrine deter U.S. courts from adjudicating property rights conferred by a foreign sovereign. Yet, exceptions have been made, most frequently in the copyright domain, empowering a court of general jurisdiction to hear a claim that otherwise has no connection to the forum. Even if a court finds it has proper personal and subject matter jurisdiction and that

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45 See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1095 (9th Cir. 1994).
the plaintiff has stated a claim, defendants can invoke the doctrine of *forum non conveniens* to dismiss the case when a more appropriate forum exists, which will often be the case if the defendant is a foreign national and the locus of the infringement was in the defendant’s home country.\(^{48}\)

Nevertheless, even if U.S. courts were to follow this practice more widely, it would provide scant relief to most intellectual property owners whose rights are infringed abroad, since, as noted above, most foreign infringers are not domiciled in the United States and therefore U.S. courts would have no basis to exercise general jurisdiction.\(^{49}\)

**B. Treating IP Theft as Unfair Competition**

If direct infringement actions brought in U.S. courts are unsuitable to remedy foreign violations, does unfair competition provide an alternative theory under which the unauthorized use of intellectual property overseas triggers liability in the United States? Four different sources of unfair competition law could be employed to this end: (1) Section 337 of the 1930 Tariff Act of 1930; (2) Section Five of the Federal Trade Commission Act; (3) general state unfair competition statutes, and (4) specialized state unfair competition statutes targeting foreign “theft” of information technology.

1. *Section 337 Actions in the International Trade Commission*

The International Trade Commission (ITC) has the authority to block the importation into the United States of articles arising from “unfair methods of competition” under Section 337 of the 1930 Tariff Act.\(^{50}\) In a


\(^{49}\) A court could exercise specific jurisdiction over a defendant that is not based in the jurisdiction, but only over claims arising from contacts with the jurisdiction. The foreign infringement at issue in this Article will typically lack close connections to a U.S. forum. By similar analogy, claims arising under other regulatory domains—such illegal child labor or other sweatshop abuses in an overseas factory—will be equally ineligible for specific jurisdiction in U.S. court.

recent case, the Federal Circuit upheld an ITC action that relied on Section 337 to extraterritorially apply U.S. law to trade secret misappropriation overseas. At issue in the case, TianRui Group Co. Ltd. v. International Trade Commission, was the International Trade Commission’s authority under § 337 of the Tariff Act of 1930 to seize steel wheels manufactured in China using proprietary technology covered by a trade secret. The defendant’s unlawful acquisition and use of the trade secret occurred entirely in China.

The Federal Circuit held that the ITC’s authority over “[u]nfair methods of competition and unfair acts in the importation of articles” gave it the power to consider the trade secret misappropriation, notwithstanding that the operative acts had occurred outside the United States. Moreover, the court applied U.S. law to determine whether the acts in China constituted trade secret misappropriation. The court rejected the argument that applying U.S. law to the overseas misappropriation violated the presumption of territoriality, noting that Congress must have intended that extraterritorial acts may trigger the Section 337 sanction because the statute is directed at unfair acts “in the importation of articles.” Further, the court argued that its application of Section 337 “does not purport to “sanction purely foreign conduct”; rather, it served to block importation to the United States resulting in domestic injury.

In applying U.S. law to evaluate misappropriation in China, the ITC brushed aside potential conflicts with Chinese law, noting that both China and the United States were bound by Article 39’s trade secrecy provisions in the TRIPS Agreement. “Theft was theft” went the implicit argument of the court, and thus choice of law concerns were seen as irrelevant. As we will see, however, state courts applying unfair competition law to software piracy overseas have taken a different tack: determining infringement based on the law of the country of origin (here China).

In allowing Section 337 to reach extraterritorial misappropriation of trade secrets, TianRui offers a powerful new enforcement tool at a time when the United States has experienced mounting anxiety over flagrant acts of industrial espionage and cybersecurity breaches originating

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51 661 F.3d 1322 (Fed. Cir. 2011).
52 While protection of trade secrets is normally a matter of state law, the ITC applied a “federal common law” standard of trade secret misappropriation.
54 Id.
overseas (and particularly from China). At the same time, in doing so, TianRui also potentially opens the door to claims based on overseas misconduct in other domains as well.

The scope of TianRui’s precedent as a license to bring unfair competition claims based on extraterritorial violations in domains other than trade secrecy is unclear, a point that was contested by the majority and dissent in TianRui; Part III will further explore such implications in domains beyond intellectual property. Ironically, however, although based on infringement of intellectual property, TianRui offers little comfort to holders of patents and copyrights. While holding that seizure under Section 337 was available for a foreign trade secret misappropriation, the court confirmed older cases holding that the unfair competition provision of Section 337 could not be applied to foreign patent infringement. The patent situation was distinguishable, the court reasoned, because of the longstanding rule against extraterritorial application of U.S. patent law. While the court did not mention copyright, a similar result would be almost certain because of an equally strong presumption against applying U.S. copyright law to acts that occur abroad. To pursue an analogous enforcement pathway to combat overseas patent and copyright infringement, U.S. right holders have turned to domestic sources of unfair competition law.

2. Federal Trade Commission Act (FTCA)

In November 2011, attorneys general from thirty-six states and three U.S. territories sent a letter to the commissioners of the Federal Trade Commission (FTC) urging them to use Section 5 of the FTCA to address the unfair competition they allege results from selling goods in the United States that were produced using unlicensed software. Section Five of the FTCA grants the Commission extremely broad powers to prohibit “unfair or deceptive acts or practices in or affecting commerce.” Congress intentionally drafted Section Five broadly to address new unfair trade practices that do not fall within conduct proscribed by the Sherman Act.

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55 See supra note 8 and accompanying text.
56 See infra note 319 and accompanying text.
57 See infra Part III-A.
58 TianRui Grp. Co., 661 F.3d at 1334–35.
59 Id.
60 Nat’l Ass’n of Att’y Gen., Letter to Federal Trade Commission Commissioners and the Director of the Bureau of Competition, Nov. 4, 2011.
and the Clayton Act.\textsuperscript{62} Despite its potential to be a significant force in shaping competition policy in the United States in antitrust matters and beyond, it remains a little-used provision that has played an insignificant role in competition policy.\textsuperscript{63} Nevertheless, commentators including former FTC chairman William Kovacic, have recently argued that the FTC should more vigorously employ Section 5 to address anti-competitive business practices.\textsuperscript{64} At least one commentator agrees with the attorneys general that it is a proper exercise of FTC power under Section Five to sanction manufacturers who avail themselves of unlicensed software and sell the resultant products in the U.S.\textsuperscript{65} However, to date the FTC has not indicated that it will initiate any such actions.


The attorneys general also suggested in their letter that state unfair competition statutes modeled after Section Five of the FTCA (so-called “mini-FTC Acts”) could be used to sanction this form of alleged unfair competition at the state level.\textsuperscript{66} A number of states, including New York, California, North Carolina, Massachusetts, Iowa, Tennessee, and Missouri have facially broad statutes prohibiting unfair business conduct.\textsuperscript{67} Some go further than the FTC Act by providing for a private right of action. New York’s “mini-FTC Act,” for example, declares unlawful the “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York state],” and grants the attorney general and private citizens the right to bring an action.\textsuperscript{68}

To date, five such state unfair competition laws have been invoked to address foreign IT theft. In 2012, the Massachusetts state attorney general brought an action under Massachusetts unfair competition law against a Thai seafood distributor, alleging that the Thai company used unlicensed software in the process of producing and distributing its products and thereby gained an “unfair cost advantage over rivals who play by the

\textsuperscript{62} See Kovacic & Winerman, \textit{supra} note 2.
\textsuperscript{63} Id.
\textsuperscript{65} Andrew F. Popper, \textit{Beneficiaries of Misconduct: A Direct Approach to IT Theft}, 17 \textit{MARQ. INTELL. PROP. L. REV.} 27, 36 (2013).
\textsuperscript{66} Nat’l Ass’n of Att’ys Gen., \textit{supra} note 60, at 2.
\textsuperscript{67} See POPPER, \textit{supra} note 65, at 14.
\textsuperscript{68} N.Y. Gen. Bus. Law § 349(a),(b),(h) (McKinney 2014).
rules.” In its settlement agreement with the attorney general, the distributor agreed to cease using unlicensed software and paid a $10,000 civil penalty. California recently brought similar actions against two apparel manufacturers accused of using unlicensed software in their production process, one from China and one from India. The case remains pending. In June 2013 the state attorney general of Tennessee announced the Business Software Alliance settled an unfair competition claim against a Thai tire manufacturer that used pirated software in its business operations and therefore unfairly competed with Tennessee tire manufacturers. In March 2014, the Oklahoma attorney general sued a Chinese petroleum equipment manufacturer, alleging the defendant sold its goods in the state at artificially low prices due to its use of pirated enterprise software. The case remains pending at the time of this writing.

Beyond their diverging sources of law, these state law actions differed from the Section 337 action in TianRui described above in one crucial aspect: as noted, the ITC in TianRui explicitly relied solely on U.S. law to assess the underlying “unfairness” of the conduct by the overseas Chinese defendant. By contrast, state unfair competition actions to date have been premised on a hybrid approach: “Unfairness” under U.S. state law hinges on a determination that the overseas conduct was itself unlawful under the intellectual property laws of the foreign state in which the manufacturing took place. In other words, rather than extraterritorially assert U.S.


70 Id.


74 See TianRui Grp. Co. v. Int’l Trade Comm’n, 661 F.3d 1322 (Fed. Cir. 2011). In doing so, the ITC brushed aside potential conflicts with Chinese law, noting that both China and the United States were bound by Article 39’s trade secrecy provisions in the TRIPS Agreement.
prescriptive authority, the state actions effectively import the foreign legal standard as the substantive law by which to evaluate the conduct at issue. This hybrid approach applies to the specialized unfair competition statutes described in the next sub-section as well.

4. Specialized State Unfair Competition Statutes

At least two states—Louisiana and Washington—have recently enacted specialized statutes that attempt to address the problem of foreign IT theft. Similar bills were presented to the legislatures in at least ten other states. These statutes focus on a particular form of unfair competition—the use of misappropriated technology—typically copyrighted software—in the production process.

a. Louisiana Statute

The Louisiana statute was the first of the specialized statutes to be enacted, adopted in 2010. It makes manufacturers (not retailers) of goods and suppliers of services liable for unfair competition occurs when (1) any misappropriated property is used in the manufacture of a product or “development” of a service, (2) that product or service is sold or offered for sale in the state, and (3) competing products or services are offered or sold in the state. An action may be brought by the state Attorney General or anyone, including a competitor, who “suffers any ascertainable loss of money or movable property” resulting from the unfair act. Available remedies include injunctions, civil penalties, and damages. In 2013, the Louisiana attorney general sent a demand letter to a Chinese barbeque grill manufacturer, alleging that the company used stolen IP to produce its

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76 That the statute makes use of any misappropriated property potentially actionable—not just intellectual property. For example, a legal consulting service that employed a stolen Westlaw password might fall within its terms.


78 Id. § 51:1409.

79 Id. § 51:1407.

80 Id.

81 Id. § 51:1409.
The company settled for more than $250,000 and promised to purchase licensed software.

b. Washington Statute

Washington’s 2011 specialized unfair competition statute makes it an act of unfair competition to sell in the state any article or product manufactured “using stolen or misappropriated information technology in its business operations.” The statute defines “stolen information technology” as “hardware or software . . . acquired, appropriated, or used without the authorization of the owner [or licensee] of the information technology . . . in violation of applicable law.” The statute targets manufacturers of products that utilize “stolen” information technology at any point in the product’s manufacture, distribution, marketing, or sale. It also targets “third parties,” including large retailers, who sell products manufactured using stolen information technology, have a contractual relationship with the manufacturer, and have annual revenue exceeding $50 million. As an unfair competition law, the statute empowers the Attorney General and competitors of the manufacturer to bring suit, but does not give a cause of action to the copyright owner.

Notice and cure provisions form a central feature of the statute. No action may be commenced until the copyright holder notifies the defendant in writing, identifies the stolen IP and the law allegedly violated, and avers the notice is given after a “reasonable and good faith investigation.” After the defendant receives notice, it has ninety days to rebut or cure by establishing that it did not use stolen information technology or that it has ceased using the stolen information technology.

83 See id.
88 Such an action, if permitted, would doubtless raise federal Copyright preemption issues. See Pager, Preempted. Additional exceptions built into the statute further narrow the cause of action. See Rev. Code Wash. § 19.330.010, 030, 080; Popper, supra note 65, at 57–59.
89 Id.
90 Id. Arguably, such provisions serve as an attempt at norm building that goes beyond deterrence. See infra Part III-G.
To date one action has been brought under the statute: a claim by the Washington State attorney general against Brazilian aircraft manufacturer Embraer in April 2013. Embraer, which was accused of using unlicensed Microsoft software, agreed to pay a $10 million penalty and to cease using pirated software.\footnote{Mitchell et al., Emerging Risks—Part II, supra note 75, at 7; Press Release, Washington State Office of the Attorney General, Washington’s New Unfair Competition Law Protects Local Company From Software Piracy (Apr. 3, 2013), available at http://www.atg.wa.gov/pressrelease.aspx?id=31143#.UtOBZmpXHk.}

5. Initial Appraisal

While use of unfair competition law in the contexts above is premised on a violation of intellectual property rights, these actions do not merely replicate the structure of an IP infringement claim. First, the plaintiff may be a different person. The Copyright Act affords rights to the copyright owner. The state unfair competition laws, by contrast, grant rights to manufacturers who produce goods that compete in the relevant state with those produced by the infringer. While the copyright owner may also be one of these competing manufacturers, ownership of the copyright is not relevant in determining who may sue under state law. Second—and crucially—redefining the underlying infringement as an action for unfair competition shifts the jurisdictional focus to the United States end market where the effects of the unfair competition are realized. In this way, the jurisdictional obstacles to extraterritorial enforcement within U.S. courts described above can be effectively circumvented.

In giving give rights to one party (a competitor) to police a harm caused to another (the IP right holder), unfair competition actions described above represent an unorthodox use of unfair competition law. For example, it is not at all clear that a court adjudicating a common-law unfair competition claim would find liability in a case where defendant, in delivering its goods or serviced, trespassed on a third party’s land, or violated a speed limit. In these sorts of cases, a court might well find that the availability of a trespass claim or criminal prosecution might be sufficient. However, given the challenges posed by direct enforcement overseas, the benefits afforded by securing jurisdiction in U.S. courts may well justify such unorthodox use of unfair competition law to support what might otherwise be seen as a redundant cause of action.

Yet, while such third party standing is unusual for harm caused to another commercial entity, it is common in cases where defendant causes
harm to consumers. For example, the enforcement actions under this approach are akin to the false advertising branch of unfair competition law. The core harm in a false advertising case is a wrong to consumers; namely, a misrepresentation that defendant made to those consumers. However, false advertising law gives a cause of action not to those consumers, but to competitors of the defendant. The rationale for providing a cause of action is that competitors are also harmed by the false statements, because misinformed consumers are more likely to buy from the defendant.\textsuperscript{92} That consumers might also have a claim for misrepresentation or breach of warranty is immaterial. Because the aggregate harm to a competitor is likely to be far greater than that suffered by any individual consumer, the competitor has a greater financial incentive to challenge the false advertisement, and thus the law deputizes competitors to act on the public’s behalf.

Similarly, the state unfair competition laws discussed in this article empower competitors to challenge a harm to another party—the right holder whose technology was misappropriated. As in false advertising, it is reasonable to think that competitors will be harmed by infringement in the manufacturing process. The defendant’s illicit use of technological inputs lowers its costs, as the defendant avoids paying the license fee required to use the technology. This ill-begotten savings may allow the defendant to reduce its prices, thereby gaining an undeserved edge over competing products. The “unfairness,” then, is the cost savings that results from infringement. Because the competitors are harmed by this savings, they have the right to sue.

Of course, the owner of intellectual property rights in the misappropriated technology may also have the right to sue. Moreover, unlike the false advertising context, the need for competitors to police the market on behalf of commercial rights holders seems less justifiable on its face. Unlike consumers, software companies and other information technology providers whose products are pirated by overseas manufacturers are likely to be well-resourced companies with ample incentive to enforce their rights directly. The problem, as we have seen, arises when manufacturing occurs in jurisdictions with weak enforcement norms, making direct remedies unavailing. Such enforcement gaps make the case for deputizing competitors more plausible: collateral enforcement through unfair competition law may offer the only recourse.

\textsuperscript{92} 1 McCarthy on Trademarks and Unfair Competition § 2:33 (4th ed.).
Nonetheless, the potential for conflicts arising from parallel actions must be considered, as must other jurisprudential concerns raised by this novel extension of unfair competition into the perilous shoals of extraterritorial jurisdiction. The promise of effective enforcement of global regulatory norms underscores the importance of resolving such concerns. Thus far, the application of state unfair competition law has proceeded in a fairly loose fashion, with state attorney generals espousing the same “theft is theft” rhetoric that the Federal Circuit implicitly adopted in TianRui. This Article argues for a more carefully calibrated approach, one that balances the need to regulate the integrity of state markets against the sovereignty of other countries and their legitimate concerns over extraterritorial enforcement.

C. Enforcement Challenges beyond Intellectual Property

This Article examines a new way of leveraging the U.S.’s control over access to its end market in order to curb “upstream” abuses that result from lack of regulation or enforcement in foreign jurisdictions. So far this Article has focused on intellectual property infringement as its paradigmatic case because this is the domain in which unfair competition laws have been enacted and enforcement actions undertaken so far. However, intellectual property represents but one of the many domains in which the shift to a globally integrated economy has challenged regulatory governance. Failures of local regulators and enforcement agencies to meaningfully deter abusive business practices are partly to blame for some of the most pressing global human rights and environmental challenges. These include sweatshop labor conditions and other violations of workplace health and safety standards, child soldiering, human trafficking, slavery, and bonded labor, “conflict minerals” and “blood diamonds,” and a host of environmental abuses.

93 Notably, the Washington state statute contains a provision requiring the court to dismiss the unfair competition action if the defendant has already been adjudged liable for misappropriating the technology. See Rev. Code Wash. § 19.330.060(1)(c).
97 See generally Desierto, supra note 97.
n countries where these offenses take place are often all too willing to turn a blind eye due to corruption or in the name of economic development. Unfair competition law provides a mechanism to bring global bad actors at the heart of such abuses within the jurisdiction of U.S. courts, backed by the threat of being frozen out of U.S. markets.

The unfair competition approach is far from the first strategy to leverage end market control in order to extraterritorially regulate conduct. Global ills are often tied to commerce; hence efforts to cure them have in recent decades sought to pressure powerful downstream players in developed markets to control the practices of their upstream suppliers abroad. Activists and regulators in the U.S. and other developed markets have employed two general tactics to this end: (1) private ordering and corporate self-monitoring, and (2) “private attorneys general,” that is, private individuals who sue to vindicate some public interest. Both revolve around the idea that if powerful buyers in developed end markets could be motivated to deal only with suppliers that adhere to global regulatory norms, then upstream suppliers would quickly fall in line. This premise has merit; many suppliers’ very existence depends on their retaining contracts with powerful lead firms in the value chain. As the following discussion details, however, these tactics have fallen far short of their goal of curbing regulatory abuses.

1. Corporate Self-Regulation and Private Ordering

Exposés of human rights and environmental abuses and tragedies involving unsafe working conditions have led to increased scrutiny of corporate misconduct. Global activists have mounted campaigns to rouse public opinion and shame multinationals. The primary response has been corporate self-regulation and private ordering initiatives.

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102 See Clifford & Greenhouse, supra note 94.
Over the past two decades, voluntary corporate conduct codes have proliferated, often modeled on “corporate social responsibility” standards developed by non-governmental organizations (NGOs). One such standard, the U.N. Global Compact, has been signed by more than 8,000 companies in 161 countries since its launch in 2000. To monitor compliance, industry actors have banded together to form independent monitoring and non-governmental certification organizations.

Governments in developed countries have sought to augment such private ordering through public regulations aimed at coercing companies to assume greater responsibility for their suppliers’ practices. In the U.S., for example, President Obama in 2012 issued an Executive Order compelling federal contractors to police their supply chains for practices associated with human trafficking. The Dodd-Frank Wall Street Reform and Consumer Protection Act invites public pressure by requiring that firms whose supply chains involve “conflict” minerals originating in Central Africa, to provide detailed information about their due diligence and sourcing. Similarly, the California Transparency in Supply Chains Act of 2010 requires major retailers and manufactures doing business in the state to publicly disclose their efforts to “eradicate slavery and human trafficking” from their supply chains. Globally, more than fifty countries have joined the voluntary Kimberley Process Certification Scheme. Established in 2003 to restrict diamonds sales that fund armed...
conflict, the Kimberley Process aims to block trade in conflict diamonds by incentivizing traders to police their supply chains.\(^\text{110}\)

While conduct codes, voluntary certification regimes, and other private ordering initiatives have yielded incremental gains,\(^\text{111}\) they have ultimately failed to make a serious dent in the abusive practices described at the outset of this Section. The fatal flaw in these initiatives is their voluntary nature and lack of enforcement.\(^\text{112}\) Such handicaps severely limit the potential for corporate conduct codes to curb abuses. Compliance is often inadequately monitored and both suppliers and multinationals have learned how to game the system.\(^\text{113}\) All too often the conduct codes become whitewash (or “greenwash” in the environmental context),\(^\text{114}\) enhancing firms’ image at little cost while failing to produce meaningful improvements.\(^\text{115}\)

Even scrupulous firms have difficulty holding their suppliers to the standards enshrined in their own codes. Effective inspections are costly, time-consuming, and difficult. While their quantity has increased markedly in recent years, factory bosses continue to cheat the system with ease.\(^\text{116}\) Perhaps most importantly, many multinationals’ own economic incentives effectively doom corporate social responsibility standards to failure. They impose tight deadlines and razor-thin profit margins on suppliers, often giving suppliers little choice but to cut corners on labor and environmental standards if they wish to remain profitable.\(^\text{117}\)

### 2. Private Attorneys General

Private individuals have sought to force multinational companies and their suppliers to observe global standards by leveraging existing U.S. state and federal laws. As with the private ordering initiatives described above, there have been isolated successes here but these efforts have failed to yield lasting change.\(^\text{118}\) One celebrated success occurred in *Kasky v. Nike*, in which an activist sued the sportswear company in California state court, invoking the false advertising provisions of the state’s unfair

\(^{110}\) See id. at 365–66.

\(^{111}\) See, e.g., Murphy, supra note 103, at 420.

\(^{112}\) See Desierto, supra note 97, at 364–65.

\(^{113}\) See Parella, supra note 99, at 771.


\(^{115}\) See Murphy, supra note 103, at 421–22.

\(^{116}\) See, e.g., Clifford & Greenhouse, supra note 94; Parella, supra note 99, at 774–79.

\(^{117}\) See Parella, supra note 99, at 766–67.

\(^{118}\) See Bang, *Casting a Wide Net*, supra note 99, at 235.
The plaintiff alleged Nike’s public denials that it used sweatshop labor contained actionable false and misleading statements about its suppliers’ working conditions. After the California Supreme Court reversed Nike victories in the lower courts, Nike settled by agreeing to donate $1.5 million to causes involved in monitoring labor conditions.

Despite this apparent success, not a single case seeking to enforce statements on corporate social responsibility through false advertising law has been brought in the U.S. since Kasky. Commentators have noted that Kasky was a highly fact-dependent decision that involved controversial and unsettled questions concerning commercial speech doctrine. First Amendment jurisprudence has arguably shifted in a more corporate-friendly direction since Kasky was decided in 2003. Moreover, corporate communication teams have undoubtedly taken Kasky’s example to heart and now exercise greater care in issuing public statements.

Actions based on contract theories have enjoyed even less success. In 2005, for example, employees of Wal-Mart’s foreign suppliers filed a class action suit in California alleging that Wal-Mart neglected to enforce its suppliers’ contractual commitments to adhere to Wal-Mart’s conduct code. The Ninth Circuit dismissed all of the plaintiffs’ claims, in part because Wal-Mart’s written commitment to “undertake affirmative measures, such as on-site inspection of production facilities, [and] to

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120 Id. at 302.
121 Id. at 319. The key issue on appeal was whether Nike’s public rebuttals were “commercial” speech accorded a lesser degree of First Amendment protection. The California Supreme Court held that “when a corporation, to maintain and increase its sales and profits, makes public statements defending its labor practices and factory working conditions, those public statements are commercial speech that may be regulated to prevent consumer deception.” Id. at 319.
125 See Jennifer L. Pomeranz, Are We Ready for the Next Kasky?, 83 U. CIN. L. REV. 203, 204, 207–08 (2014) (concluding “[c]orporate communications are the most protected that they have been in American history”).
126 See Bang, Casting a Wide Net, supra note 99, at 238–39.
implement and monitor said standards” did not actually create an enforceable duty to monitor the suppliers.128 A grab-bag of other tort and contract-based liability theories have been equally ineffective in large part because multinational corporate defendants usually succeed in characterizing their suppliers as independent contractors whom they have no duty or ability to control, thereby precluding liability.129 Meanwhile, direct actions against suppliers and other foreign producers are precluded by U.S. jurisdictional limits analogous to those discussed in the context of IP law above.130

Alien Tort Statute (ATS) claims, until recently, offered the means to circumvent such jurisdictional constraints. By expressly creating jurisdiction in U.S. courts, the ATS appeared to offer a potent weapon against foreign malfeasance. Specifically, it provides that “[t]he district courts [of the United States] shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”131 Since 1980, courts had interpreted ATS to allow foreign citizens to seek remedies in U.S. courts for human rights abuses and other international law violations committed outside the United States.132 In Kiobel v. Royal Dutch Petroleum Co., however, the Supreme Court put an end to the use of ATS to redress wrongful conduct abroad by effectively finding that ATS only reaches tortious conduct on U.S. territory.133 Expressing concerns about “the danger of unwarranted judicial interference in the conduct of foreign policy,”134 the Court justified its ruling by invoking the presumption against extraterritorial application of U.S. statutes.135 The ruling thus abruptly closed what had long seemed the most promising avenue for private actions against corporate misconduct overseas.

128 Wal-Mart, 572 F.3d at 681.
130 See id; supra notes 39–49 and accompanying text. Moreover, even if courts could exercise jurisdiction, plaintiffs with suitable standing to file a complaint may be unavailing. NGOs, for example, typically lack standing, and foreign employees are often afraid of employer reprisals.
133 133 S.Ct. 1659 (2013).
134 Id. at 1664.
135 Id. at 1669.
3. Scholarly Proposals

Legal scholars in diverse fields have targeted the transnational supply chain as the vehicle for remedying regulatory failure abroad. Most proposals seek to perfect corporate self-regulation, envisioning that state actors or civil society (or some combination thereof) will serve as frontline agents of change. Kishanthi Parella, for example, argues that non-state actors in developed countries should become the primary “regulators” by pressuring multinationals to police their suppliers, while the state plays the role of facilitator by remedying information gaps through mandatory disclosure laws.136 Environmental law scholar Michael Vandenbergh has stressed the importance of transnational buyers contractually imposing obligations on upstream suppliers in markets with poor environmental enforcement.137 Vandenbergh envisions consumer pressure in the United States, instigated by mandatory disclosure laws, as the key catalyst for change. Galit Sarfaty encourages expanded use of securities regulations to compel corporations to disclose and root out human rights abuses in their supply chains.138 Like others, she looks to social sanctions—“reputational damage that can affect a company’s share price” or spur opposition within local communities—as a primary motivating factor.139 Annette Burkeen argues that enforcement of international law labor norms through supply-chain contracts would improve global labor conditions.140 Others have pinned their hopes on fair trade certification as the means to encourage consumer pressure for compliance with global labor standards.141

All of these works, and many more related ones, advocate different tactics premised on the same idea: that U.S. leverage over global supply chains holds the key to addressing malfeasance abroad. These works are generally written for expert audiences within discrete academic silos—environmentalists appeal to environmentalists, human rights experts to human rights experts, labor lawyers to labor lawyers, and so on. Few look at this issue from a holistic perspective. Furthermore, such proposals tend to leave “enforcement” to concerned citizens, NGOs, and other members

136 See generally id.
138 Sarfaty, supra note 103, at 115–18.
139 Id. at 124.
of civil society, even though such mechanisms for informal sanction have proven woefully inadequate. Still, the torrent of scholarship in this area underscores the strong demand for a U.S.-based approach to combat overseas violations, if only a viable strategy could be devised.

The basic flaw in all of these efforts—from voluntary corporate social responsibility codes to private attorneys general to the scholarly proposals noted above—is that they lack legal backbone and effective means of enforcement. Powerful incentives exist for corporations and their contractors to evade voluntary conduct codes, and they do so all-too-easily with little consequence. Actions by private attorneys general are rebuffed by multinational corporations with sophisticated counsel, who can invoke a variety of defenses to deflect liability. U.S. courts remain reluctant to exercise direct jurisdiction over conduct that occurs abroad. Lastly, proposals that rely on “enforcement” in the court of public opinion founder on consumer indifference. While consumers may favor human rights standards in the abstract, they are often either unwilling to pay premium prices for “fair trade” products or are too ill-informed to care.142 Meanwhile, corporations deflect adverse publicity by instituting new conduct codes, leading to a new generation of gamesmanship and workarounds without addressing the underlying causes of misconduct.

A few commentators have sought more direct legal interventions. Naomi Jiyoung Bang, for example, proposes an economic realities test that would enable plaintiffs to demonstrate that U.S.-based lead firms are joint employers of their contractors’ workforce, making them liable for human rights abuses.143 Diane Desierto argues that state regulation holds the key to disincentivizing the inscription of child soldiers in war-torn countries. She calls on U.S. states to unilaterally ban goods resulting from child soldier labor, thus requiring U.S. companies to police their suppliers.144 These proposals, and a handful of others, recognize that imposing direct liability on multinational corporations would force them to take regulatory compliance seriously throughout their supply chain.145 Yet, suitable

142 A plethora of competing certification regimes with conflicting agendas and standards does not help matters, nor does the lack of transparency and accountability under which such regimes operate. See Margaret Chon, Marks of Rectitude, 77 FORDHAM L. REV. 101, 106-109 (2009).
143 Bang, Justice for Victims, supra note 129, at 1083–84.
144 Desierto, supra note 97, at 414. While Desierto’s proposal does not address enforcement, presumably state laws banning such goods would incorporate enforcement provisions and penalties.
145 See Mark Anner et. al., Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting
vehicles to achieve such enforcement have thus far been lacking. As we saw, existing avenues for private attorney general suits have been curtailed. Bang’s proposal for an expansion of agency liability would have domestic implications, and corporations would lobby vociferously against it.146 Desierto’s proposal, for its part, requires state legislatures to act and faces an equally long and difficult road.

By contrast, use of unfair competition to target regulatory violations by foreign manufacturers requires no new legislation and could be pursued at a variety of levels. It provides a wide-ranging tool to reach overseas misconduct that affects sales in the U.S. market. Moreover, rather than relying NGOs and other chronically underfunded actors, this strategy enlists a powerful new set of agents in the service of global enforcement: commercial competitors who have a financial interest in taking on their overseas rivals.

Unfair competition suits could prove to be a game-changer. Empowering competitors to challenge regulatory shortcuts could provide a long-sought mechanism for accountability. Moreover, by providing a vehicle for U.S. courts to assert jurisdiction and a meaningful target for remedial action—sales to U.S. markets—unfair competition law could provide genuine teeth to such enforcement. Such efforts could have powerful repercussions throughout the global supply chain. As we note in Part III-G, below, the key to changing the behavior of suppliers is to change the system of norms in which they operate from one of non-compliance to one of compliance. Unlike the tactics employed to date, the unfair competition approach has the potential to produce the kind of sustained enforcement necessary not just to achieve a victory or two, but to systematically alter compliance norms across entire industries.

There are, of course, potential downsides to global enforcement through unfair competition law. Allowed to operate unfettered, it could provide a tool for domestic firms to harass overseas competitors and gain a competitive advantage of their own by, for example, seizing on trivial infractions in the competitor’s home market as grounds to enjoin importation of its goods. The approach also raises familiar concerns that

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146 Bang’s proposal may hold the greatest promise for claims based on specific federal statutes involving human trafficking and labor abuses because these statutes have been applied expansively. See id. at 1092-96.
accompany any unilateral application of national laws to extraterritorial effect. Coming from the U.S., in particular, it may rekindle perceptions of imperialist hubris and American unilateralism. Moreover, allowing private lawsuits to flout territorial norms of international law raises the concern that animated the Supreme Court’s decision to limit ATS suits: the specter of undue interference in the conduct of foreign policy.¹⁴⁷ The danger is especially acute if state unfair competition actions, uncoordinated with national foreign policy, become the primary vehicle for redress. If U.S. unilateralism invites retaliation and imitation, it could usher in a global unfair competition “arms race” that could cause lasting damage.

Before getting to these prudential questions of global regulatory policy, a more basic question must be addressed: is the extraterritorial application of U.S. unfair competition law legally justified? As we will see, this approach faces several legal hurdles. In analyzing them, the positive law analysis cannot be entirely divorced from the normative questions regarding global policy.

II. RESTRAINTS ON EXTRATERRITORIAL REGULATION OF INFRINGEMENT

A. Overview of Potential Legal Challenges

The legality of treating foreign infringement as domestic unfair competition is open to challenge under a variety of legal doctrines. This Article focuses on objections related to extra-territoriality, leaving detailed analysis of other potential objections to a pair of forthcoming companion articles.¹⁴⁸ However, some of the considerations addressed here have implications for these other analyses, and vice versa. Accordingly, it is worth briefly considering the full range of legal challenges in order to situate the present analysis within this larger context.

In addition to extraterritoriality, the primary basis for international challenges to the unfair competition actions would arise under the discrimination provisions of world trade law. Discrimination based on national origin could be challenged under both the General Agreement on Trade and Tariffs (GATT) and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). It is notable that all of the actions to date

¹⁴⁷ See supra note 79 and accompanying text.
have been filed against foreign infringers, and there is reason to think that such targeting is far from accidental.\textsuperscript{149} Such discrimination against foreign nationals opens the door to a national treatment challenge under GATT and TRIPS.\textsuperscript{150} Moreover, as we will see, from the standpoint of extraterritoriality, there are sound reasons to discriminate \textit{between} foreign countries, either explicitly or implicitly targeting states where domestic IP enforcement is lacking.\textsuperscript{151} Such discrimination could lead to a most-favored-nation challenge under GATT and TRIPS.\textsuperscript{152} The question then would be whether the U.S. could defend its differential treatment as legally justified.\textsuperscript{153}

In addition to these challenges grounded in world trade law, the state unfair competition action would face an additional set of objections based on domestic federalism concerns.\textsuperscript{154} These concerns are less relevant to

\textsuperscript{149} See Pager & Priest, supra note 148 (discussing legislative history and comments from state attorney generals suggesting anti-foreigner targeting is intentional); Pager, Preempted, supra note 1489 (arguing that states are federally preempted from bringing unfair competition claims against domestic infringers).

\textsuperscript{150} See GATT, Article III; TRIPS Article 3. One might question, however, whether TRIPS would cover these claims in so far as they are grounded in unfair competition law, not intellectual property per se. See Pager & Priest, supra note 148 (discussing two theories supporting an affirmative answer).

\textsuperscript{151} See infra Part III-D (discussing merits of targeting rogue states or requiring proof of exhaustion of direct remedies).

\textsuperscript{152} See GATT, Article I; TRIPS Article 4.

\textsuperscript{153} The United States would seem to have a decent shot at mounting such a defense. See Pager & Priest, supra note 148. In the case of GATT, the United States would justify any \textit{prima facie} discrimination under the General Exception provision of Article XX(d), which enable such differentiation where necessary to enforce an intellectual property right or other GATT-compliant law. TRIPS does not provide for such explicit exceptions. However, some authority suggests that evidence of \textit{prima facie} discrimination can be overcome through objective justification. See Graeme Dinwoodie & Rochelle Dreyfuss, Diversifying Without Discriminating: Complying with the Mandates of the TRIPS Agreement, 13 MICH. TELECOMM. & TECH. L. REV. 445, 450 (2007); Report of WTO Dispute Settlement Panel, Canada-Patent Protection of Pharmaceutical Products, P7.94, WT/DS114/R (Mar. 17, 2000) (defining discrimination as “a normative term, pejorative in connotation, referring to . . . unjustified imposition of differentially disadvantageous treatment.”) (emphasis added); see also id. at ¶ 7.92 (“Article 27 does not prohibit bona fide exemptions to deal with problems that may exist only in certain product areas”).

\textsuperscript{154} First, state enforcement of intellectual property rights may be preempted by federal intellectual property law. Indeed, this would almost certainly be the case where states to bring such actions against domestic infringers, but preemption may not apply to against infringement overseas. See Pager, Preempted, supra note 148. Such differentially disadvantageous treatment of foreign nationals would set up a clear WTO discrimination claim based on national treatment. See Pager & Priest, supra note 148. Second, state could face challenges based on dormant foreign affairs doctrine, which forbids states
the international analysis pursued here in so far as any defects could be remedied by pursuing analogous claims under federal law. Indeed, the ITC has already begun to do so in TianRui in the context of trade secrecy. As we saw, however, dicta in TianRui, appears to preclude ITC unfair competition actions based on infringement of U.S. copyrights or patents. Accordingly, more aggressive federal initiatives in the unfair competition domain may be called for.

B. Threshold Discussion of Extraterritoriality

With this backdrop in mind, we turn now to the question of whether unfair competition actions based on overseas infringement violate territoriality norms in international law. Historically, territoriality limits were strictly observed. The territoriality principle flows directly from the notion of national sovereignty, which gives nations the right to rule their own territory without external interference. Because each country’s national sovereignty was deemed absolute within its own borders, asserting jurisdiction extraterritorially was regarded as an intrusion upon the sovereign power of neighboring states.

As globalization obliged nation states to cope with issues of transnational scope, a system of autonomous, territorially-bounded national sovereigns proved increasingly untenable. International jurists came to accept the idea that countries may have legitimate grounds to regulate conduct beyond their borders. A driving force behind such expansion of national jurisdiction was the so-called “effects doctrine,” by

_155_ Because federal constraints only apply to state law actions, they do not affect the ITC’s unfair competition authority under section 337, nor would they constrain the FTC from acting under section five.

_156_ Several options exist to expand federal involvement: (1) the ITC could hear unfair competition claims based on infringement of foreign IP rights; (2) the FTC could invoke its section five authority; or (3) Congress could enact additional means to pursue such actions, for example, providing a right of action for private attorney generals.


_159_ Parrish, _The Effects Test, supra_ note 157, at 1465-67.
which countries asserted authority over conduct that took place outside the national territory but whose effects were felt within it.\footnote{Id. at 1471-76.} As we saw, such downstream effects have been invoked to justify the extraterritorial nature of the unfair competition actions which target foreign infringement based on alleged harm to United States end markets.

While some have welcomed the expanded authority that the effects doctrine enabled, other fret that exercising extraterritorial jurisdiction on this basis is unprincipled, undemocratic, and needlessly provocative of conflicts with foreign states.\footnote{Id. at 1479-92.} To minimize such downside risks, international jurists have devised various constraints to keep effects-based jurisdiction within acceptable limits. We explore such doctrinal constraints in Parts II-C & II-D, \textit{infra}, and address the larger normative debate surrounding extraterritorial regulation in Part III-A, \textit{infra}. However, before undertaking this analysis, we first address a threshold issue: namely, the extent to which such use of U.S. unfair competition law is, in fact, extraterritorial in nature.

As we saw, the TianRui majority’s stoutly denied that its interpretation of Section 337 “g[ave the ITC] the authority to ‘police Chinese business practices.’”\footnote{661 F.3d at 1330.} Rather, the majority argued that Section 337 “only sets the condition under which products may be imported \textit{into the United States}.”\footnote{Id. (emphasis added)} Likewise, the state unfair competition claims were premised on sales in the U.S. \textit{domestic} market. What makes such regulation of internal markets extraterritorial?

The answer is that, the protestations of the TianRui majority aside, such actions effectively use U.S. domestic unfair competition law to hold defendants accountable for infringing conduct that takes place overseas. Doing so may not be \textit{wholly} extraterritorial in so far as sales in the domestic market are also relevant. Yet, the hybrid nature of these actions, incorporating \textit{both} domestic and international elements, does not alter their fundamentally extraterritorial nature. After all, at its core, the “unfairness” of the domestic sales is entirely derivative from and contingent upon proof of a legal violation overseas. Specifically, in the cases to date, the predicate violation alleged has been infringement of IP rights that took place exclusively on foreign soil.\footnote{Moreover, in the state law cases, the IP rights at issue arose under the intellectual property law of the foreign source country.}
Making U.S. courts the arbiters of such overseas conduct is therefore tantamount to exercising extraterritorial jurisdiction. As the Supreme Court has commented in a different context, “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States.” The Court further cautioned that the presumption against “extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.”

Accordingly, the extraterritorial effect of the unfair competition actions cannot be denied. It remains to clarify what kind of extraterritorial jurisdiction is being exercised. International law distinguishes the jurisdiction to prescribe rules regulating foreign conduct (“prescriptive jurisdiction”) from jurisdiction to subject foreign parties to judicial process (“adjudicative jurisdiction”). In general, a more restrictive standard applies to extraterritorial exercises of prescriptive jurisdiction than to exercises of adjudicative jurisdiction.

In TianRui, the application of Section 337 to the Chinese misappropriation represented a clear exercise of prescriptive jurisdiction because U.S. trade secret law supplied the substantive standard by which unfairness of the Chinese conduct was evaluated. By contrast, defenders of the state unfair competition actions can argue that instead of imposing U.S. legal standards on conduct that takes place overseas, the state actions are premised on infringement of the foreign jurisdiction’s own IP laws. That such infringement would be established in a U.S. court represents an exercise of adjudicative jurisdiction. However, the application of foreign

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167 The presumption at issue in Morrison is a domestic rule of statutory interpretation under which federal statutes are presumed to lack extraterritorial effect. Yet, the presumption itself is informed by customary norms of international law militating against extraterritoriality. Id.
169 Compare Restatement (Third) of Foreign Relations Law § 403, with id. at § 421. The requirements for adjudicative jurisdiction essentially track the “minimum contacts” requirement for personal jurisdiction. See id. at § 421, Reporter’s Notes 1-2, 7. By contrast, legislating extraterritorially requires additional justification under international law beyond mere constitutional due process. See id. at § 402.
IP law arguably distinguishes these actions from assertions of prescriptive jurisdiction whereby which domestic standards are imposed overseas unilaterally.

That said, exercising U.S. *adjudicative* jurisdiction over conduct taking place in China governed by Chinese law can be problematic in of itself. The sovereign prerogative of the foreign state (here China) to enforce its own laws is potentially offended where such actions take place in U.S. courts employing different evidentiary rules (including liberal discovery), remedies, and procedures than those found overseas. The objectionable nature of U.S. jurisdiction is particularly troubling in the context of intellectual property rights, which have traditionally been considered non-transitory (local) actions. For this reason, U.S. courts generally decline to hear cases arising under foreign intellectual property law.\(^\text{170}\)

Furthermore, the hybrid nature of the state law unfair competition actions goes beyond mere adjudication of a foreign law claim. Rather than applying Chinese law as such in a direct infringement action, these cases import the foreign legal standard as one element in an unfair competition claim that focuses on (non-infringing) sales taking place in the United States. This amalgamation of U.S. and foreign law elements arguably entails a degree of prescriptive jurisdiction. In particular, the U.S. actions are likely brought by a different plaintiff (competitor vs. right holder) and implicate a different set of remedies. Therefore, it seems reasonable to hold such actions to the more restrictive standards for exercising prescriptive jurisdiction abroad.

Accordingly, having established the extraterritorial implications of reaching foreign infringement through U.S. unfair competition law, we turn now to the question of whether such actions can be justified: first in the specific realm of intellectual property law and then more generally under customary international law.

### C. Restraints on Extraterritoriality in Intellectual Property Law

Before examining the extent to which extraterritorial jurisdiction is compatible with global intellectual property law, we should address a threshold question: to what extent are unfair competition actions governed by this body of law? Clearly, some forms of unfair competition are embraced explicitly by both the Paris Convention and TRIPS Agreement.

In particular, acts of commercial deception or dishonesty and misappropriation of trade secrets are unambiguously included. A more difficult question concerns the applicability of international IP law to unfair competition actions premised purely on patent or copyright infringement, without accompanying acts of dishonesty. The Paris Convention defines unfair competition broadly as “[a]ny act of competition contrary to honest practices.” Yet, it is unlikely that this provision was meant to encompass copyright and patent infringement simpliciter, or else the rest of the Paris Convention and the entire Berne Convention would be rendered superfluous. At the same time, other provisions of those treaties and of TRIPS clearly do govern copyright and patent infringement. Arguably, therefore, an unfair competition action that seeks to collaterally enforce such rights against infringers does fall within their remit. Accordingly, we turn then to the question of whether such treaties preclude the extraterritorial application of unfair competition law.

The principle of territoriality remains deeply entrenched in the global intellectual property regime. Substantive standards have been harmonized through treaties, and procedural mechanisms instituted to facilitate the acquisition of rights across multiple jurisdictions. Yet, the rights themselves remain stubbornly national. A system of reciprocal protection ensures that the same innovation receives separate, but parallel rights in each jurisdiction. IP rights are thus territorially bounded by design, with each nation’s jurisdiction beginning and ending at its borders.

Locating affirmative restraints on extraterritorial jurisdiction in the positive law of international intellectual property, however, presents a challenge. Part of the problem is that territoriality is largely an unspoken principle that permeates the international IP system, but which is rarely

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171 See Paris Convention, Art. 10bis, TRIPS Agreement, Art. 39.
172 See Paris Convention, Art. 10bis(2).
173 See, e.g. TRIPS Agreement, Art. 1 (2) (defining intellectual property as “all categories of intellectual property that are the subject of Sections 1 through 7 of Part II”—including copyrights and patents).
175 See the Patent Cooperation Treaty, June 19, 1970, 1160 U.N.T.S. 231; Madrid Agreement,
55 TRADEMARK REP. 758 (1965). Copyright law, for its part, automatically accords worldwide reciprocal protection to works of authorship without need for such formalities. Berne Convention, Art. 5.
176 Dinwoodie, supra note 174, at 766-67.
explicitly articulated. The treaties clearly operate on the assumption that each signatory state will regulate intellectual property within its own borders. When one moves from the abstract to the specific, however, the application of this general principle becomes less clear-cut.

None of the leading international intellectual property treaties specifically addresses the question of territorial limits to state authority. The Paris and Berne Convention both stipulate that national IP rights should function independently of rights arising under the laws of other countries. Yet, independence of rights just means that the treatment of such rights should not be interlinked. Such provisions do not address the possibility that national rights could extend to conduct beyond national boundaries. Still less do they articulate explicit territorial limitations on the scope or adjudication of such rights.

In the United States, territorial limits have historically been emphasized through the presumption against extraterritorial application of U.S. law. This presumption assumes particular force in IP matters because U.S. courts are conscious that intellectual property rights function within a global system in which other nations have legitimate and often superior interests outside U.S. territory. Judge Moore clearly saw

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177 See id. at 725-26 (criticizing “unquestioning incantation of the principle of territoriality”).
178 See, e.g. Berne Convention § 5(2) (providing that “protection shall be governed exclusively by the laws of the country where protection is claimed”); Paris Convention, Art. 6 (“The conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation.”).
179 The closest thing to an explicit endorsement of territoriality came with the 2005 Doha Protocol, which added a new Article 31bis to TRIPS expanding the existing provisions for compulsory licenses to allow for parallel importation of pharmaceuticals pursuant to such licenses. See General Council Decision, WT/L/641, 8 December 2005. Paragraph three of the new protocol stipulates that “[i]t is understood that this will not prejudice the territorial nature of the patent rights in question.” However, the Protocol does not spell out what might entail “prejudice” to territoriality and by its own terms applies only to patent rights in the compulsory licensing context.
180 Paris Convention Article § 4bis, 6(3); Berne Convention § 5(2).
181 For example, the validity of a right in one jurisdiction should not hinge upon its grant or denial elsewhere.
182 See Dinwoodie, supra note 174, at 756-57 (criticizing Voda for “over-reading” independence of rights). Some courts and commentators attempt to imply territoriality out of the national treatment principle, although the logic of doing so seems strained. Id. at 716-17.
183 Subafilms, Ltd. v. MGM-Pathe Commc’n. Co., 24 F.3d 1088, 1097 (9th Cir. 1994); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 453-56 (2007).
184 Subafilms, 24 F.3d at 1097-98, Microsoft, 550 U.S. at 455.
TianRui’s extraterritorial extension of trade secret law as offending these principles. Dissenting in that case, she argued adamantly that “United States trade secret law simply does not extend to acts occurring entirely in China. We have no right to police Chinese business practices.”

In describing the existing reach of U.S. trade secret law, Judge Moore may have been correct. Yet, her second sentence implies that it would be wrong to extend the law to reach such extraterritorial conduct. For this broader assertion, Judge Moore cannot rely on the presumption against extraterritoriality, which is just an interpretative rule. If Congress wants to extend U.S. law overseas and says so clearly, the presumption disappears.

Indeed, we have already seen an example of such extraterritorial extension: Sections 271(g) and 337 allow patent holders to block importation of products made overseas using processes covered by a U.S. patent. The United States was hardly the first to adopt such an extraterritorial rule for products-of-patented processes. The rule dates back to a 1906 British case that other countries gradually followed (the United States being somewhat of a laggard). Far from violating the territorial limits enshrined in international IP law, such extraterritorial patent rights are now affirmatively mandated by international treaties.

In using importation into the U.S. market as the jurisdictional hook to regulate foreign conduct, the structure of the process patent right closely parallels that of the unfair competition actions considered here. In both cases, domestic sales of the end product are tied to intellectual property used overseas during the manufacturing process. Does one precedent therefore legitimate the other?

On one hand, the specific rationale underlying the products-of-patented-process rule does not readily extend to other contexts. The process patent reflects the perceptions that the most viable basis for exploiting a patented process often involves selling the end products that result. If a manufacturer could evade the exclusive rights provided by a territorially-bounded patent by moving production processes offshore while remaining free to sell the (unprotected) products in the territorial

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185 661 F.3d at 1338.
188 TRIPS art. 28(1)(b); Paris Convention, Article 5quater.
market, this would effectively undermine the market exclusivity that patent law seeks to furnish. Such a problem is most salient in the patent context where the enabling public disclosures required for the patent to be granted readily facilitate foreign appropriation.

On the other hand, at a broader remove, one could argue both rules rely on effect-based rationales: Just as the process patent rule targets extraterritorial usage of proprietary technology in order to prevent undesirable effects on the downstream (territorial) market, so too, the unfair competition actions target extraterritorial infringement to prevent a different effect in the end market: namely, harm to competitors. Where piracy in the manufacturing process confers a significant competitive advantage in the end market, importing states arguably have a legitimate ground to remedy such market distortions.

Indeed, the extraterritorial intrusion of the infringement-as-unfair competition cases is arguably less objectionable than that of the products-of-patented-process rule because, in the case of the latter, the process in question need not infringe any patent rights in the foreign jurisdiction where it is being used. All that is required is that the process be covered by a U.S. patent (which otherwise only governs conduct occurring in the United States). By contrast, the state version of unfair competition actions hinge on a finding that the overseas production process infringes intellectual property rights recognized under the foreign jurisdiction’s own laws. And while TianRui did apply U.S. trade secret law to the Chinese misappropriation, the court defended its ruling based on a perceived congruence between U.S. and Chinese law, both of which (presumably) reflected the harmonized standard established in Article 39 of the TRIPS Agreement.

Defenders of territoriality might argue that the existence of an explicit exception for patented processes in the IP treaties underscores the foundational nature of territoriality as a default norm, invoking the canon *expressio unius, exclusio alterius*. The scope of the unfair competition

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190 Market exclusivity is the carrot that patent law dangles as an incentive to induce innovation. *See* Graham v. John Deere Co, 383 U.S. 1, 9 (1966).

191 By contrast, copyright law does require disclosures, nor does it confer exclusive rights over methods or facts, *see* 17 U.S.C. sect. 102(b). And trade secrets remain secret, by definition, thereby inhibiting competitors from setting up shop off-shore to free-ride with impunity.

192 *TianRui*, 661 F.3d at 1332-33 (“TianRui failed to identify a conflict between the principles of misappropriation that the Commission applied and Chinese trade secret law.”).
actions is potentially much broader than the patent process rule: It would cover not only products of patented processes, but also imported goods made using patented products, copyrighted processes, trade secrets, and potentially much else. Arguably, the treaties do not contemplate such wholesale circumvention of territorial limits.

Parallels between patent and unfair competition actions have also been used to argue against the need for further inroads on territoriality. In *TianRui*, Judge Moore noted that her sympathy for the U.S. complainant, Amsted, in the face of the Chinese defendant’s blatant misconduct was “somewhat muted since Amsted had a ready-made solution to its problem: obtain a process patent.”

Judge Moore was correct in the context of that case. Yet, as noted, the rights provided under the product-of-patented-process rule fall well short of the broad range of infringing conduct that could be reached using unfair competition law. Accordingly, the former will rarely suffice as an alternative for the latter. Furthermore, the mere fact that the product-of-patented-process patent rule is instantiated in a treaty should not foreclose the opportunity to develop new rules by analogy should sufficiently compelling circumstances present themselves. Indeed, as a formal matter, global intellectual property law does more than permit extraterritorial extension of the process patent rule, it requires it. Accordingly, the only *expressio unius* conclusion one can draw is that extraterritorial rights are not obligatory elsewhere. The absence of such an affirmative obligation, however, does not preclude national sovereigns from voluntarily extending their laws.

Indeed, the process patent rule is hardly the only departure from territorial limits on IP rights. Global intellectual property norms continue to evolve to reflect the needs and challenges of the modern age. As Graeme Dinwoodie has noted, the result has been a gradual encroachment on territorial limits on a variety of fronts, with courts willing to consider

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193 The product-of-patented processes rule is also limited to “direct” products of the process under TRIPS, or products that are not “materially changed” or “trivial components” under section 271(g). By contrast, the unfair competition actions would apply even to ancillary technology such as software used for “back office” functions that are peripheral to the manufacturing process.

194 *Id.* at 1343.

195 *See supra* notes 36–38 and accompanying text.
the exercise of extraterritorial IP jurisdiction, both prescriptive and adjudicative, in particular cases.\footnote{See Dinwoodie, \textit{supra} note 174, at 737-744, 795-97. Such departures occur most often in copyright cases. \textit{Id.} at 785. Courts also engage in implicitly extraterritorial extensions of IP norms that are not labeled as such. \textit{Id.} at 726-28.}

Accordingly, neither international IP treaties nor U.S. foreign relations law offers any absolute impediment to extraterritorial use of unfair competition. To the extent that restraints on extraterritoriality remain, they are couched in prudential terms, based on such inherently malleable concepts as comity, avoidance of conflicts, respect for other countries’ sovereignty, \textit{forum non conveniens}, and customary international law.

The question, therefore, is not whether extraterritorial jurisdiction over intellectual property is permissible, but rather, under what conditions is such jurisdiction reasonable, fair, and duly respectful of other countries. Here, a helpful analogy comes from trademark law. Federal courts have constructed a variety of tests to determine when extraterritorial application of the Lanham Act is appropriate. “[R]ather than mechanical doctrinal formulations,” these tests require “careful factual analysis.”\footnote{Dinwoodie, \textit{supra} note 174, at 780.} They generally combine two essential features: First, they seek to establish that the defendant’s foreign conduct “had a substantial effect on U.S. commerce,”\footnote{See Steinberg & Flanagan, \textit{supra} note 186, at 847-48 (summarizing various tests used by different circuits).} thus establishing an adequate foundation to justify extraterritorial assertion of U.S. law. Second, the circuit tests generally incorporate some consideration of comity, avoidance of conflicts with foreign law, or assessment of the comparative interests of the United States versus those of other nations.\footnote{See, e.g. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 642 (2d Cir. 1956); McBee v. Delica Co., 417 F.3d 107, 121 (1st Cir. 2005); Reebok Int’l, Ltd. v. Marnatech Enters., Inc., 970 F.2d 552, 555 (9th Cir. 1992).} Thus, effects alone are insufficient to establish jurisdiction.\footnote{See \textit{Reebok}, 970 F.2d at 555.} These decisions form part of a larger generative process to develop international norms governing extraterritorial jurisdiction.
D. Customary International Law Limitations

1. Restatement Section 403

In formulating their tests for extraterritorial trademark jurisdiction, at least two circuits drew inspiration from analogous tests for prescriptive jurisdiction developed in antitrust law. Moreover, the trademark tests unsurprisingly replicate essential features governing effects-based economic regulation in other substantive domains. These doctrinal formulations reflect two imperatives that U.S. courts have identified as crucial to the interactions between U.S. law and the international legal system.

First, effects-based jurisdiction must incorporate some mechanism to verify that a non-trivial quantum of effects on U.S. territory are involved. Without such mechanism, the rise of the effects doctrine would threaten the very concept of territorial limits on sovereignty. After all, at some level, “everything affects everything.” If countries were free to regulate based on perceived effects, extraterritorial jurisdiction would fast become the rule not the exception.

Second, even where effects on U.S. territory are involved, the United States should take into account the interests of other countries through some form of interest balancing or conflicts analysis. The nature of this balancing and the degree of conflict required to refrain from exercising U.S. jurisdiction is heavily contested, with conflicting precedent all over the map.

Rather than attempting to summarize such disparate holdings, we can instead rely on the work performed by the Restatement (Third) of Foreign Relations Law in synthesizing case law governing extraterritorial jurisdiction into the multifactor balancing test that comprises Section 403. Accordingly, we can apply Section 403 as a reasonable approximation of

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202 Parrish, The Effects Test, supra note 157, at 1479.
the analysis that U.S. courts apply to determine when, and under what circumstances, prescriptive jurisdiction is justified.\textsuperscript{205}

The extent to which Restatement Section 403 reflects customary international law is less clear. The Restatement drafters made some effort to survey comparative international precedent in formulating Section 403.\textsuperscript{206} And they note that the principle of “reasonableness” as a limitation on effects-based jurisdiction “has emerged as a principle of international law as well.”\textsuperscript{207} However, there is no international consensus as to how such limitations should be formulated or applied.\textsuperscript{208} Instead, Section 403 reflects a U.S. perspective on “the limitations customarily observed by nations upon the exercise of their powers.”\textsuperscript{209}

The Restatement test assesses the reasonableness of prescriptive jurisdiction by evaluating the following factors:

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

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

(c) The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.

(d) The existence of justified expectations that might be protected or hurt by the regulation;

(e) The importance of the regulation to the international political, legal, or economic system;

\textsuperscript{205} See Hoffman, 542 U.S. at 165 (favorably citing Section 403); Hartford Fire, 509 U.S. at 818-19 (Scalia, J., dissenting) (relying extensively on Section 403).

\textsuperscript{206} See, e.g. Restatement (Third) of Foreign Relations Law § 403, Reporter’s Notes 1, 3, 7-8.

\textsuperscript{207} Id. at cmt. a.


\textsuperscript{209} United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir.1945).
(f) The extent to which the regulation is consistent with the traditions of the international system;

(g) The extent to which another state may have an interest in regulating the activity; and

(h) The likelihood of conflict with regulation by another state.

Accepting arguendo the legitimacy of the Restatement test, considerable ambiguity attends its application to the cases at hand. The following analysis works through the factors in three main groupings: First, factors (a) and (b) can be regarded as performing a “minimum contacts” analysis. Second, factors (c)-(f) probe the “international legitimacy” of the underlying substantive norm. Finally, factors (g) and (h) call for a “conflicts of law” analysis.

a. Minimum Contacts

Factors (a) and (b) perform something akin to a “minimum contacts” analysis under personal jurisdiction case law. Factor (a) measures the “link of the [regulated] activity to the territory of the regulating state,” in this case, shown through evidence of a “substantial, direct, and foreseeable effect” upon the territory. Formally, the states are regulating sales within their territory. Yet, as we have seen, the “unfairness” of such sales is ultimately derivative from and contingent upon proof of a legal violation during the manufacturing process abroad. Therefore, in exercising jurisdiction over these cases, the U.S. interest rests on the asserted effect such violations (here infringement) have on the downstream market. The more clearly established the link between the infringement and competitive injuries downstream, the stronger the case for the United States to assert jurisdiction.\(^\text{210}\)

In addition to establishing causation, consideration should also be given to the size and significance of the effect on the downstream market. In general, where the value of the stolen IP represents only a minute fraction of the total inputs used in the manufacturing process, one may presume the resulting distortion in the market would be negligible. Conversely, where the value of the IP represents a significant, material component of total manufacturing costs, one would expect the infringement to lead to a far more “substantial, direct, and foreseeable

\(^{210}\) In addition to proving causation-in-fact, factor (a) appears to allow for proximate cause limitations in asking whether the effects are “direct and foreseeable.”
“effect” in conferring undeserved price advantages vis-à-vis more law-abiding competitors.\textsuperscript{211}

In practice, the economic analysis, however, can get far more complicated. For example, in the Embraer case, the Washington state attorney general reportedly negotiated a settlement in the amount of $10 million.\textsuperscript{212} While a sizeable sum, this figure pales compared to Embraer’s $6.6 billion annual revenue in the regional and executive jet markets.\textsuperscript{213} Yet, even a cost small savings can have an outsized effect on a firm’s investment and production decisions in ways that affect pricing in the end market. The analysis hinges on a number of variables that must be considered through econometric analysis.\textsuperscript{214}

Fortunately, the methodology for undertaking such analyses and the legal expertise to evaluate them already exists. Indeed, the ITC routinely performs such analyses to assess domestic injuries in section 337 actions.\textsuperscript{215} An analogy can also be made to the regulation of subsidies in world trade law. Infringement here functions a form of \textit{de facto} subsidy that allows the infringer to avoid paying the full costs of manufacturing.\textsuperscript{216} The WTO Subsidies Code allows countries whose industries are adversely affected by another nation’s subsidies to impose countervailing duties upon a showing of a material injury, or threat thereof.\textsuperscript{217} Here, too, proof hinges on econometric analysis to demonstrate a causal effect between the subsidy and market outcomes. Factors considered include the size of the subsidy, the price advantage it confers, total volume of imports, effects on market share, profits, etc.\textsuperscript{218} The Subsidies Code further provides that a 5

\textsuperscript{211} Buckler & Jackson, \textit{supra} note 3, at 534.
\textsuperscript{212} See Mitchell III et al., \textit{supra} note 91. The remedy in the Massachusetts case was even smaller: $10,000 paid by a Thai seafood exporter. See Rob McKenna, \textit{Defending U.S. Intellectual Property}, \textit{WASHINGTON TIMES}, Apr. 26, 2013. While these settlement amounts undoubtedly represent a discount on potential damages, we will assume they are roughly of the same order of magnitude.
\textsuperscript{214} Buckler & Jackson, \textit{supra} note 3, at 534.
\textsuperscript{215} See Buckler & Jackson, \textit{supra} note 3, at 532-33.
\textsuperscript{216} Note, however, that infringement falls outside the formal remit of the WTO Subsidies Code because the latter applies only to government subsidies.
\textsuperscript{217} WTO Subsidies Code, arts. 5, 15, 19.
\textsuperscript{218} \textit{Id.} art. 15.4-15.5.
percent cost advantage based on “total ad valorem subsidization” can serve by itself as proof of “serious prejudice” (a higher threshold than material injury). Notably, the Washington State IP theft statute specifies a similar measure—a 3 percent cost advantage—as proof of a “material competitive injury.”

Further issues would doubtless arise when one engages the multiplicity of fact patterns that could arise. Two examples may serve to illustrate the range of possibilities: First, it should not be necessary that competitors use the same proprietary technology as the foreign manufacturer. The mere fact that the latter realizes significant cost savings by foregoing license fees should create a presumption of unfairness, assuming such costs savings can be linked to market effects. Second, prospective injuries, where supported by credible evidence, may be counted in lieu of actual competitive harm. Where a foreign manufacturer has used its ill-gotten windfall to make long-term investments in augmented capabilities that will position it for future competitive advantage, this too should be actionable.

Factor (b) assesses the connections between the state and the respective parties, either the the person being regulated, or those whom the regulation is designed to protect. It is possible that some defendants targeted in these unfair competition actions may have substantial ties to or presence in the United States that justify the exercise of jurisdiction on the basis of nationality alone. More likely, however, the analysis would turn on the presence of domestic competitors who are harmed by the unfair competition from abroad. Since by hypothesis, these actions would only

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219 Id. art. 6, Annex V. The WTO Subsidies Code specifies two different standards of injury. A lower threshold of “material injury” is required to take countervailing measures in domestic markets. A higher threshold of “serious prejudice” is required to act against subsidies in external markets. Id. at Art. 5.

220 While any party who suffers economic harm has standing to sue, a party seeking an injunction or attachment order must also show that it suffered “material competitive injury,” defined as a retail price difference of at least three percent between the plaintiff’s product and that produced by the infringing manufacturer. RCWA §§ 19.330.060(5)(c),(d), 19.330.010(5).

221 Cf. Buckler & Jackson, supra note 3, at 531 (noting TianRui was a case involving differing technology).

222 For example, the foreign manufacturers may have acquired more sophisticated manufacturing equipment that will yield long-term efficiencies or expanded its sales force and distribution footprint, positioning it to reap future gains in market share. Cf. Buckler & Jackson, supra note 211, at 530.

223 The presence of direct competitors based in the U.S. market would present the strongest justifications for protective jurisdiction. However, even foreign-based firms that
be brought by, or on behalf of actual competitors, this criterion would pose little difficulty in practice. Therefore, assuming a causal link between the infringement and market effects can be established, the first two factors will establish the “minimum contacts” required to justify extraterritorial regulation.

b. International Legitimacy

The real argument is likely to come under Factors (c), (d), (e), (f), and (g). These factors get to the underlying legitimacy of extraterritorial regulation in question: inquiring as to its importance to both the regulating state and the international community, its effect on vested interests, and the degree to which precedents for such regulation have been established. Accordingly, these criteria introduce an unavoidably normative element to the inquiry: in determining whether this sort of regulation is consistent with customary international law, we are essentially asking whether the broader interests of the international community would be served by endorsing (or at least acquiescing in) its adoption.

The right of governments to regulate competitive conditions in their internal markets is beyond question. Likewise, enforcement of intellectual property rights represents a clearly legitimate interest, the importance of which is underscored by the TRIPS Agreement, whose extensive enforcement provisions are binding on the vast majority of the world’s countries.224

Infringers of IP rights can hardly claim a “justified expectation” (per Factor d) to infringe with impunity.225 Moreover, with the harmonization of standards ushered in by TRIPS and other IP treaties, the scope for disagreement as to what qualifies as infringement has been narrowed considerably. Competitors disadvantaged by upstream infringement can reasonably claim that their injuries are precisely the distortions of global trade that the TRIPS Agreement sought to end.226 Therefore, ending such

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224 See TRIPS Agreement, especially Part III and IV, which establish minimum standards regarding enforcement procedures and remedies.
225 This argument applies only to sanctioning primary infringers. To the extent the state regulation reaches down the supply chain to sanction those who merely purchase (non-infringing articles) from infringers (as the Washington State statute would allow for), a different standard of liability may be required. See infra Part III-E.
226 Cf. TRIPS Preamble (“Desiring to reduce distortions and impediments to international trade . . .”).
market distortions both vindicates such justified expectations and upholds an important interest that the international community has collectively endorsed.227

Note, however, that the strength of foregoing assertions relies on the fact that the cases thus far have concerned blatant violations of clearly accepted norms (misappropriation of trade secrets in TianRui and software piracy in the state law cases) that would be recognized as such in almost every country. The further one departs from these shared baselines of global agreement, the more controversial this enterprise arguably becomes. A very different case would arise should a future defendant present a colorable claim to fair use (or other defense), or where the validity and scope of the IP rights themselves are disputed. To retain the mantle of international legitimacy, unfair competition actions should arguably be restricted to instances where the validity of the underlying rights and claimed infringement are relatively uncontested.228

Assuming enforcement of the IP right passes muster as internationally legitimate in the specific case, the real problem comes with the means chosen to vindicate this interest. Using unfair competition law as the vehicle for a collateral attack on upstream infringement is hitherto without precedent. As we saw, territoriality represents a bedrock principle of international IP law to which only limited exceptions have been recognized thus far. The novel use of unfair competition law to circumvent territoriality limits expands the boundaries of state regulation in a potentially undesirable direction. Courts in at least two European states have explicitly rejected invitations to embark down this path.229

That said, the concern those courts expressed—that of preempting the rights of IP right holders—could be addressed by having the right holders themselves participate in the unfair competition action by certifying that the use of their IP was unauthorized. The Washington state statute does

227 Cf. Factors c, e, and f of Restatement Section 403.

228 As noted previously, where the validity of the foreign IP right is contested (especially for registered rights), issues of national sovereignty loom especially large. At the same time, courts should not allow themselves to be deterred by spurious defenses; they should resolve validity challenges under something akin to a “clearly erroneous” standard.

229 Clinique Happy (German Federal Court of Justice); Prominentenbildnisse, Austrian Supreme Court, 4 Ob 20/08g (2008); Internetnachrichten-Agentur, 4 Ob 93/01g, April 24, 2001. But see 1997 R.D.C. 434 (Court of Appeals, Brussels, Oct. 2, 1996) (upholding third party unfair competition claim based on infringement of copyright).
exactly this. As for the unorthodox use of unfair competition concern, Article 10bis, the unfair competition provision of the Paris Convention, deliberately employs broad, open-ended language in order to encompass emerging unfair practices. It is an evolving norm intended to fill the gaps left by conventional intellectual property rights. Finally, we have already seen that territoriality limits have proven malleable in recent years. The further incursion entailed here seems defensible against that backdrop.

Defenders of the unfair competition actions could emphasize that they are not conflicting with the IP laws of foreign nations, but merely providing a necessary backstop to ensure that such laws are enforced. Unlike Special 301 proceedings in the pre-TRIPS era or even section 271(g), the extraterritorial assertion of jurisdiction in the state unfair competition cases assumes a respectful guise that supports the laws of other countries rather supplanting them. Even the assertive stance adopted in TianRui, which applied U.S. law to determine infringement, was cushioned by the court’s care to note the convergence between U.S. and Chinese standards, as well as their shared basis under the TRIPS Agreement.

Moreover, far from exercising jurisdiction over the infringement claim directly, states only regulate the downstream effects of such infringement as concerns sales in U.S. markets. Remedies would be limited accordingly. In this regard, states can assert their legitimate interest in protecting the integrity of their domestic marketplace. Where market distortions are proximately caused by upstream violations whose illegality is beyond dispute, why should the injured state not take actions to correct the distortions?

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230 See Rev. Code Wash. § 19.330.050 (requiring notice of infringement from right holder to commence action).
231 Paris Convention Art. 10bis (prohibiting “any act of competition contrary to honest practices in industrial or commercial matters”).
232 See Edson B. Rodrigues, Using the TRIPS Agreement’s Unfair Competition Clause to Curb the Misappropriation of Biological Resources, 4 Queen Mary J. Intell. Prop. 139, 141-42 (2014); see also F.T.C. v. Gratz, 253 U.S. 421, 437 (1920) (“[A]n enumeration, however comprehensive of existing methods of unfair competition must necessarily soon prove incomplete, as novel unfair methods would be devised and developed.”).
233 See supra note 196 and accompanying text.
235 Cf. Rowe & Mahfood, supra note 8, at 95.
A further objection could be raised by states whose nationals are targeted by such actions: They could complain that the desire to escape such unilateral assertions of U.S. authority (wielded via Special 301 etc.) was what led them to sign on to TRIPS and the WTO in the first place. As such, allowing unfair competition actions to function as an end-run around the WTO Dispute Settlement Understanding (DSU) would nullify a principal advantage that the WTO promised to provide.236

Defenders of the U.S. state actions would retort that if the targeted states had lived up to their commitments under TRIPS and provided an effective means to enforce IP rights directly at the source, such recourse to unfair competition law would be unnecessary. Moreover, they would emphasize that the remedies here are private actions taken against individual infringers. As such, they likely fall outside the state-to-state remit of WTO dispute resolution.237

Opponents would counter by contesting the extent to which effective enforcement is, in fact, required by TRIPS. On its face, Article 41(1) of TRIPS appears to require explicitly that:

\[
\text{[m]embers shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.}^{238}
\]

Yet, the force of this imperative is substantially undercut by Article 41(5), which stipulates that:

\[
\text{[T]his Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law...}
\]

236 This line of argument is relevant here primarily with respect to factor (d)—the existence of justified expectations that might be hurt. It could also form the basis for a formal WTO complaint under DSU Article 23. See infra notes 246–247 and accompanying text.

237 See DSU, Article 23. Note that the same logic applies to actions filed by a state attorney general so long as the defendant is a private party and not a WTO Member State.

238 TRIPS Article 41(1). Article 41(2) further provides that enforcement procedures be “fair and equitable” and “not be unnecessarily complicated or costs,” or entail “unwarranted delays.”
in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

In other words, Member States whose legal regimes are dysfunctional across the board are not obliged to make special efforts to improve IP enforcement. The exemption granted in Article 41(5) does not, however, negate the Article 41’s duty to provide effective enforcement. It just means such Members are not obliged to devote additional resources to reforming their legal institutions pursuant to this duty.\(^{239}\) To the extent that they fail to remedy enforcement deficiencies, however, they arguably have no cause to object if other Member States take matters into their own hands, which is precisely what the unfair competition cases here are intended to do.

In sum, both sides have some good arguments as to whether allowing these unfair competition actions to proceed advances the shared goals and values of the international community and is consistent with established tradition and settled expectations. Ultimately, how one comes out on these questions may reflect one’s intuition as to whether these actions are a welcome innovation directed toward a worthy goal vs. a cheap, lawyerly trick that subverts established norms for a dubious purpose.\(^{240}\) Indeed, the normative subjectivity implicit in this inquiry has led critics to dismiss this portion of the Restatement test as geopolitics masquerading as law.\(^{241}\)

c. Avoiding Conflicts

If the preceding inquiry focuses on lofty systemic values, the last two factors of Section 403 focus on a much more pragmatic set of concerns: avoiding conflicts, actual or potential, with other nations. Factor (g) asks whether “another state may have an interest in regulating the activity.”

\(^{239}\) Moreover, as a derogation from the rest of Article 41, Article 41(5) arguably should be construed narrowly. Compare TRIPS Agreement, Article 41(1)-4), with Article 41(5). Indeed, a broad reading of Article 41(5) cuts against the entire goal of the TRIPS Agreement, which is to instantiate minimum worldwide standards of IP protection and effective procedures to enforce them. See TRIPS Preamble, cl. (b)-(c).

\(^{240}\) The outcome may also depend on where one places the burden of proof. Compare Stigall, supra note 208, at 331 (“the starting point for any jurisdictional analysis is a presumption of permissibility”), with Wittes & Blum, supra note 203, at 155 (reversing the presumption).

\(^{241}\) See, e.g. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 947-953 (D.C. Cir. 1984) (dismissing “purely political factors which court[s] are neither qualified to evaluate comparatively nor capable of properly balancing”); Meyer, supra note 1, at 159-60 (same).
The country where the infringement takes place ("the source country") obviously has such an interest. Even if the source country’s laws supply the infringement standard, it will be applied by a foreign court, and important nuances may be lost in translation.

As noted, however, these concerns can largely be assuaged by ensuring that the validity of the underlying right and the wrongfulness of the infringement are undisputed and based on internationally recognized standards. Here too, we see the virtue of restricting unfair competition remedies to such clear-cut cases.\(^{242}\) The bigger concern therefore arises with Factor (h), which inquires into the likelihood that conflicts may actually arise.

The simplest scenario would arise where the source country’s legal system is entirely dysfunctional—here conflicts can be effectively ruled out because direct enforcement at the source is impracticable.\(^{243}\) Whatever theoretical interest the source country may have has been effectively forfeited. Restricting the unfair competition action to such cases would not only avoid potential conflicts, it would also strengthen claims to international importance and justifiability under factors (c) and (e) by showing that such actions are reserved as a last resort for cases where direct enforcement is truly unavailable.\(^{244}\)

In assessing foreign IP enforcement climates, states should take care to avoid falling into the trap of being seen to pronounce source countries formally in breach of their effective enforcement obligations under the TRIPS Agreement.\(^{245}\) DSU Article 23 forbids Member States from making any determinations regarding violations of WTO obligations outside the DSU process.\(^{246}\) Unilateral measures to redress such breaches are

\(^{242}\) See supra note 228 and accompanying text. To the extent that validity of a foreign IP right is challenged, a U.S. court would also be wise to confine its ruling to inter partes effect. See infra note 296 and accompanying text.

\(^{243}\) Such an “exhaustion of foreign remedies” requirement may, in fact, be required by customary international law. See infra Part III-D.

\(^{244}\) Such a limiting criteria would also offer the further benefit of strengthening the regulating states’ ability to fend off charges of undue burdensomeness and arbitrary discrimination under a GATT Article XX analysis. See Pager & Priest, WTO Paper, supra note 148.

\(^{245}\) For U.S. states, in particular, passing judgment on foreign governments in this manner would violate dormant foreign affairs doctrine in addition to WTO issues. See Pager, supra note 148.

\(^{246}\) WTO Dispute Settlement Understanding, Article 23.2.
forbidden. Accordingly, making TRIPS violations a threshold requirement for unfair competition actions to proceed would place the United States in breach of Article 23.

So long as U.S. states take appropriate care, however, they should be able to dodge this minefield by focusing solely on the *de facto* IP enforcement climate and avoiding comment on *de jure* violations of TRIPS. While the former may appear inextricably linked to the latter, as we saw, the effective enforcement obligation of TRIPS, Article 41(1) is subject to Article 41(5)’s disclaimer of any obligation to invest resources specifically toward improving IP enforcement. As such, it is possible for a Member State to have duly ticked off its enforcement obligations under TRIPS, while failing conspicuously to provide an effective enforcement climate in practice. Accordingly, a finding regarding the latter as a *de facto* reality need not presuppose any formal judgments regarding specific TRIPS violations, and Article 23 can accordingly be finessed on this basis.

In any case, countries where enforcement is completely futile are largely too poor to bother with. By contrast, IP enforcement in most middle income countries is not entirely hopeless. Rather, it falls along a spectrum of effectiveness, with the bulk clustered somewhere between “mostly futile” and “partially effective.” Moreover, each jurisdiction is dysfunctional in its own distinctive way, making comparative assessments difficult. As a result, it seems prudent to tolerate some potential for parallel enforcement actions.

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247 See United States — Sections 301–310 of the Trade Act 1974, WT/DS152/R.

248 This duality was illustrated in the *WTO China – Intellectual Property Rights* decision, where the panel found China in technical compliance with its TRIPS obligations, despite its manifest failure to ensure an effective climate for IP enforcement in practice.

249 Nor can source countries argue that TRIPS itself supplies the exclusive framework under which IP rights are to be regulated. Unlike the WTO Antidumping Agreement, where such an argument was successfully advanced (see WTO decisions on 1916 Tariff and Byrd Amendment), TRIPS does not purport to set forth an exclusive or comprehensive set of norms. Rather, TRIPS only provides a partial harmonization of global IP norms, setting forth minimum standards for IP protection that Member States remain free to exceed. See TRIPS Article 1. Disgruntled source countries could challenge such evasion of the DSU via a non-violation nullification and impairment claim, but the heightened burden of proof and extremely low track record of success would make such claims a longshot.

250 Indeed, TRIPS’ obligations have been actually suspended for the “least developed” countries. https://www.wto.org/english/news_e/news13_e/trip_11jun13_e.htm.
Where the possibility of direct enforcement exists in tandem with the collateral action via unfair competition law, more active conflict management measures are required. In most cases, different parties will be involved: direct enforcement will be undertaken by the rights-holder, whereas unfair competition actions are brought by competitors. Yet, ideally, the two actions would be coordinated as parallel paths to a shared destination.\footnote{As noted, at minimum, the right holder should have to certify that usage of its intellectual property was unauthorized. See supra note 230 and accompanying text.} For example, the Washington statute provides for the unfair competition action to be suspended, pending the outcome of an action for direct enforcement.\footnote{See Rev. Code Wash. § 19.330.060(c).}

On the other hand, the extent of redundancy between the parallel actions may hinge in part on the nature of the remedies at issue. States may claim that the act of selling misbegotten wares constitutes a separate violation that is cognizable independently of the original infringement. Yet, the parasitical nature of the unfair competition action whose “unfairness” flows directly from the infringement argues otherwise. Arguably, the defendant’s undeserved competitive gains should be measured as a first approximation by the value of the “stolen” IP (normally the cost of a license). If so, granting a remedy for both violations would be duplicative.\footnote{The preceding analysis assumes that the defendant’s cost savings from foregoing the costs of licensure are allowed directly as the price reductions on the products exported exclusively to the forum market on a 1:1 basis. If not, allocation of the unfair competition gains would have to be discounted pro rata. The Washington State “stolen technology” law allows for the greater of either (a) actual direct damages, or (b) “[s]tatutory damages of no more than the retail price of the stolen or misappropriated information technology.” Rev. Code Wash. § 19.330.060} Sometimes, however, small price advantages can translate into much larger competitive gains. One can envision further consequential harms in terms of lost market share, volume efficiencies, etc. that would not be duplicative of the infringement remedy.\footnote{See Rev. Code Wash. § 19.330.060.} Where a plaintiff presents credible evidence of such independent harm, the case for decoupling the two actions becomes stronger. Punitive damages may also be appropriate in an unfair competition action, whereas remedies for intellectual property infringement are structured differently.\footnote{Copyright law allows hefty statutory damages for willful infringement which serves a quasi-punitive function. 17 U.S.C. § 504(b). Patent law allows treble damages}

Accordingly, this issue may need to be decided on a case-by-case basis.

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\footnote{Copyright law allows hefty statutory damages for willful infringement which serves a quasi-punitive function. 17 U.S.C. § 504(b). Patent law allows treble damages}
If parallel actions are permitted to proceed, conflicts could arise in various ways: the parallel tribunals could reach conflicting results; they could issue inconsistent or duplicative remedies; and res judicata questions could arise. Managing the conflicts in these cases would require appropriate care. States will need to develop principles of comity and/or abstention doctrines to minimize the risk of serious conflicts from developing.

The source state is not the only jurisdiction with potentially overlapping interests in these cases. If the products of the infringing manufacturer have been sold in more than one market, then unfair competition actions could arise in multiple jurisdictions. Overlapping actions could also be filed by multiple competitors. Appropriate principles to apportion damages would need to be devised to avoid making the infringer pay more than once for its misdeed. Accordingly, the devil would be in the details. The more states can show that they can handle these concerns through well-worked out procedures, the firmer ground on which they will stand in defending their assertion of jurisdiction.

d. Taking Stock

It is difficult so see a serious challenge arising under Restatement Section 403, so long as the unfair competition actions remain within the parameters identified above: (1) a quantifiable connection between upstream violation and downstream market effects; (2) a clear violation of an internationally recognized norm; and (4) commonsense conflict management provisions.

Adherence to the Restatement parameters keeps extraterritorial extensions of unfair competition law safely within the bound of reasonableness. Such limits not only serve to mediate conflicts with other countries, they also minimize the ability of unscrupulous regimes to wield unfair competition law for nefarious ends such as protectionism.


256 As noted, validity determinations of a foreign right require particular sensitivity. See supra note 242 and accompanying text.

257 These are issues with which the regular tort system continues to struggle, but at least the problem is well understood. See generally Jim Gash, Solving the Multiple Punishments Problem: A Call for A National Punitive Damages Registry, 99 Nw. U. L. Rev. 1613 (2005).

258 Further discussion of conflict issues lies beyond the present scope. Suffice to say that the problems here are not unique, but that a coherent set of governing principles remains to be developed. Id.; Austen L. Parrish, Duplicative Foreign Litigation, 78 GEO. WASH. L. REV. 237, 239-42 (2010).
Tougher questions would therefore arise should plaintiffs file actions that fall outside these parameters or rely on a murkier set of facts.\footnote{259} Compounding the line-drawing difficulty is the imprecision inherent in Section 403 itself. Detractors of the Restatement test have complained that “the interests-balancing approach relies on an unwieldy list . . . and is without guidance as to how one factor should be weighed against another.”\footnote{260} The test has garnered criticism for inquiring into matters that are inherently political.\footnote{261} Commentators have also cast doubt on the extent to which the Restatement test accords with the reality of state practice.\footnote{262} Even commentators sympathetic to customary international law limitations on extraterritoriality concede, at the end of the day, “[t]here appears to be no generally accepted and undisputed answer to the question of what rules of international law govern extraterritorial jurisdiction.”\footnote{263} Commentators have recognized that an increasingly globalized and digitally networked world may require new principles.\footnote{264} Meanwhile, nation states are pressing forward, testing jurisdictional limits with expansive extraterritorial laws.

2. State Practice & Opinio Juris

Customary international law norms on extraterritoriality continue to evolve, as countries expand their jurisdictional reach through unilateral measures. The United States has been especially active of late in asserting its regulatory authority globally in economic domains such as bank secrecy, securities regulation, and foreign corruption.\footnote{265} However, far from objecting as in decades past, many U.S. trading partners have been

\footnotesize\begin{itemize}
\item Query whether the actions filed thus far have already played fast and loose with effects doctrine.
\item Meyer, supra note 1, at 158-59 (“[B]alancing tends not to work so well in practice, because the considerations being weighed are usually imprecise enough to permit several answers, and to dictate none”).
\item See id. at 159-60.
\item J.G. CASTEL, EXTRATERRITORIALITY IN INTERNATIONAL TRADE 22 (1988).
\item See, e.g., Meyer, supra note 1, at 111.
\end{itemize}
busily pursuing their extraterritorial regulatory agenda. The more the international community acquiesces in such extraterritorial envelope-pushing—and, a fortiori, the more other countries emulate it—the more the goalposts arguably shift toward a new customary international norm of de facto permissiveness.

Formally, customary international law is defined by (a) consistent state practice; (b) informed by a sense of legal obligations. Evidence of such customary norms, however, is notoriously equivocal and hard to come by. Moreover, the recursive and retrospective nature of this standard does not readily accommodate the emergence of new customary norms. Ultimately, the reactions of other countries to unfair competition actions emanating from the United States, and the extent to which such reactions either constrain or embolden future conduct by the United States and other nations, may define the line of permissibility in practice. As with many questions of international law, the answer could therefore come down to a matter of diplomatic opinion and practical politics.

It may therefore be instructive to measure the unfair competition actions against a contemporary precedent in which global opinion did signal consensus disapproval: namely, the de facto secondary boycott mandated under the Helms-Burton Act. Unlike other boycotts justified under national security grounds, Title III of Helms-Burton purported to create a purely private law remedy to provide restitution to certain individuals whose properties in Cuba were seized (“nationalized”) by the Castro regime without compensation. Like the unfair competition action, the main effect of Helms-Burton was to provide a legal mechanism for U.S. courts to rectify wrongs committed overseas, by leveraging control over U.S. markets as a jurisdictional hook. In both cases, the

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266 See, e.g., European Court Defies U.S. Over Carbon Tax, NBCNews.com, Dec. 21, 2011; Brandon Mitchener, Rules, Regulations of Global Economy Are Increasingly Set in Brussels, WALL ST. J., April 23, 2002; Dodge, supra note 262, at 141 n.243; Meyer, supra note 1, at 117 n.33 (“other countries claim ‘me too’”).

267 See Restatement (Third) of the Law of the Foreign Relations of the United States, sect. 102(2).


269 See Gerald J. Postema, Custom, Normative Practice, and the Law, 62 DUKE L.J. 707, 715-18 (2012);


271 See Postema, supra note 269, at 729-31 (theorizing formation of customary international norms as a “normative discursive practice”).

United States could claim to be upholding accepted principles of international law, enforcing private property rights, and filling a gap in international enforcement by providing a remedy that would otherwise be unavailing.\textsuperscript{273}

The vehement protests lodged by U.S. trading partners and overwhelming criticism by commentators make Helms-Burton an exemplar of U.S. overreach and abuse of international law—a clear instance where customary international law norms regarding extraterritorial regulation were overstepped.\textsuperscript{274} A formal WTO challenge to the law was filed by the European Union; international resolutions deploiring the law were adopted; and counter-measures enacted by several countries.\textsuperscript{275} Tellingly, in response, President Clinton issued an executive order suspending implementation of Title III; a practice continued by his successor, President Bush.\textsuperscript{276}

Yet, despite ostensible similarities, the unfair competition cases appear distinguishable in that the nexus between effects and injury is much more palpable. First, the imported goods on which U.S. jurisdiction is based can be linked directly to the underlying unlawful activity (infringement during manufacturing). Second, states can arguably demonstrate (and ideally quantify) a causal connection between the overseas violation and the downstream harm to their domestic markets. By contrast, the effects felt on U.S. territory due to property that was confiscated in Cuba thirty-six earlier seem far more tenuous. Moreover, the state unfair competition cases thus far have been lodged against the primary offenders who themselves committed the infringing acts at issue.\textsuperscript{277} By contrast, although the Cuban government carried out the confiscations, Helms-Burton

\textsuperscript{273} Id. at 283, 297-98.
\textsuperscript{274} See, e.g., Andreas Lowenfeld, \textit{Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act}, 90 Am. J. Int’l L. 419 (1996) ("[T]he effort to place Helms-Burton with the effects doctrine is nothing more than a play on words. It does not withstand analysis). But see Claggett, supra note 272, at 279-96 (defending law).
\textsuperscript{275} Request for the Establishment of a Panel by the European Communities, WTO; Doc. WT/DS38/2/Corr.1 (Oct. 14, 1996); Freedom of Trade and Investment in the Hemisphere, Opinion of the Inter-American Juridical Committee (CJI/SO/II/doc.67/96 rev.5); Clagett, supra note 272, at 298-302.
\textsuperscript{277} The Washington State statute does hold out the possibility of secondary liability for retailers and distributors, thereby taking a step closer to Helms-Burton. However, such actions are subject to a notice and cure provision.
imposed liability on non-Cuban entities deemed to have subsequently “trafficked” in the stolen property, whether knowingly or otherwise, raising serious concerns about penalizing “innocent” third parties.278

Furthermore, where Helms-Burton elicited near universal condemnation, the unfair competition actions have elicited silence. Admittedly, Helms-Burton was a high profile act of Congress passed following the destruction of two Cuban-American aircraft in a hostile incident that commanded global headlines.279 By contrast, the unfair competition actions are more low-key affairs. Yet, we now have a more than three-year track record in which state unfair competition actions have been pursued, with the ITC order in TianRui going back even further to 2009. These extraterritorial actions have not gone unnoticed by countries whose nationals were affected. Tennessee’s Attorney General apparently exchanged letters with the Attorney General of Thailand in this regard.280 Yet, none of these countries have publicly criticized the actions, let alone questioned their legitimacy under international law. Nor has any one else in mainstream policy circles. Defending companies that commit blatant software piracy is not a cause that most governments or NGOs want to take on.

Admittedly, lack of protest should not automatically be equated with approval. Nor does the fact that unfair competition actions are less objectionable than Helms-Burton mean that they necessarily pass muster. However, measured against other regulatory domains in which the U.S. exercises extraterritorial jurisdiction, the unfair competition actions appear fairly circumspect in scope. Focused squarely on sales in the domestic market, they have a strong nexus to the United States compared to other extraterritorial U.S. laws.281 So as long as a plausible effects rationale can be constructed based on violation of an internationally accepted norm such as piracy, these actions seem unlikely to stir serious opposition.

278 See Lowenfeld, supra note 274, at 426 (“[T]he Act contemplates that if an English company purchases sugar from a Cuban state enterprise . . . it would be liable to a U.S. national who could show that some of the English company’s purchases consisted of sugar grown on the plantation that the plaintiff once owned”).
279 See Lowenfeld, supra note 274, at 419.
280 State AGs Target IP Theft to Strengthen Fair Competition among Manufacturers, NAJI, 2014, 2.
281 Cf. Wittes & Blum, supra note 203, at 249 (describing how the FCPA has been held to apply to act of bribery by foreign companies operating entirely outside of the United States, if any “act in furtherance” of the bribe is committed in or routed through the United States, including telecommunications, air travel or the clearing of funds, effectively conferring jurisdiction over almost any global transaction).
E. Considering Alternative Approaches

Accepting arguendo the legitimacy of an effects-based rationale for sanctioning upstream infringement based on sales in the end market, one might ask why should states regulate these injuries using unfair competition law: If upstream piracy is the source of the problem, why not act to combat such infringement directly through intellectual property law? One could do so in either of two ways: First, one could legislate an extension of the importing country’s intellectual property laws to regulate infringement overseas. Under this approach, the United States would extra-territorially assert its own IP laws against foreign manufacturers. Second, one could authorize (and perhaps encourage) courts in the importing country to hear claims based on infringement of foreign intellectual property rights. Under this approach, U.S. courts would enforce the IP laws of the country where the infringement occurs. Under either approach, the actions would be filed by right holders directly, rather than relying on a collateral attack by competitors.

1. Extraterritorial Application of U.S. Law

As an initial matter, we note that directly applying U.S. intellectual property law to regulate foreign manufacturing without further limitation would entail a massive violation of the territoriality principle. It is difficult to imagine any foreign state acquiescing in such a wholesale intrusion upon its sovereign authority to regulate conduct within its own borders. A more palatable alternative, however, would emulate the approach of our old friend, Section 271(g), the product-of-patented process rule. Under this approach, U.S. jurisdiction would only apply where foreign infringement results in exports to the U.S. Regulating sales in the end market creates a contact with U.S. territory that ostensibly localizes the cause of action. Yet, the gravamen of the infringement claims would still hinge on conduct taking place abroad. The United States would be hard pressed to justify such extraterritorial jurisdiction.

In the case of 271(g), a specific effects-based rationale (the threat of outsourced production undermining the value of U.S. process patents) justified the linkage. However, that rationale does not extend readily to other contexts. In general, right holders are not harmed by sales of otherwise lawful products that happen to be linked to overseas infringement. The only harm right holders incur arises from the

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282 See supra note 34 and accompanying text.
infringement itself during manufacturing. It is competitors who suffer harmful follow-on effects in the downstream market. Therefore, right holders have no claim to extraterritorially enforce their IP rights on this basis.

Another more practical objection is that the United States is a very big market, and thus a wide array of infringing acts could potentially be tied to U.S. imports. Compounding the problem is the standard of quasi-strict liability governing intellectual property infringement: Intent to infringe is not required, nor is proof of actual injury; invasion of the right holder’s property is an actionable trespass in of itself.\textsuperscript{283} Such an expansive basis for extraterritorial liability creates the potential for jurisdictional conflicts between rival sovereigns.\textsuperscript{284} Manufacturers may hesitate to export to the U.S. for fear they could be subject to legal harassment for relatively minor infractions.\textsuperscript{285} We need some limiting criteria to keep extraterritorial applications of U.S. law to a tolerable level.

In the case of the product-of-patented-process rule, liability is reserved only where the exported end products are the “direct” result of the infringing manufacturing process.\textsuperscript{286} Such a “directness” test makes sense in the process patent context, where direct products are presumably the most threatening to the patentee’s entitlement in the end market. However, outside the process patent context, a directness inquiry is less workable. Many patented products are used for a variety of purposes, making it hard to say which uses constitute “direct” inputs to a particular manufacturing process. And copyrights do not cover methods of production, making a search for direct results a non-starter.\textsuperscript{287} Importing a derivative version of a copyrighted work is, in any case, independently actionable, rendering a connection to upstream infringement superfluous.\textsuperscript{288} More fundamentally, without a logical connection between the violation and its purported

\textsuperscript{283} Strict liability also gives rise to notice problems: why should a manufacturer have to pay attention to U.S. intellectual property law when conducting its affairs in its home country?

\textsuperscript{284} Cf. \textit{Love}, 611 F.3d at 611.

\textsuperscript{285} For example, a manufacturer may have inadvertently underreported the number of users for software licensing purposes. Or a manufacturer could have bought grey market technology whose legality is ambiguous.

\textsuperscript{286} TRIPS Art. 28(1). Section 271(g) frames the limitation in terms of a lack of “material modification” and adds the further caveat that the product be an essential component of the final exported good.

\textsuperscript{287} See 17 U.S.C. § 102(b).

\textsuperscript{288} See id. at § 602(b). As for trade secrets, a “directness” inquiry would make sense only in the context of a secret production process.
downstream effects, imposing such conduct-based limitations would become a pointless, question-begging exercise.

Rather than relying on arbitrary conduct-based limitations, the more logical approach is to focus on effects.\(^{289}\) This is the approach taken in the extraterritorial trademark cases, which hinge on consumer confusion. The unfair competition approach offers a similar effects-based orientation. Rather than relying on an abstract trespass upon an intangible right, this approach requires proof of actual injury, namely demonstrable competitive harms suffered in the marketplace (e.g. lost sales, declining profits or market share). Moreover, as outlined in the previous section, establishing such harm should require proof of a causal link between the infringing acts and the downstream injuries alleged.\(^{290}\) Accordingly, pursuing such extraterritorial extension of intellectual property law under an unfair competition rubric allows for a more nuanced and calibrated exercise of jurisdiction than a direct approach rooted in intellectual property law alone.

Unfair competition law is also an accepted and widely recognized body of law that enjoys prima facie global legitimacy. While the use of unfair competition in the cases at hand is admittedly unorthodox, the law in this domain is meant to be construed flexibly to fill the gaps left by conventional intellectual property rights.\(^{291}\) Indeed, there is a long tradition of adapting and extending unfair competition norms to reach new subject-matter as changing conditions warrant.\(^{292}\) Given clear enough competitive injuries, the case for extending it in this context seems compelling. Unfair competition also has a well established pattern of deputizing competitors to assert the interests of third parties (typically consumers).\(^{293}\) Accordingly, allowing competitors to serve as a stand-in for right holders arguably represents less of a “stretch” than a wholesale extension of existing intellectual property rights to cover extraterritorial conduct.

\(^{289}\) See Dinwoodie, supra note 174, at 775-76.

\(^{290}\) See supra note Error! Bookmark not defined.–278; Buckler & Jackson, supra note 211, at 534.

\(^{291}\) Rodrigues, supra note 232, at 141-42, 144-46.

\(^{292}\) Id. at 143; Nari Lee et. al., INTELLECTUAL PROPERTY, UNFAIR COMPETITION AND PUBLICITY 19 (2014) (describing historic role played by unfair competition law as “incubator” for new IP rights).

\(^{293}\) Actions for passing off (trademark) and unfair advertising provide two examples.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 (1995); 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:33 (4th ed.)
2. Adjudicating Infringement Claims under Foreign Law

A second alternative to the unfair competition approach would be to allow foreign law claims to be brought directly by right holders in U.S. court. By retaining foreign law as the substantive source governing the infringement, this approach avoids the risk of norm conflicts associated with extraterritorial extensions of U.S. law. Respecting the prescriptive sovereignty of the source nation also deflects accusations of legal imperialism in so far as it merely holds defendants accountable to the laws of their own home country. However, the foreign state might still object to such assertions of adjudicative jurisdiction as intrusion upon its sovereign prerogative to interpret and enforce its own laws. Some contend that intellectual property rights, in particular, are so intrinsically linked to sovereignty of the state that created them that only that state should touch them.294

As noted, this objection is stronger with respect to patent rights than copyright, and most salient with respect to validity determinations, as opposed to infringement.295 The American Law Institute has devised a partial dodge to objections founded on the latter ground, proposing that where validity is raised as a defense, a foreign court confine its ruling to a declaration of rights inter se.296 In any case, the reluctance to meddle appears to be grounded in notions of comity and prudential restraint, rather than any absolute legal bar.297 “[I]t is far from clear that intellectual property laws differ so drastically from other laws in either their variety or importance to warrant [such] special caution.”298 Arguably, in an interconnected world, a more relaxed, pragmatic approach to jurisdiction makes sense.

However, even if the theoretical objections to foreign adjudication of IP claims can be overcome, practical obstacles would remain. Opening the doors of U.S. courthouses to foreign IP claims could lead plaintiffs from the world over to pursue their claims in the U.S., attracted by liberal discovery rules, effective remedies, and (relatively) speedy justice that the

294 See 7 PATRY ON COPYRIGHT § 25:105 (arguing that copyright disputes are quintessential “local actions” that must be heard in the jurisdiction where the rights arose); Dinwoodie, supra note 174, at 790 (citing view that IP laws implicate “core questions of national culture and innovation policy”).
295 Id. note 174, at 779-91.
296 Id. at 792-93 (validity determination binding on parties to the specific dispute); see also CLIP, the European analogue to the ALI Principle (adopting the same approach).
297 See Bradley, Age of Globalism, supra note 43, at 577-82.
298 Id. at 578.
U.S. judiciary offers. \(^{299}\) Such a flood of new cases would clog dockets and tax existing judicial capacity. \(^{300}\) Admittedly, the high cost of U.S. litigation provides a deterrent, particularly for plaintiffs from developing countries. Lack of personal jurisdiction would also prevent many foreign claims from being filed, and forum non conveniens motions would doubtless kick out some portion of the remainder. \(^{301}\) Unless the United States wants to encourage IP tourism and become the de facto dispute resolution center for the world, it should devise limiting criteria to weed out cases without a substantial nexus to U.S. territory. \(^{302}\)

Conversely, lack of personal jurisdiction could fatally limit the ability of U.S. companies to pursue claims against foreign manufacturers. Merely exporting products to the U.S. does not give rise to general jurisdiction. \(^{303}\) And specific jurisdiction would not be proper where the infringement takes place entirely outside of U.S. territory and the subsequent U.S. sales are extraneous to the foreign cause of action. \(^{304}\) Thus, one of the principal benefits of the unfair competition approach is that it overcomes this jurisdictional hurdle by linking the infringement to harmful effects in the U.S. end market. By creating a hybrid cause of action over which U.S. jurisdiction can be reliably granted, the unfair competition approach affords a crucial advantage over direct claims for infringement arising under foreign law. This alone justifies pursuing unfair competition actions as an alternative enforcement strategy.

A further benefit of unfair competition actions may be the opportunity to secure greater remedies. Recall that a weakness of many foreign IP regimes is the failure to award adequate remedies to prevailing plaintiffs. \(^{305}\) To the extent such deficiencies are dictated by the substantive

\(^{299}\) See Rowe & Mahfood, supra note 235, at 65 (“plaintiffs generally see U.S. courts as an attractive venue due to, inter alia, broad discovery rules, the potential for high damage awards,” and restrictions on attorney fee awards).

\(^{300}\) U.S. civil procedure rules are already considered plaintiff-friendly by international standards. Parrish, The Effects Test, supra note 157, at 1490 (citing “unique [pro-plaintiff] features of U.S. litigation—‘juries, discovery, class actions, contingent fees’).

\(^{301}\) That said, dismissal on these grounds can be waived by defendants, and jurisdiction can be consented to contractually in advance.

\(^{302}\) Cf. BP Chemicals Ltd. v. Formosa Chemical & Fibre Corp., 229 F.3d 254, 261 (noting limited interest of the United States in adjudicating “dispute between two non-citizens . . . regarding acts that took place in Taiwan that caused an injury in Great Britain”)

\(^{303}\) See Goodyear, 131 S. Ct at 2851.

\(^{304}\) See BP Chemicals Ltd. v. Formosa Chemical & Fibre Corp., 229 F.3d 254, 261 (3d Cir. 2000).

\(^{305}\) See supra notes 17–22 and accompanying text.
foreign law, a U.S. court applying that law in a direct infringement action might be equally restricted in the relief it could award. However, under an unfair competition rubric, the remedy would be based on U.S. law, allowing for more robust relief. That said, in many cases, the parsimonious nature of foreign remedies may arise from judicial application of facially adequate provisions. If so, a U.S. court applying those provisions could reach a different result even in a direct infringement action.

F. Choosing Between Unfair Competition Approaches

It remains to be seen which of the two unfair competition approaches is to be preferred: (1) the TianRui approach, in which U.S. law supplied the substantive criteria of infringement; or (2) the state unfair competition law approach, which applies the substantive law of the source country where the infringement took place. The first approach exports the U.S. legal standards abroad, while the second imports the foreign legal standard to the United States.

On one hand, the latter approach seems more consistent with global IP norms based on lex loci delicti. Applying the source country’s laws, albeit in a foreign forum, is arguably more respectful of the foreign country’s territorial sovereignty, in so far as exercising adjudicative jurisdiction is less intrusive than prescriptive. Furthermore, the reluctance of courts to exercise jurisdiction over foreign IP claims can arguably be finessed on the basis that the foreign law issue functions here only as a subsidiary component, as one element of a larger unfair competition cause of action that is itself squarely rooted in U.S. law. And the remedy that the U.S.

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306 Conflicts rules concerning damages are “notoriously byzantine and unstable.” Patrick J. Borchers, Conflict-of-Laws Considerations in State Court Human Rights Actions, 3 U.C. IRVINE L. REV. 45, 52 (2013). While courts have traditionally looked to foreign law for determining types of damages available and forum law for quantification of damages, these distinctions are murky and can lead to absurd results whereby actions in U.S. courts become “unsustainable” because foreign law stipulates remedies that are nonexistent in the U.S. Id.

307 In addition, an unfair competition action could conceivably embrace additional competitive harms that transcend the direct costs of the infringement itself. See supra note 302–303.

308 See Bradley, Age of Globalism, supra note 43, at 578 (“[I]t would seem to be more respectful of a country’s policy interests to apply that country’s laws to conduct occurring in its territory than to apply U.S. law to the conduct.”).
court would craft would be limited solely to redress effects in the U.S. market.\footnote{See Rowe & Mahfood, supra note 235, at 95.}

On the other hand, there are other problems with importing a foreign norm as the substantive criteria to assess infringement. First, adjudicating foreign law questions can be costly and time consuming, as expert witnesses must be brought in order to establish the underlying law.\footnote{See Fed. R. Civ. P. s. 44.1.} Second, doing so introduces uncertainty and risks of error due to interpretive shortcomings and/or ambiguous source materials. Courts are notoriously reluctant to undertake this burden, which may lead to actions being dismissed on spurious grounds.\footnote{See Bradley, Age of Globalism, supra note 43, at 577 (criticizing reluctance of U.S. courts to enter the “‘bramble bush’” of foreign law as “reflect[ing] an overly parochial view”).} Third, applying different laws to different defendants, based on their country of origin, could potentially be challenged as international trade discrimination under either GATT or TRIPS.\footnote{As noted, ruling on the validity of a foreign IP right is particularly fraught with sovereignty concerns. See supra note 242 and accompanying text.} A rule of lex fori avoids these problems and allows courts to operate in the comfort zone of their own legal system.\footnote{See Colangelo, False Conflicts, supra note 234, at 8-9 (applying “forum law ‘enjoy[s] the additional virtues of being more streamlined and less time-consuming).}

Ultimately, the difference between these approaches may matter less than appears. Under the approach we suggest (and as outlined further in Part III, infra), unfair competition actions should be reserved for cases where the underlying norms are clearly established internationally. Under such circumstances, both forum and foreign laws should ideally align. Given the broad harmonization of global IP standards in recent decades, this will normally be the case for intellectual property infringement.\footnote{Buckler & Jackson, supra note 211, at 545-46. For further exploration of this issue, see Pager & Priest, WTO paper, supra note 148.} Indeed, the state law cases thus far have involved unambiguous instances of software piracy. TianRui likewise concerned trade secret theft that the
Federal Circuit was careful to note violated both Chinese and U.S. law.\footnote{661 F.3d at 1332-33.} Arguably unfair competition remedies should be reserved for cases of comparable clarity.

**PART III: APPLICATION BEYOND INTELLECTUAL PROPERTY**

**A. Unilateralism Uncaged?**

As noted at the outset, the underlying theory of unfair competition that animates the enforcement actions described above is by no means limited to intellectual property rights. Any violation of law or regulatory indiscretion that yields a quantifiable cost savings or other market advantage could conceivably be attacked as on the same basis. Indeed, in some respects, unfair competition claims based on substantive areas outside intellectual property may rest on a sounder footing than IP claims for two reasons: (1) such claims would likely not be subject to TRIPS’s discrimination provisions;\footnote{See supra notes 171–173 and accompanying text. Non-IP claims would still face potential discrimination challenges under GATT, but, as noted, these can be defended under the General Exception provisions in Article XX. See Pager & Priest, supra note 148.} and (2) few such claims could be challenged under DSU Article 23.18 Accordingly, the precedent set in the IP domain—and the legal analysis above—could have powerful repercussions for the future of international regulatory policy.

Dissenting in the *TianRui* case, Judge Moore warned that:

> The potential breadth of this holding is staggering. Suppose that goods were produced by workers who operate under conditions which would not meet with United States labor laws or workers who were not paid minimum wage or not paid at all—certainly United States industry would be hurt by the importation of goods which can be manufactured at a fraction of the cost abroad because of cheaper or forced labor.\footnote{661 F.3d at 1330, n. 3 (citing *FTC v. Gratz*, 253 U.S. 421, 427 (1920)).}

The majority responded to these concerns in a footnote:

> The dissent's concern about the possible extension of section 337 to other foreign business practices, such as the...
underpayment (or nonpayment) of employees, is unwarranted. At oral argument, the Commission explicitly disavowed any such authority. Moreover, in the analogous context of the Federal Trade Commission Act, the Supreme Court long ago responded to similar concerns by holding that the prohibition on “unfair methods of competition” does not encompass “practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.”

The majority’s response seems questionable on several levels: First, forced labor, as opposed to mere “underpayment,” would seem to epitomize an immoral practice “characterized by . . . oppression.” Second, whatever the merits of the majority’s response as a description of the current contours of unfair competition law, the concerns expressed by the dissent cannot be dismissed so readily. Unfair competition law is a flexible norm subject to common law development that has proved a fertile source of legal innovation over the years. Just as common-law rules against deceit developed through unfair competition case law into today’s strict liability standard of trademark infringement, so too one can easily imagine the boundaries of existing unfair competition standards being stretched should these actions continue. The possibilities for such norm development expand when one considers that unfair competition norms exist in all 50 states, in addition to federal law, as well as a myriad foreign jurisdictions. Indeed, should the United States continue to extend its writ overseas in this fashion, other countries are likely to follow suit. Without some agreed principles to cabin such initiatives, one can expect all manner of opportunistic extensions, some motivated by jurisprudential conviction, others by expediency.

This begs the larger normative question: if unfair competition law is to be permitted extraterritorial reach in this way, what principles should govern its application? Such a question serves as a Rorschach test for attitudes to extraterritorial regulation in general. Within U.S. scholarship,

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320 Id. at 1330 n.3.
321 See Lee et al., supra note 292, at 19 (describing unfair competition law’s role as “incubator” of new rights); McCARTHY ON TRADEMARKS, 4th ed., sect. 1:13 (1-38-39) (“Unfair competition law represents “a flexible legal instrument [that has] adapt[ed] itself to technological, political, and social changes.”).
the range of viewpoints spans a broad continuum ranging from “unilateralists” on one extreme to “territorialists” on the other.\(^{323}\)

For unilateralists, the challenge of global governance is fundamentally about the lack of law.\(^{324}\) Rather than worrying about the risk of conflicts, unilateralists stress the imperative of effective regulation to cope with our fast-changing, globally interconnected world.\(^{325}\) Better for a concerned nation to step into the void and supply its legal writ than to acquiesce in systemic underregulation.\(^{326}\) From this perspective, extraterritorial assertion of unfair competition law offers a promising means to compensate for shortcomings in the global regulatory system whereby companies that operate in countries with weak domestic legal systems are inclined to cut corners in the name of increased profit. IP theft is just one example, but the problem of global underregulation encompasses far more grievous concerns. From the collapsing factories of Bangladesh, to environmental destruction in China, to child laborers in Africa—such vexing challenges defy simple resolution. Targeting such abuses in the end markets where the offending producers sell their products could allow countries that do have functioning legal systems to vindicate the underlying global norms and bring a measure of justice to those powerless to enforce their rights in their home country.

Moreover, applying pressure on global export producers in this fashion could also engender more systemic change. Proponents argue that “judicial unilateralism may create friction in the short run, it is more likely to lead to international cooperation in the end.”\(^{327}\) Bilateral or multilateral negotiations can be triggered in response to one-sided initiative. Vindication of global regulatory norms can lead them to be taken more seriously. Indeed, the long-term hope is that enforcement pressures via the supply chain will propagate awareness and ultimately acceptance of the underlying norms, leading to a broader “culture shift” in the countries of production.\(^{328}\)

\(^{323}\) See Meyer, supra note 1, at 114-118 (categorizing scholarship on extraterritorial regulation in this fashion).

\(^{324}\) Id. at 115; Dodge, supra note 262, at 104-05.


\(^{326}\) Dodge, supra note 262, at 152.

\(^{327}\) Id. at 164-67.

\(^{328}\) See infra Part III-G.
Territorialists skeptical of judicial unilateralism stress the dangers of such an approach. They warn that unilateral measures lack international legitimacy and can lead to conflicts with other countries through clashing laws and diplomatic discord. As the global hegemon, the U.S. faces inevitable push-back whenever it is seen as trampling on the sovereignty of other nations. Acts perceived as legal imperialism feed into a long history of unilateral bullying that offends our trading partners and undercuts efforts to solve the underlying problems through more constructive means. Indeed, the antagonism and resistance provoked by extraterritorial meddling could discredit the very norms they purport to advance and thereby reduce the willingness of other countries to undertake internal reforms.

Unilateral acts of extraterritorial regulation can also provoke retaliation and imitation, leading to “an anarchic free-for-all” of clashing jurisdiction. Unfair competition actions could function as a form of a disguised protectionism, a tool for domestic manufacturers to harass foreign competitors. If allowed to proliferate without restraint, such expansion of extraterritorial regulation could usher in a destructive wave of tit-for-tat retaliation that could escalate into a larger regulatory conflict or outright trade war.

Much depends therefore on the way in which these unfair competition norms develop, and, in particular, on the limitations that apply. Some of the relevant principles have been previewed in Part II. First, a clear violation of a broadly accepted international norm is required to establish international legitimacy. Second, a materially significant threshold of market harm must be proven as a causal consequence of violating said norm. Such a showing establishes the substantial effects on domestic territory that justifies extraterritorial jurisdiction. Third, to manage
possible conflicts with legal authorities in other countries, basic principles of comity, abstention, and remedial proportionately should be applied.\textsuperscript{337}

Enforcing these commonsense limitations would respect international comity and prevent unfair competition suits from proliferating at the expense of both judicial economy and other substantive values. Without them, unscrupulous firms could too easily wield unfair competition suits as a strategy of legal harassment. And governments could similarly wield unfair competition law as a pretext to advance hidden goals. After all, the United States is unlikely to remain the only player in this game. Far less savory regimes could join—and take advantage of whatever license our precedents create.

The remainder of this Part examines how these limitations would apply in non-IP contexts and also addresses some additional considerations. It proceeds as follows: Section (B) explores what types of norms are suitable for enforcement through unfair competition and how established must they be to qualify; (C) considers the evidentiary requirements to prove “substantial effects”; (D) addresses comity and conflict considerations such exhaustion requirements; (E) explores secondary liability for intermediaries; (F) discusses special concerns regarding private lawsuits in international relations; and lastly (G) offers thoughts on how this model may be employed to best effectuate lasting changes in behavior by shifting from the deterrence of wrongdoers to internalization of compliance norms.

\textbf{B. Internationally Accepted Norms}

What kind of violations are subject to properly unfair competition remedies? Any legal infraction? What about ethical breaches? How widely established must be the underlying norm—nationally, bilaterally, or internationally? And how clear-cut must the violation be?

\textit{1. Type of Norm}

In theory, any regulatory norm whose compliance costs are borne by private firms could serve as the basis for an unfair competition claim. However, in order to draw appropriate comparisons across jurisdictions (to establish international congruence/acceptance) and to assess competitive effects, the norm would need to impose specific, clearly defined

\textsuperscript{337} See \textit{supra} notes 256–258 and accompanying text.
obligations that carry identifiable associated costs.\textsuperscript{338} For this reason, ethical breaches that are not formally backed by legal obligation are unlikely to suffice. While in theory an emerging ethical norm related could meet these criteria, in practice, the evidentiary burden required to establish this would be extremely difficult to meet in the absence of formal legal authority.

2. \textit{International Acceptance}

That extraterritorial application of unfair competition law itself represents a novel enforcement strategy of potentially suspect international legitimacy underscores the importance of restricting such actions to domains where the underlying norms are internationally accepted. The question is how accepted need they be, and based on what evidence?

Intellectual property presents a comparative easy case because global standards in this domain have been extensively harmonized through detailed international agreements such as TRIPS. Thus, the \textit{TianRui} court could brush aside concerns over conflicts and legitimacy with the assurance that trade secrets are protected both under U.S. and Chinese law, and under TRIPS.\textsuperscript{339} Such triple norm convergence—where the underlying legal principles are instantiated both in the forum state, the country of production, and via multilateral treaty—represents the gold standard for international acceptance.

While the degree of harmonization achieved in intellectual property law may be unprecedented, widely accepted global norms exist in regulatory domains ranging from human rights to “hard-core-price-fixing” in the antitrust context.\textsuperscript{340} Certain international labor standards and environmental protections are similarly subject to widespread adherence.\textsuperscript{341} Any of these norms could therefore support an unfair

\textsuperscript{338} Where the norm does not lend itself to clear domestic application, it may be impossible to determine the extent to which any particular firm has benefited from non-compliance. For example, a commitment to cut a country’s aggregate carbon emissions might not specific how such emissions are to be reduced. If so, absent some further metric for allocating the burdens domestically, it would seem unfair to tax any specific industry with the costs of reduced emissions.

\textsuperscript{339} 661 F.3d at 1332-33.

\textsuperscript{340} Meyer, \textit{supra} note 1, at 170-71.

\textsuperscript{341} See, \textit{e.g.} ILO Convention No. 182 on the Worst Forms of Child Labour and Convention No. 138 on the Minimum Age for Admission to Employment; Convention on International Trade in Endangered Species of Wild Fauna and Flora (each with 150+ signatories).
competition action based on the “triple convergence” standard of international acceptance.

By contrast, the worst scenario would be to lodge an unfair action based on application of a U.S. law that has no analog either in the country where the violation occurred or in international law. Doing so courts an obvious charge of legal imperialism. For example, labor unions in the United States and other wealthy countries routinely demonize foreign competitors in the developing world for engaging in “unfair trade practices” based on their low wages and lack of labor regulation. Yet, making such “social dumping” actionable through unilateral measures would deny poor countries a legitimate source of competitive advantage. Those in poverty may rationally value increased employment over regulatory protection, and it should be left to their own governments to make the appropriate tradeoffs.

Unilateral enforcement of a foreign law that has no U.S. analog is arguably no better. Unless substantially the same standard applies in both countries, it is hard to see why a breach of a norm that applies in only one of them should be equated with unfair competition. After all, the playing field was uneven to begin with. Penalizing foreigners based on norm violations for which U.S.-based companies would be exempt is not only hypocritical, it would violate the national treatment principle in international trade law.\(^{342}\)

Between the two extremes of triple convergence and unilateral impositions lies a spectrum of intermediate scenarios whose legitimacy could be debated. For example, ensuring bilateral congruence of norms between the source country and forum state deflects the concerns over imperialism and hypocrisy and largely avoids trade law conflicts.\(^{343}\) Yet, just because both governments have passed a minimum wage law, for example, does not necessarily mean it is appropriate for one country to extraterritorially enforce such laws unilaterally. Not every law on the books is enforced. And source countries should retain the sovereign right to undertake such enforcement (or not) on their own terms without others meddling.

\(^{342}\) See Pager & Priest, WTO paper, \textit{supra}.

\(^{343}\) See Meyer, \textit{supra note} 1, at 174 (“If a foreign state has decided that particular acts are dangerous or noxious enough to be outlawed or civilly regulated in a certain manner, it is ill-positioned to complain that the United States has chosen to embrace and pursue a violation” on this basis).
A different case arises where the norm in question is supported by international law which commits each country to implement the norm in question. Such a commitment could arise either through a treaty, or arise from a widely adhered to customary norm.\textsuperscript{344} Either way, enforcement is now no longer a sovereign choice, but arguably an international obligation. Even if specific enforcement measures are not specifically required by international law, the source country has less ground to object when others step in to undertake enforcement in its stead.\textsuperscript{345}

Indeed, the same logic should arguably apply where the source country has failed to enact the relevant regulatory norm in the first place. Some may question penalizing a private firm for the omissions of its sovereign. If the source country has failed to implement the norm at home, why should a firm operating there pay a price when it has broken no law? To be sure, the better remedy would be to hold the source country directly accountable.\textsuperscript{346} However, outside of the WTO, binding mechanisms for state-to-state dispute resolution are rarely available. Moreover, where the regulatory norm has costs attached, the private firm has still benefited (albeit passively) from the source country’s failure to implement. Conversely, competing firms in countries that \textit{did} implement their treaty obligations have incurred the added costs. As between the two, arguably the latter should take precedence. Accordingly, the forum state could legitimately pursue an unfair competition action to enforce the relevant norm.

One can envision many more variations on the international acceptance scenarios, which will not be addressed here for reasons of space. However, in general, a sliding scale could apply: The further one departs from the triple congruence standard of norm acceptance, the more a heightened standard of proof would apply to other elements of the unfair competition action.

Care should also be taken to ensure norm congruence at the right level of specificity. Many countries may regulate in a substantive domain in ways that are broadly parallel. However, unless the norms as applied to the

\textsuperscript{344} Given that the norm in question here is being collaterally enforced via unfair competition law—and only as respects access to the regulating state’s internal market—arguably, widespread adherence by the international community to the norm would confer sufficient legitimacy to enable the unfair competition action to proceed even in the absence of clearly established customary law.

\textsuperscript{345} See Colangelo, \textit{supra} note 165, at 1106.

\textsuperscript{346} \textit{Cf.} Francovich v Italy (1991), Case C-6/90, [1991] ECR I-5357 (holding Member States liable for failing to implement E.C. law).
facts at issue in the specific case would yield a substantially similar result, such generalized resemblances are irrelevant.

3. Clarity of Violation

On its own, a widely accepted norm is not enough. Plaintiffs in unfair competition action should have to advance clear and convincing evidence of a violation. Forum states arguably have a heightened burden to justify asserting jurisdiction over conduct outside their borders. And again, the unorthodox nature of unfair competition actions as an enforcement strategy underscores the importance of such a “clarity” requirement from a legitimacy standpoint.347

C. Market Harm

For similar reasons, convincing evidence establishing a casual link between violations and market harm is imperative. Evidence would be evaluated in the manner described in Part II: the cost savings reaped through non-compliance with an international norm yields should be quantified, and downstream effects in the forum market analyzed using the same econometric analysis as with piracy.

Quantifying the competitive effect of violations may sometimes be challenging. Where Microsoft can generate a precise accounting of the number of infringing copies of Windows running in a factory and calculate their market value in terms of foregone licensing costs, a labor NGO may find it harder to quantify the impact of sweatshop abuses such as mandatory overtime on a factory’s bottom-line, let alone establish competitive harms in a downstream market. Limitations on international discovery can make evidence difficult to come by where the records are maintained by the party responsible for the violation. Yet, where the abuses are sufficiently egregious—as they often are—sometimes the evidence will speak for itself.

347 Cf. Colangelo, False Conflicts, supra note 234, at 11 (“courts using international law as rules of decision should use only well-established, extant norms and resist stretching international law in new ways and directions [especially] since foreign actors may not have adequate notice of idiosyncratically creative or expansive domestic interpretations of international law”).
D. Conflicts

As in the IP context, courts faced with unfair competition claims must reckon with the possibility that a parallel action for direct enforcement may be undertaken at the source. As with IP, limiting unfair competition claims to jurisdictions where direct enforcement is entirely unavailable would be too draconian. Another option would be to require exhaustion of local remedies before an unfair competition claim could be brought. Other areas of law, including federal habeas corpus and ATS claims, enforce such a requirement. Moreover, exhaustion of remedies may also be required under customary international law to exercise extraterritorial jurisdiction.

Yet, there are practical difficulties in applying an exhaustion requirement. The competitor experiencing the downstream injury will likely lack standing to bring a direct enforcement action locally even assuming a private right of action. In many cases, regulatory enforcement may be the exclusive preserve of the foreign government. In other cases, potential plaintiffs may encompass a diffuse class (e.g. employees). Why should the competitor’s claim be at the mercy of these third parties? There is also the issue of timing. Should a competitor be forced to suffer losses in the U.S. market while the direct enforcement action wends its way through local processes? Arguably, these questions should be settled on a case-by-case basis, based on the nature of the relief sought, the extent of harm, the balance of hardships, the likelihood of conflicts, the public interest, comity principles, and so forth. To the extent that parallel actions are allowed to proceed, the same conflict management tools discussed supra in the context of intellectual property claims would need to be deployed.

E. Secondary Liability

This Article has generally contemplated unfair competition actions directed at the primary wrongdoer—e.g., the manufacturer that engages in cost-cutting malfeasance and thereby runs afoul of unfair competition laws in the U.S. Often, however, there are insurmountable jurisdictional or other practical barriers to hailing such defendants into U.S. courts. It is

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348 See supra note 250 and accompanying text.
349 Sosa, 542 U.S. at 733 n.21 (ATS).
351 As noted, in markets such as India and Brazil, local remedies may take many years or even decades to be obtained.
important, therefore, to consider under what conditions secondary (or indirect) liability should apply to participants who are not themselves directly responsible for the underlying violation.

While the economic benefits of unfair competition flow readily down the supply chain, it is less clear that moral culpability should accompany them. The Washington State statute provides for more lenient liability standard for retailers and distributors, rebuttable upon a showing that such secondary actors have exercised due diligence in ensuring compliance (i.e. that their suppliers have licensed their software). Such provisions may prove effective in helping to propagate compliance norms. And perhaps it is not unreasonable for Washington State to impose such diligence duties on firms that actively and continuously operate in its marketplace. Yet, it seems less warranted to impose similar liability on firms operating further up the supply chain. For example, a Chinese intermediary that bought TianRui’s steel wheels and assembled them onto locomotive cars for export should not necessarily bear responsibility for its supplier’s sins. Rather, secondary liability should arguably hinge on standard tort principles of vicarious or contributory liability based on a showing of culpable knowledge, material assistance, right of control, and/or financial complicity. Moreover, providing notice before imposing liability would ease concerns that foreign intermediaries might feel blindsided by claims out of the blue.

There may, however, be further justification for imposing a heightened duty to affirmatively police supply chain compliance on firms that have specifically held themselves out as undertaking such responsibility, e.g. as part of a commitment to fair trade or corporate social responsibility. Such pledges and commitments should be incorporated in to the secondary liability calculus based on a standard of commercial reasonableness/due diligence. Indeed, as we discuss in Part III-G, below, the ultimate endgame of the unfair competition lawsuits is to spur adoption of compliance norms among overseas producers. Ideally, placing secondary liability on intermediaries would encourage a compliance culture to work its way up global supply chains.

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352 See Rev. Code Wash. sect. 19.330.060(2)
353 See infra notes 413-15 and accompanying text.
354 See Grokster, 545 U.S. at 930-34; Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 30 (2d. Cir. 2012) (considering basis for imputing knowledge based on “red flags” and duty to police proactively).
356 See supra Section I-C.
Beyond fairness concerns for the immediate defendant, however, another limiting factor is potential harm to third parties.\(^{357}\) Imposing broad secondary liability on intermediaries may lead risk-averse companies to avoid dealing with suppliers in countries perceived as “dodgy.” While some may argue that such blacklisting practices would encourage systemic reform, we should worry about penalizing honest suppliers who may resent being unjustly tarred by an overbroad brush. Such unintended outcomes could have the perverse consequence of provoking a backlash that undermines compliance norms, rather than affirming them. Accordingly, a balance must arguably be struck in setting diligence levels high enough to preclude willful blindness, but not so high that firms shun foreign suppliers entirely.

Finally, a related question is which country’s law should supply the secondary liability standard. The answer would seem to depend on the where the actor in question operated. The liability of a Chinese exporter whose contacts with the primary wrongdoer occurred in China should presumably be judged based on Chinese law.\(^{358}\) By contrast, an American importer could be judged based on a U.S. secondary liability standard. Standard conflict of law principles would apply to resolve ambiguous cases.\(^ {359}\)

## F. Concerns Raised by Private Litigation

Consideration should also be given as to the degree to which it is appropriate to enforce the underlying foreign or international norms via civil lawsuits. While it is generally accepted that intellectual property rights are private rights that can be enforced through civil actions,\(^ {360}\) the same is not true for other regulatory norms.\(^ {361}\) In many cases, enforcement is left to the state. Where a country has implemented a regulatory norm in a manner that does not allow for private rights of action, should unfair competition actions brought by private litigants be similarly barred?

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\(^{357}\) See Daryl J. Levinson, Aimster and Optimal Targeting, 120 HARV. L. REV. 1148, 1148-51 (2007); Parella, supra note 99, at 817. Parella describes the unintended consequences that occurred when, to improve monitoring, Nike centralized production, imposing hardships on the predominantly female work force that was accustomed working at home while caring for children. \(\text{Id.}\)

\(^{358}\) Cf. Colangelo, supra note 165, at 1085.

\(^{359}\) Similarly, the same distinctions would apply with respect to questions of corporate veil piercing. \(\text{Cf. id.}\) at 1089.

\(^{360}\) See TRIPS Preamble.

As it happens, the state unfair competition actions thus far have all been brought by state attorneys generals. However, one could argue that foreign officials (and foreign courts) are equally unsuitable to enforce the public law norms of a foreign sovereign.\textsuperscript{362} There is precedential support for this viewpoint. U.S. courts generally refrain from hearing cases arising under the revenue or penal laws of foreign nations on prudential grounds; such laws represent quintessential domains of sovereign interest, and are thus seen as exclusively within the jurisdiction of the country of origin.\textsuperscript{363} Perhaps unfair competition actions touching on these domains should indeed be off limits. Yet, that does not mean that, as a general rule, the mere absence of a private right of action should preclude enforcement via unfair competition law. The enforcement here is only collateral and oblique; rather than directly applying the foreign norm, the unfair competition action merely uses it as an interpretive yardstick to determine the degree of unfair advantage that the defendant has reaped through non-compliance.\textsuperscript{364}

Beyond this, broader questions could be raised as to the appropriateness of delegating transnational enforcement to private attorneys general. Allowing private competitors to bring such actions potentially enlists a powerful advocate for regulatory enforcement. As Hannah Buxbaum observes:

In an era in which unchecked corporate power often results in economic misconduct on a global scale, civil proceedings in U.S. courts could help provide meaningful regulation of economically harmful behavior. Particularly in developing countries, where the challenges of global economic harm have not yet been adequately addressed, such assistance would be significant. In this regard, the litigation promises to mobilize available resources to address a problem that concerns the international community at large.\textsuperscript{365}

Unlike fair trade/environmental certification or corporate social responsibility/disclosure regimes, the plaintiffs in these cases have a

\textsuperscript{362} See Dinwoodie, \textit{supra} note 174, at 789 (describing “public law taboo”).

\textsuperscript{363} Bradley, \textit{Age of Globalism}, \textit{supra} note 43, at 576; Buxbaum, \textit{supra} note 329, at 278.

\textsuperscript{364} Cf. Buxbaum, \textit{supra} note 329, at 284-85 (describing analogous case under tax laws).

\textsuperscript{365} \textit{Id.} at 271.
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direct financial interest in holding violators accountable. Competitors may also have deeper pockets to fund litigation than NGOs.\(^\text{366}\)

Yet, private motivations can also lead to skewed enforcement practices and opportunistic behavior.\(^\text{367}\) Regulatory issues frequently present complex polycentric interests for which private parties in a civil suit may be inadequate advocates. In this regard, the use of unfair competition law to enforce international regulatory norms may share the perceived shortcomings of other domains in which regulatory policy has been delegated to private litigants.\(^\text{368}\)

Indeed, this critique has resonated in international law of late. From Alien Tort litigation to inventor-state arbitration, the merits of private enforcement of international law have been increasingly questioned.\(^\text{369}\) This well-rehearsed debate reprises the argument between “unilateralists” and “territorialists” described above, here filtered through the lens of private litigation.

Critics allege private lawsuits “distort the structure of international law and . . . undermine the measured progress of foreign relations.”\(^\text{370}\) For Curtis Bradley,

[\text{t}he most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives. The plaintiffs and their representatives decide whom to sue, when to sue, and which claims to bring. These actors, however, have neither the expertise nor the constitutional authority to determine US foreign policy. Nor, unlike our elected officials, will these actors have the incentive to weigh the benefits of this litigation against its foreign relations costs.\(^\text{371}\)]

\(^{\text{366}}\) Smaller competitors can also mobilize through trade associations, or enlist the state attorney general’s office.

\(^{\text{367}}\) State attorneys general with political aspirations can likewise be expected to align their enforcement efforts with parochial commercial interests.

\(^{\text{368}}\) See Parrish, The Effects Test, supra note 157, at 1489-90 & n.179.


\(^{\text{370}}\) Stephens, supra note 369, at 434.

Others worry that litigation “create[s] piecemeal solutions to global problems” that can lead to inconsistent rulings” and “encourage overregulation.”372 They see litigation as framing issues narrowly in ways that miss the bigger picture.373 They also fear private suits will disrupt negotiations through political channel and warn that “[r]ulings by US courts cannot substitute for the hard work of reaching consensus within foreign states on respect for human rights and responsible development.”374

Finally, transnational private litigation “ha[s] met the same criticism leveled at transnational public law litigation--that [it] arrogate[s] power to the courts of particular countries in a way that violates the international jurisdictional framework, and therefore infringe the sovereignty of other countries.”375 “The most pointed criticism of this type casts transnational litigation as the product of intentional hegemonic behavior of the United States.”376 Such lawsuits can engender antagonism that undermines international cooperation and provokes retaliation and obstruction.377

Defenders of transnational litigation acknowledge these concerns, but counter that sometimes national courts supply “the scalpel needed to cut through the tangled web of money and politics and lay bare the moral and social dimensions of global wrongdoing.”378 When international regulatory mechanisms fail, “plaintiffs should be [free to] bypass[] the uncertainty of political negotiations and compensate for the weakness of international tribunals by turning to effective national courts.”379 At the same time, courts should acknowledge “the practical limits of their

374 Anne-Marie Slaughter & David Bosco, Plaintiff’s Diplomacy, 79 FOR. AFF. 102, 111 (2000).
375 Buxbaum, supra note 329, at 272.
376 Id. at 304. United States’s own somewhat spotty record of compliance with international law and unwillingness to subject its citizens to the jurisdiction of foreign courts can also smack of hypocrisy. Slaughter & Bosco, supra note 374, at 115.
378 Slaughter & Bosco, supra note 374, at 112; Stephens, supra note 369, at 435 (human rights are “too important to be left to the unscrutinized domain of governments and government officials”).
379 Slaughter & Bosco, supra note 374, at 115.
power.” To preserve their legitimacy, they should refrain from pushing policy beyond the limits of international consensus.

All of this underscores the need to place extraterritorial regulation through unfair competition law on a sound legal footing. The preceding sections of this Article have emphasized specific safeguards designed to keep the unfair competition action on the “safe” side of the line. Restricting such actions to clear violations of concretely defined norms backed by international obligations serves to address international legitimacy concerns. Countries have less reason to object to enforcement of norms to which they have already consented. Enforcing materiality thresholds for competitive injuries offer further safeguards against abuse by restricting such actions to demonstrable cases of domestic harm. The limited nature of the remedy—focused solely on harms to the regulating state’s own internal market—further cushions the intrusion on foreign sovereignty. Conflict management provisions and comity principles serve to head off direct conflicts. Further controls on the subject matter, procedural, and evidentiary foundation of such actions should also remain within the court’s discretion.

Such doctrinal restraints would go a long way toward alleviating the concerns raised by critics of transnational private litigation. They would ensure that extraterritorial application of unfair competition law remains a narrowly tailored remedy, rather than an all-purpose tool to solve the world’s ills. At the same time, as Chimène Keitner observes, while private litigation is not the ideal global governance solution, “the ideal system has yet to be designed and implemented on a global scale.” In the meantime, private litigation can be an effective, albeit imperfect, tool for initiating the process of positive social change. Thus, while unfair competition suits can supply “only one part of the answer,” one should not overlook their potential to serve as an “initial step” in a larger process of reform. Indeed, for many plaintiffs, the primary value of transnational litigation is the publicity it secures. Such public attention can put substantive issues on the agenda for political resolution and trigger spillover effects that lead to enduring, widespread reforms. With this in

380 Id. at 116.
381 Id. at 112.
382 See Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d. Cir. 1980).
384 Slaughter & Bosco, supra note 374, at 112.
385 Id. at 112.
386 Id. at 106, 108.
mind, it is worth reflecting further on the potential for unfair competition suits to serve as a piece of a larger puzzle: a tool to improve global economic governance and respect for international regulatory norms.

G. Norm Shifting Strategies

While this Article has focused on unfair competition lawsuits, bringing such suits should not be viewed as an end in itself. The real victory comes not from winning isolated judgments against individual bad actors, but rather would be achieved by effecting a broader and more durable shift toward a norm of compliance with international standards that spans an entire industry or region. To achieve this goal requires an integrated strategy in which lawsuits form but one component in a coordinated norm-shifting campaign.

Laws function best when they effectively promote and shape behavioral norms.387 Most regulations that are generally obeyed are not in fact comprehensively enforced.388 As copyright scholar Paul Goldstein put it, a law that relies solely on legal deterrence to achieve its ends by punishing every offense “would be as futile as it is costly.”389 There are two bases on which people tend to comply with a given law even in the absence of widespread enforcement: (1) concern about maintaining social relations, and (2) personally held normative values.390 Thus, if failing to conform one’s behavior to a legally prescribed standard would result in disapproval from one’s peer group, or would lead to other informal social sanctions, an individual usually complies willingly even when the perceived risk of formal legal sanctions is low.391 Likewise, an individual is likely to conform to legally prescribed standards that she believes are “right,” appropriate, or fair, regardless of the perceived risk of legal enforcement.392

391 Id. at 24–25.
The unfair competition actions described herein are no different from other regulations in this regard. Actions initiated for purposes of “specific” deterrence, that is, aimed to stopping malfeasance by the defendant, are bound to be a mere drop in the ocean given existing patterns of widespread misconduct. Indeed, even bringing such actions for their “general” deterrent effect on wrongdoers other than the defendant is unlikely to provide a complete solution as ongoing enforcement through repeated unfair competition actions may be impractical. To the extent, then, that unfair competition actions seek to change endemic behaviors in overseas industries in a meaningful, enduring way, the challenge is to devise a strategy that not only deters behavior, but also engenders permanent changes in behavioral norms so that wrongdoers police themselves and, ideally, their competitors.

Effecting norm shifts in the unfair competition context is challenging for two reasons, however. First, the actors targeted will typically be corporations, which may be less susceptible than individuals are to social group “sanctions” and may not have “personally held normative values” like individuals. Nevertheless, norms of corporate behavior can and do arise, and are susceptible to influence. Corporations can be disaggregated to individuals who interact within, and are sensitive to the norms of, social groups within the corporation and industry. Company managers and directors may be loath to violate widely observed norms relating to corporate governance, for example, due to personal moral convictions or ingrained customs. Executives may also seek the esteem of others in the industry—including competitors—in order to create opportunities for their companies for intra-industry deals and partnerships. They may also be protective of their personal reputations in order to maintain professional mobility.

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394 See supra Part I-A(1),C.
395 See CALABRESI, supra note 396.
399 See id.
401 See id.
Second, attempts to influence norms across a transnational divide face added hurdles. Ideally, norm-shifting strategies appeal to shared interests and values. However, cultural differences can impede such efforts and magnify misunderstandings, as can innate resistance to foreign pressure. As the world superpower, the U.S. must also navigate anti-imperialist sentiment.

Norm-shifting campaigns may work better for some international standards such as human rights or environmental protection, where a plausible case can be made that such norms really are both morally justified and in the long-term national interest. By contrast, issues such as intellectual property theft are not widely considered as implicating values of fairness or morality, making it more difficult to trigger “personal” norms that lead to self-policing. Thus, unfair competition strategies might be less effective at addressing wrongs such as IP infringement that many perceive as merely malum prohibitum. Indeed, there is a danger that enforcing legal standards that are viewed as unjust or against the national interest can trigger the opposite of the intended result—a backlash in which the target group’s anti-compliance norms actually become stronger.  

In any case, for norm-shifting to have a realistic chance of success, unfair competition suits should be carefully coordinated as part of a three-part strategy: (1) legal actions should be targeted against a discrete group of defendants within a single industry or region, (2) litigation should be accompanied by a coordinated outreach campaign, and (3) followed by long-term monitoring mechanisms.

1. Strategic Targeting

First, as we saw, filing lawsuits scattershot is insufficient to deter widespread malfeasance. Instead, strategically targeting companies within a single industry which operate within a close-knit structure or which are geographically clustered within a specific region is likely to have more impact and create beneficial spillovers. Targeting one defendant will get the attention of the others. And if the initial suits are successful in bringing their targets into compliance, ideally, once a critical mass of industry players have incurred the cost of compliance, they will be motivated to

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402 A high profile example of this phenomenon was the music industry’s ill-fated attempts to sue file sharers into submission. The result was that file sharing persisted and pro-infringement norms became more entrenched. See Ben Depoorter et al., Copyright Backlash, 84 S. CAL. L. REV. 1251, 1267–1268 (2011).
pressure free-riding competitors to do the same.\textsuperscript{403} Erstwhile defendants, out of self-interest, may therefore impose effective group sanctions on members who have not yet gone legit.\textsuperscript{404}

From this perspective, the unfair competition cases filed to date would seem of dubious efficacy in that they targeted a series of unconnected defendants in disparate industries and countries.\textsuperscript{405} The one exception may have been the action filed by Massachusetts Attorney General Martha Coakley against Thailand-based Narong Seafood in 2012. Local media reports claimed Coakley planned to file a slew of unfair competition actions against other Thai firms,\textsuperscript{406} suggesting there may have been a targeting strategy. Moreover, Thai commercial fishermen may present a more concentrated, close-knit target than, for example, the T-shirt manufacturers California’s attorney general sued in India and China.

Discussion of targeting should also consider the potential to pursue downstream purchasers under theories of secondary liability.\textsuperscript{407} As we saw in Part I-C, U.S.-based or multinational distributors often enjoy substantial leverage over their suppliers. As we suggested in Part III-E, standard tort principles of secondary liability could be employed to extend unfair competition liability to such supply chain intermediaries, holding such firms accountable for legal violations committed by their suppliers. Where large intermediaries source supplies from a cluster of related producers, targeting the intermediary may provide a more efficient means of exerting pressure up the chain.

2. \textit{Coordinated Outreach}

Second, unfair competition suits should not take place in a vacuum; rather, they should form part of a multi-faceted strategy. Litigation serves to capture the attention of wrongdoers and generate valuable publicity. It can also serve as a spur to structure forward-looking settlements. Indeed,

\textsuperscript{403} Priest, \textit{Acupressure}, supra note 7, at 186–90. This progression has been observed in at least one fiercely competitive industry: Chinese online video websites. The largest Chinese video websites, formerly notorious pirate sites, developed widely adhered-to industry norms against copyright infringement once copyright owners successfully pressured a handful of sites to go legit. \textit{See id.} at 225–28.

\textsuperscript{404} See Priest, \textit{Acupressure}, supra note 7, at 225–28.

\textsuperscript{405} See \textit{id.} at 229 (“Inducing a change in behavioral norms across multiple industries in multiple countries seems like an impossible goal to attain through a handful of sporadic actions brought by state attorneys general.”).


\textsuperscript{407} See supra Part III.E.
the focus of unfair competition suits should be less on exacting retribution, and directed more toward coopting defendants as potential allies on the road to reform.

Direct legal pressure should be accompanied by a coordinated outreach strategy designed to reshape industry attitudes and norms through persuasion, ongoing education, and, where possible, compliance assistance. While specific tactics should vary by context, they may include working through industry associations, lobbying business leaders, or contacting local government officials. The correspondence between Tennessee’s Attorney General and the Attorney General of Thailand may offer a real-life example along these lines. Conducting such targeted outreach and educational initiatives and can help to minimize backlash provoked by legal enforcement and pave the way for longer-term reforms.

3. Long-term Monitoring

Finally, initial advances achieved through legal settlements and outreach should be consolidated through longer-term arrangements designed to reiterate legal standards and verify compliance. Such sustained private ordering provides an essential bridge to reinforce compliance norms that will eventually become internalized. As we saw in Part I-C, above, the corporate social responsibility movement has spawned a host of private ordering initiatives of varying efficacy. By themselves, such measures have proven insufficient to solve the vexing global ills at which they are aimed. However, strategic deployment of unfair competition litigation could provide the previously lacking enforcement necessary to give teeth to such arrangements. It can also bolster them where appropriate through proactive settlements and monitoring mechanisms.

Chimène Keitner argues that private litigation targeting extraterritorial misconduct can contribute to “a broader strategy for promoting internalization of corporate social responsibility norms . . . particularly in countries whose own legal and regulatory frameworks are not well

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408 See Priest, Acupressure, supra note 7, at 231–34 (arguing that market pressures and persuasion are important factors in creating industry norm shifts); Hope M. Babcock, Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm, 33 HARV. ENVTL. L. REV. 117, 165–73 (2009) (suggesting a multifaceted approach to changing environmental protection norms combining enforcement with “persuasive tools” including education and market-based incentives).

equipped to control or avoid” harmful corporate activities.\footnote{Keitner, supra note 383, at 2214.} Yet, as we saw, viable theories to bring suits targeting transnational supply chains in U.S. court have been lacking. Unfair competition lawsuits may thus provide the missing piece to the puzzle.

As we suggested in Part III-E, imposing secondary liability could bring a further layer of accountability to private ordering commitments. We suggested that such liability be premised on failures to exercise diligence in complying with voluntarily assumed corporate social responsibility codes. The threat of such liability would give teeth to such conduct codes and reorient the priorities of multinational corporations, so that they are focused on achieving actual solutions rather than optics and whitewashing.

The real promise of secondary liability, however, is its potential to trigger enduring reforms that alter the business norms of suppliers. Major multinational corporations rely on a vast array of suppliers, and thus holding them accountable for misconduct in their supply chain could have a powerful multiplier effect. At the same time, as noted above, intermediary liability could be counterproductive if imposed too broadly. The best approach, arguably, would be to use the threat of liability to motivate proactive reforms based on specific contractual commitments reinforced through continued monitoring. Notice and cure provisions such those in the Washington State statute\footnote{See supra notes 89–90 and accompanying text.} arguably provide an effective vehicle to encourage such private ordering efforts. Individual firms should be encouraged to educate both employees and management about the importance of compliance, identify and monitor potential red flags, and work with industry associations to develop a set of best practices to strengthen compliance norms.\footnote{See Mitchell et al., supra note 90, at 33–35.} The hope is that such continued engagement over time, motivated by the deterrent effect of unfair competition suits, will lead suppliers to internalize the underlying norms more effectively than either the threat of litigation or private ordering on its own. Such a virtuous dynamic could hold powerful repercussions for global economic governance.

\footnotetext{[410]}{Keitner, supra note 383, at 2214.} 
\footnotetext{[411]}{See supra notes 89–90 and accompanying text.} 
\footnotetext{[412]}{See Mitchell et al., supra note 90, at 33–35.}
IV. CONCLUSION

This Article has explored the extraterritorial use of unfair competition law to target regulatory violations by foreign producers who export to the United States. While thus far applied in the context of intellectual property infringement, the same underlying theory of unfair competition would work to target violations in many other domains including human rights, labor law, and environmental protection. Unfair competition law could therefore supply a potent remedy for persistent failures in the rule of law and bring a measure of justice to those powerless to enforce rights in their home countries.

Globalization has exposed the weak links of global regulatory governance regimes that remain dependent on national sovereigns. Outsourcing of production across extended global supply chains pushes problems upstream to low cost producers, which typically inhabit states with weak regulatory regimes and inadequate enforcement. The result has been a host of dire challenges: sweatshop labor conditions, environmental crimes, child labor, human trafficking, confiscated land, and widespread theft of intellectual property.

Activists, NGOs, and governments in developed countries have sought to end these outrages through an array of tactics. Yet, both existing initiatives and proposals from pundits all suffer from a single fatal flaw: lack of a reliable enforcement mechanism. Powerful incentives exist for corporations and their contractors to evade voluntary conduct codes, and they do so all-too-easily. Actions by private attorneys general have foundered on doctrinal barriers, and U.S. courts are reluctant to exercise jurisdiction directly over conduct that occurs abroad. Meanwhile, consumers remain largely indifferent to the human suffering that their purchases underwrite.

Unfair competition law could be a game changer that supplies a powerful new tool to vindicate global regulatory norms. This approach has numerous potential advantages: it creates jurisdiction in U.S. courts, creates a class of willing and well-resourced plaintiffs in disadvantaged competitors, and provides enforcement with real teeth as perpetrators risk being frozen out of lucrative U.S. markets. Perhaps most importantly, this strategy requires no new laws to be passed and has already gained traction in the context of intellectual property.

In order for unfair competition lawsuits to be employed as an instrument of global governance, however, such actions need to be tempered by jurisprudential restraint. Otherwise, the potential risks posed
by such actions are just as momentous as their possible rewards. Allowed to operate in unfettered fashion, such extraterritorial actions could easily lend themselves to abuses ranging from domestic protectionism to unilateralist bullying. U.S. actions would likely provoke imitation and retaliation by other countries, including some with far less scrupulous adherence to the niceties of legal objectivity and global comity. The result could be a global unfair competition “arms race,” leading to an anarchic free-for-all of clashing jurisdiction.

This Article has proposed a comprehensive set of principles to cabin such dangers and minimize adverse repercussions. Restricting extraterritorial unfair competition action to clear violations of concretely defined norms backed by international obligations would ensure that such actions are cloaked in the mantle of international legitimacy. After all, countries cannot object to enforcement of rules to which they have already consented. Enforcing materiality thresholds for competitive injuries offers further safeguards against abuse by restricting such actions to cases where demonstrable harm to the domestic market can be proven. Application of conflict management provisions and comity principles would serve to head off direct conflicts with foreign legal processes. Keeping unfair competition causes of action tightly reined in according to these principles will not only defuse immediate conflicts, it will also establish useful precedents in customary international law that could dissuade future regimes from wielding unfair competition law in an abusive manner.

However, on their own, even narrowly tailored unfair competition lawsuits are not a panacea. We envision them functioning best as part of a coordinated effort to trigger long-term reforms that alter the business norms of suppliers. Such a strategy is most likely to be effective if it involves selective targeting of industries and combines legal deterrence with extralegal outreach and long-term monitoring. Rather than exacting retribution, the focus of unfair competition suits should be on coopting defendants as potential allies on the road to reform. A coordinated outreach strategy should seek to reshape industry attitudes and norms through education and compliance assistance. The aim should be to turn targeted businesses into stakeholders who will adopt the mantle of enforcement themselves. The most effective unfair competition strategy, therefore, may be to use secondary liability to hold multinational corporations accountable for misconduct in their supply chains. In this way, the web of supplier contracts on which modern globalized production relies can be harnessed as a vehicle to propagate compliance norms.
The hope is that the motivating pressure of litigation combined with continuous reinforcement through private ordering will, over time, lead regulatory compliance to become internalized by industry actors. Such a virtuous dynamic could spur widespread adherence to global regulatory norms. Unfair competition suits therefore hold profound implications for the global rule of law. While private litigation has inherent limits, deployed judiciously as part of an integrated strategy, such actions could make a vital contribution to global governance.