D. The Way Forward

The previous parts of the study have been in large part guided by the research question, whether the territoriality-based system of jurisdiction is still capable of providing order in international relations by delimiting regulatory competences between States. The answer to this question depends on whether it is possible to define normatively consistent boundaries of territoriality to be respected by States. Through a multitude of examples, however, this study has demonstrated that indeed, ever more intricate and sophisticated legal arguments have proved futile in providing such consistent boundaries. As several commentators have noted, globalization and in particular the advent of internet have made it increasingly difficult to pinpoint the exact location of a certain conduct and to answer the question whether such conduct is territorial or extraterritorial.[953] In addition, however, this study has shown that modern transnational regulation itself has become more complex in that the measures often seek to compel conduct by someone else than the formal (territorial) addressee of the regulation. These measures often rely on the dense personal and commercial ties between the regulatory subjects to impact behaviour beyond territorial boundaries, aiming to export domestic norms and standards. In these cases, the question is not only where the conducts to be regulated are exactly located, but also, with regard to regulations involving multiple elements, which of these elements are relevant for the normative inquiry of territoriality versus extraterritoriality.

At the same time, the interests of transnational regulation have become much more complex than the architects of Westphalian sovereignty could have ever imagined. Considerations of State sovereignty are complemented by international community interests as well as the rights and the autonomy of individuals. However, the traditional approach to jurisdiction offers only limited possibility to balance these considerations. Because the territoriality-based system is thus deficient on multiple accounts, this part of the study offers an alternative conception of extraterritorial jurisdiction. This research proposes that functionally, extraterritorial jurisdiction as a regulatory technique resembles domestic exercises of public authority *vis-à-vis* individuals. Therefore, States exercising extraterritorial jurisdiction

953 See already Lowe and Staker (n 50), 308 – 309; Svantesson (n 64), at 42 – 43.

under international law should not only consider the sovereignty of States, but also respect other aspects of both legitimation and limits, in particular, the relationship between the regulating State and the addressee and the international community at large.

To this end, this part proceeds in three steps. Chapter I argues why this particular new conception for extraterritorial jurisdiction in international law was chosen. It explains why it is necessary, possible and reasonable to abandon the territoriality-based system in favour of an approach highlighting the function of extraterritorial jurisdiction also as an exercise of public authority. Chapter II of this part further develops the two concepts of legitimation and limits. While this chapter discusses different possible theoretical approaches to legitimize (extra-)territorial jurisdiction, it also serves to rebut the notion that the allocation of interstate jurisdiction is solely a matter of sovereignty. In particular, it will be shown how, already today, individuals have a role possibly both legitimizing and limiting extraterritorial jurisdiction contrary to what critics would consider an impermissible enmeshment of strictly separate spheres.[954] Chapter III will then seek to translate these theoretical considerations into a framework for the lawful exercise of extraterritorial jurisdiction, which seeks to be both doctrinally coherent and practical in its application.

I. Arguing for a New Approach to Jurisdiction in International Law

The first two parts of this study have identified serious shortcomings of the traditional, territoriality-based system of jurisdiction. However, the mere identification of a problem says relatively little about if, and how, these issues should be dealt with. First, while contentious exercises of extraterritorial jurisdiction have caused discord and instability in international relations in the present, one might argue that future developments, in particular further harmonization of law across and cooperation between States may render the study of new approaches to extraterritorial jurisdiction obsolete. Second, even if the progressive development of extraterritorial jurisdiction were necessary, it might not be possible to simply abandon

954 Modern international law acknowledges a strengthened role for individuals, transforming them from mere objects to bearers of rights and duties alongside States, see Anne Peters, *Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht* (Jus Internationale et Europaeum vol 88, Mohr Siebeck 2014).

territoriality. After all, territorial sovereignty has been such a fixture in international law that it might be actually inevitable. Thirdly, before moving to a radical new conception of extraterritorial jurisdiction that may also have repercussions for international law in general, it may be worth considering whether the principles available today, and in particular the principle of non-intervention, may achieve the desired results. The next sections address these considerations in this order. The fourth and last section of this chapter introduces some preliminary consideration on the reasons behind the approach advocated for in this study.

1. Alternative Approaches to Solve Concurrent Jurisdiction

a) Substantive Harmonization

Although the process of globalization rendered the territoriality-based system incapable of establishing jurisdictional order between sovereign States, the further development of globalization in the future may instead offer a cure to these problems. In particular, harmonization of the underlying substantive rules may mitigate potential State conflicts. With regard to jurisdiction, it operates on the assumption that with harmonized laws in different countries, States have less incentive to regulate extraterritorially because it would not change the normative result of the situation. And even if a State chooses to prescribe rules extraterritorially, legal certainty for affected individuals will increase as they will only have to deal with one set of substantive rules instead of potentially multiple conflicting commands. However, while appealing in principle, harmonization suffers from some well-known problems.

From a more theoretical perspective, several authors have noted that substantive harmonization and multilateral agreements are not negotiated in a power and interest free vacuum. On the one hand, the attitude of States towards international negotiations in any particular subject area is often dependent on domestic political factors. Harmonization may be pursued if the domestic constituency perceives that the benefits accrued will outweigh the potential costs.[955] As one author notes, such multilateral negotiations are in reality 'two-level games', where the State is not only bargaining with other parties to the agreement, but also with domestic

955 Tonya L Putnam, *Courts without Borders: Law, Politics, and U.S. Extraterritoriality* (Cambridge University Press 2016), 78 – 80.

groups at home.[956] On the other hand, relative power differences between the negotiating States may result in agreements that substantially favour the preferences of the stronger parties, despite the fact that all States are nominally equal in such processes. This is because more powerful States will generally have better access to critical information and possess the necessary clout to coerce, cajole or entice their less well-equipped counterparts to adopt their positions.[957] Thus, conflicts between States may arise and the legitimacy of substantive harmonization may be undercut because of doubts surrounding the fairness of the negotiation process. At this point of course, it should be noted that unilateral exercises of extraterritorial jurisdiction are also manifestations of power and that to date, only the world's largest economies, including the EU and the United States, have successfully pursued this avenue. Moreover, affected individuals still have more legal certainty under unfairly harmonized rules than under conflicting rules imposed through different States, even if one of the States exercising extraterritorial jurisdiction happens to be much more powerful than other States.

From a more practical perspective however, given the divergent policy spectrum around the world, substantive harmonization is difficult or even elusive in many regulatory areas. The requirement of consent by all parties to reach an international agreement means that, more often than not, harmonization happens around the lowest common denominator.[958] Moreover, even if an agreement is eventually reached, it does not guarantee effective national implementation as monitoring of international treaties can be difficult or (politically and financially) costly.[959] Therefore, even with agreed harmonized standards, extraterritorial regulation may still be used to supplement a perceived lack of national implementation measures. Thus, despite a general trend towards greater convergence in many regulatory areas, extraterritorial jurisdiction will remain a feature of international law for many years to come. In addition, international harmonization efforts seem to have hit a bump in the road lately because multiple States are currently retreating from multilateralism.

956 Magnuson, 'Unilateral Corporate Regulation' (n 10), 534.
957 Ryngaert, *Jurisdiction in International Law* (n 2), 203 – 208.
958 Magnuson, 'Unilateral Corporate Regulation' (n 10), 533 – 534.
959 See for an example for successful monitoring within the OECD, above at C.IV.4b)aa) The UK Bribery Act 2010.

b) Cooperation

Sometimes, when substantive harmonization has less prospect for success, enhanced cooperation, including requirements of notice or even mutual recognition, constitutes the politically more viable option. A prime example in this regard is the area of global antitrust enforcement. While the adoption of an international agreement on competition and anticompetitive practices had been on the agenda of the WTO for some time, resistance in particular by developing nations has stopped such lofty ambitions, which will likely remain elusive in the future.[960] Even between the industrialised bloc of the EU and the United States, stark substantive divergences exist in relation to their municipal competition policies.[961]

Nonetheless, the EU and the United States, the two most dedicated promoters of extraterritorial antitrust enforcement, have entered into an agreement on mutual cooperation, which, among other things, mandates each party to notify the other whenever it becomes aware that its enforcement activities may affect important interests of the other party.[962] Moreover, the agreement contains a mechanism of positive comity, according to which each party may request the other party to initiate proceedings on its own territory if anti-competitive behaviour there affects the interests of the requesting party. However, despite the conclusion of a supplemental agreement on positive comity, use of this mechanism in practice remains scarce.[963] More recently, the International Competition Network has provided the most promising forum for informal enforcement cooperation and possibly substantial convergence. The increased cooperation through these venues seems to have yielded at least some benefit in relation to managing concurrent extraterritorial jurisdiction as evidenced by the successful multilateral enforcement action in the *Marine Hose* case. Perhaps most significantly in this example, the UK and the United States managed to negotiate a 'split-jurisdiction' deal, where the prison sentences imposed

960 Zerk (n 634), 92 – 93; Ryngaert, *Jurisdiction in International Law* (n 2), 202.
961 Avi-Yonah (n 237), 29.
962 Agreement Regarding the Application of Competition Laws between the Government of the United States and the Commission of the European Communities, (1991) 4 CMLR 823; (1995) 30 ILM 1487, [1995] OJ L 132, Art. II 1.
963 Putnam (n 955), 142; for another treaty, which contains a provision on comity in transnational environmental regulation, see: North American Agreement on Environmental Cooperation, (1993) 32 ILM 1480, Art. 22.

upon the executives of the cartel members were coordinated to avoid possibly two separate sentences in both the UK and the United States.[964]

Inspired by this and similar examples, most studies on extraterritorial jurisdiction agree that increased international cooperation is a helpful and desirable solution to avoid conflicts between States and to enhance the effectiveness of extraterritorial law regimes.[965] This is likely to be true with regard to some issues associated with the exercise of unilateral extraterritorial jurisdiction. However, cooperation is by no means a panacea as will be illustrated by two exemplary arguments: For one, while cooperation on the enforcement level might concentrate eventual proceedings in one State, it does not avoid the issue that it is impossible for the affected individual to know beforehand, which State will take the lead and which laws will be applied.[966] Thus, in the event of diverging or even conflicting legal standards by different States, individuals may still be faced with a difficult of even impossible compliance task. For the other, even solely administrative or procedural cooperation is subject to the restraints of domestic political preferences and may be more or less available depending on the concrete area of regulation, the agencies and regulators involved and the perceived costs and benefits.[967]

2. The History of the Territoriality Principle

The continued (almost slavish) reliance of States on territoriality even in an age of de-territorialisation may create the impression that there are no viable alternatives to this principle as the primary concept for the allocation of regulatory competences.[968] In order to propose a different conception of jurisdiction, this mystery should be debunked already now. It is essential to recall that, in fact, territoriality has been a rather recent historical development.[969] As several authors have pointed out, territoriality was unknown in the ancient world and allegiances then were based

964 Zerk (n 634), 103.
965 Ibid., 216 – 217; International Bar Association (n 12), 26.
966 International Bar Association (n 12), 28.
967 Pierre-Hugues Verdier, 'Transnational Regulatory Networks and their Limits' (2009) 34(1) YaleJIntLaw 113, 126 – 128.
968 Svantesson (n 13), at 13 has termed it the 'Tyranny of Territoriality'.
969 For an impressive overview of the development of territoriality, see Ryngaert, *Jurisdiction in International Law* (n 2), 50 – 62.

on connections such as personality, race or nationality.[970] Well up into Medieval Europe, sovereignty was not associated with geographical coordinates but rather with dominion over a tribe. For instance, the sovereign of the Capetian dynasty in France was originally called *King of the French* before it acquired a territorial title, *King of France*.[971] The idea of congruence between legal authority and territory fully gained traction in Europe only during the rise of the modern nation-State after the Westphalian Peace of 1648.[972] Since then, political, ideological and philosophical factors as well as technological innovations in cartography contributed to the development of the territoriality principle as it is still applied today. But it was only by the end of the eighteenth century, that territoriality had been enshrined as the primary jurisdictional basis in multiple criminal codes in continental Europe.[973]

It is equally worth noting that even in the heyday of territoriality, the principle has been riddled with exceptions. For instance, States have enjoyed jurisdiction over pirates on the high seas based on universality for centuries.[974] Equally, nationality based jurisdiction remained accepted and essential as a complement to territoriality in continental Europe.[975] On the other hand, European States frequently sought to exempt their own nationals from local territorial jurisdiction in non-Western States, such as Turkey, Morocco and China, through the maintenance of consular courts. These courts had jurisdiction over disputes involving their own nationals as well as for disputes between nationals and locals abroad and applied their home-State law instead of the local territorial law, which was seen as strange and barbaric.[976] Thus, for instance, an American living in Shanghai could be subject to the jurisdiction of the US District Court for China and US law instead of Chinese law.[977] It is clear that this practice constituted a significant breach with traditional ideals of Westphalian sovereignty

970 Ford (n 119), 868 – 872; Shalom Kassan, 'Extraterritorial Jurisdiction in the Ancient World' (1935) 29 AJIL 237, 240.
971 Henry S Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (3rd American, from 5th London ed. H. Holt 1873), 103 – 104; Ford (n 119), 873.
972 Raustiala, 'The Geography of Justice' (n 442), 107.
973 See for instance for Germany, § 3 of the Reichsstrafgesetzbuch of 15 May 1871; for more examples, see Ryngaert, *Jurisdiction in International Law* (n 2), 54 – 61.
974 See above at B.I.2f) The Universality Principle.
975 See for instance for Germany, § 4 of the Reichsstrafgesetzbuch of 15 May 1871.
976 Kassan (n 970), 238 – 239.
977 Scully (n 30), 6.

and was often only possible through the conclusion of coercive, unequal treaties between the Western and the affected non-Western States in a way not possible nor desirable today.[978] However, this example, and the other historical anecdotes related upon above, plainly contradict the narrative that strict territoriality is necessarily the only possible alternative for the allocation of jurisdictional authority between States.

3. Extraterritorial Jurisdiction regulated by the Principle of Non-Intervention

Not only was the development of territoriality as the cardinal normative principle of the jurisdictional order in international law a relatively recent phenomenon. It was also the result of one specific interpretation of Westphalian sovereignty, which emphasised aspects of internal and external independence and in particular, viewed territory as the natural physical corollary to State sovereignty. However, State sovereignty as a principle may have meaning and application beyond territorial sovereignty. Therefore, while territoriality has arguably failed in providing the normative backbone for allocating jurisdictional competences between States, this need not necessarily mean that State sovereignty may not still serve as the guiding principle to a progressive approach. Indeed, it is argued here that sovereignty and the principle of non-intervention, interpreted through a modern lens, are in fact capable of mitigating some of the issues found with the formalistic inquiry of territoriality versus extraterritoriality. Still, a reconfiguration of sovereignty alone is not sufficient to account for other bases of legitimation, in particular, the rights and interests of individuals.

In the introduction to this research, it was already explored that the principle of non-intervention, as a manifestation of State sovereignty, formed one of the outer limits of jurisdiction in international law.[979] Violation of the principle of non-intervention has two requirements, it must occur within a subject area that constitutes a domestic affair of the affected State and it must be conducted using methods of coercion.[980] This two part definition offers a rather wide margin for interpretation and

978 Ryngaert, *Jurisdiction in International Law* (n 2), 61.
979 A.III.1. State Jurisdiction and State Sovereignty.
980 *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* (n 273), 108; Ronzitti (n 270), 3 – 6.

development compared to the formal distinction between territoriality and extraterritoriality.

So far, it has been argued that the traditional bases of jurisdiction, territoriality, nationality and the protective principle all establish a genuine link to the subject matter of regulation so that the specific matter is drawn out of the domestic affairs of the affected State. However, what constitutes domestic affairs is not fixed and may change over time. Formerly domestic affairs may suddenly also be in the interest of other States.[981] This issue is particularly debated with regard to grave violations of basic human rights.[982] However, the same idea may also be transposed to other situations, where it could be said that how one State regulates a certain subject matter is not an exclusively domestic issue, but also concerns other States or the international community at large. Simply by redefining the boundaries of domestic affairs thus opens up the possibility to break away from the supremacy of territoriality.

In addition, however, the rigidity of the territoriality-based system of jurisdiction may also be mitigated by focusing on the second requirement for a violation of the principle of non-intervention, which is the existence of coercion. The relevance of the existence of coercion is reflected in the different treatment of enforcement and prescriptive jurisdiction. Traditional doctrine poses stricter requirements on the exercise of jurisdiction when it involves the performance of physical acts on the territory of another State than the mere extension of legislation to cases involving a foreign element.[983] Within prescriptive jurisdiction however, once one of the

981 An Hertogen, 'Sovereignty as Decisional Independence over Domestic Affairs: The Dispute over Aviation in the EU Emissions Trading System' (2012) 1(02) TEL 281, 292.

982 Compare also Kofi Annan's speech to the General Assembly, SG/SM/7136 GA/9596: 'State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty -- and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter -- has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny. These parallel developments […] do not lend themselves to easy interpretations or simple conclusions. They do, however, demand of us a willingness to think anew'.

983 Katharina Meyer, *Grenzen und Entwicklungsmöglichkeiten des Souveränitätsprinzips in transnationalen Handelsbeziehungen: Zur Legitimation grenzüberschreitender Verwaltungszusammenarbeit am Beispiel des Lebensmittelhandels zwischen der Europäischen Union und Drittstaaten* (Jus Internationale et Europaeum, 1. Auflage, Mohr Siebeck 2018), 202 – 203.

formally recognized bases is satisfied, it is irrelevant how intrusive the measure in question is on the affected State. Thus, by focusing on the element of coercion, the principle of non-intervention may be susceptible to a more nuanced approach to jurisdiction in international law, which looks beyond formal categories and assesses the actual intent and content of exercises of jurisdiction.

Despite this flexibility, a mere recourse to modern interpretations of State sovereignty and the principle of non-intervention may not be sufficient. After all, the reconfiguration of the relationship between States would, in essence, still put the interests of States front and centre. Fundamentally however, the exercise of extraterritorial jurisdiction does not only concern other States. Rather, as will be argued in the next section, it is of a truly hybrid functionality, in that it also directly touches upon the rights and interests of individuals. To properly account for this particular nature of extraterritorial jurisdiction requires that we complement considerations of State sovereignty with an equally strong element in relation to the protection of individuals.

4. Extraterritorial Jurisdiction as an Exercise of Public Authority

The exercise of extraterritorial jurisdiction occupies a regulatory space between clearly defined domestic law and international law.[984] For instance, the domestic regulation of foreign transnational bribery is a clearly different phenomenon than both the criminalization of bribery within the territorial State as well as the conclusion of an international treaty such as the UNCAC mandating its State parties to criminalize bribery. The domestic criminalization of bribery and the conclusion of the UNCAC also have wholly different legal requirements. The former is of course subject to domestic constitutional constraints, such as the non-retroactivity of criminal law, whereas the latter has to fulfil the requirements of traditional international law, such as the Vienna Convention on the Law of Treaties.[985] One would therefore expect that the domestic regulation of for-

984 Ireland-Piper, *Accountability in Extraterritoriality* (n 113), 4 – 5.

985 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331; unlike domestic constitutional law, the Vienna Convention on the Law of Treaties contains only few material requirements for treaties, the most significant one being that treaties must not conflict with a peremptory norm of general international law (*ius cogens*), see Art. 53 of the Vienna Convention on the Law of Treaties.

eign transnational bribery, as a fundamentally different form of regulation, also has different bases of legality. However, this is not the case: rather its legitimacy is assessed according to the same parameters as the conclusion of the UNCAC, namely the respect for the sovereignty of other States.

As a general principle, it is bad law to subject factually different circumstances to the same legal analysis. Therefore, the hybrid nature of extraterritorial jurisdiction requires that such exercises are not only considered along State sovereignty, but also respect the requirements drawn from its other function. What then, is the other function of extraterritorial jurisdiction? The purpose of exercising extraterritorial jurisdiction is to 'regulate', directly and without mediation through the home State, the conduct of the affected person. Thus, it is argued here that, when a State asserts extraterritorial jurisdiction over a certain case, this act should be regarded as an exercise of public authority over an individual just as if the domestic police arrests someone to uphold public order. In domestic systems, such 'regulation' is associated with the public law of that State. This body of law is tasked with both legitimizing, i.e., defining the situations, in which State coercion is proper, and limiting the exercise of public authority.[986] It is the contention of this study that the correct way of thinking about jurisdiction in international law should, in acknowledging its function as an exercise of public authority, consider aspects of legitimation and limitation inspired by domestic public law, alongside the still prominent category of State sovereignty.

Vigilant readers may already now argue that the above-described approach would impermissibly enmesh two wholly separate spheres, one concerning State sovereignty and the other concerning the protection of individuals. This is fair criticism. However, the proposal is far less ambitious than it may seem at first sight. In fact, it is not an entirely

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986 Meyer (n 983), 351; Christian Walter, 'Grundlagen und Rahmenbedingungen für die Steuerungskraft des Völkerrechts' (2016) 76(2) ZaöRV 363, 387; Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Völkerrecht als öffentliches Recht: Konturen eines rechtlichen Rahmens für Global Governance' (2010) 49(1) Der Staat 23, 29; Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28(1) EJIL 115, 123: 'The public law approach […] avails itself of the dual function of modern public law. Accordingly, public authority may only be exercised if it is based on an authorizing act (constitutive or enabling function), and its exercise controlled and limited by substantive and procedural standards (limiting function)'.

new phenomenon to assess acts, which were traditionally only associated with international law, also through the lens of 'regulation'. UN Security Council targeted sanctions are the most prominent example in this regard. It makes sense to consider individual rights in these instances because the sanctions concerned, although they emanate from an international body, directly assert public authority over an individual in a possibly more severe way than domestic police actions. These measures do not stand in isolation; rather, they are part of a larger trend of transnational efforts to assert direct control over individuals to solve global challenges through the means of regulation, a development, which has been aptly characterized as the regulatory turn in international law.[987] In this debate, it has become fashionable to assess the acts adopted in this manner through the lens of individual protection, too.[988] The situation of extraterritorial jurisdiction is somewhat similar and is indeed merely one of the facets of this larger trend. In fact, the hybrid nature of unilateral extraterritoriality makes it even more accessible to an assessment revolving around both State sovereignty and the protection of individuals, than truly international acts such as UN Security Council resolutions.

II. Theoretical Considerations

1. Legitimacy: Democracy and Community Interests

Because extraterritorial jurisdiction occupies a hybrid space between purely domestic and purely international law, its function is also the direct exercise of public authority, albeit with regard to persons or situations in another State. As such, it has been argued that extraterritorial jurisdiction faces similar issues of legitimacy and limitation as domestic public law regulation. Connecting extraterritorial jurisdiction with legitimacy is not exactly a novel approach. In fact, it is widely assumed that the unchecked exercise of extraterritorial jurisdiction, in particular in relation to somewhat contested bases such as the effects principle, poses difficult challenges to the principle of *democratic legitimacy*.

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987 Katz Cogan (n 52).

988 Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) EJIL 1, 5.

Gibney, for instance, in his impassionate critique, claims that extraterritorial jurisdiction diametrically breaks with this principle, because it imposes a rule on foreigners without them being able to participate in the democratic process of norm creation or otherwise influence the content of the rule.[989] According to Ryngaert, these regulations represent mere commands, without the communicative texture that makes laws legitimate.[990] Benvenisti similarly argues that governing foreigners targets the very essence of individual and collective self-determination.[991] Meyer sees a legitimacy deficit even in the particular case, in which the home State has explicitly consented to the application of the foreign regulations to domestic individuals.[992] Parrish, finally, draws the conclusion that these considerations warrant a return to stricter territoriality.[993]

The last author in particular views democracy as the paramount principle for legitimacy in general, which is natural coming out of a domestic context. However, this view may unduly restrict considerations of suitable alternatives. It should already be noted here that with regard to extraterritorial jurisdiction, the attainment of a similar level of democratic legitimacy as in national fora is not realistically feasible. Democracy is of course a concept even more difficult to grasp than jurisdiction, but for the present purpose, it may suffice to recur to the archetypal notion of ruling through the consent of 'the people' governed, typically through elections and other participatory procedures.[994] However, it is not difficult to see that States are not willing or do not even have the organisational means to open up

989 Mark P Gibney, 'The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles' (1996) 19(2) Boston College International and Comparative Law Review 297, at 305.

990 Ryngaert, *Jurisdiction in International Law* (n 2), 193.

991 Benvenisti (n 23), at 302.

992 Meyer (n 1083), 340 – 343; This is because such consent not only affected the home State competence with regard to this specific subject area, but also generally undermined the State sovereignty to freely determine its own mechanisms to legitimize public authority.

993 Parrish, 'Reclaiming International Law from Extraterritoriality' (n 10), 1483 – 1489; However, as we have discussed at length above, such a return does not seem to be possible because it is impossible to define consistent normative boundaries of territoriality.

994 Ibid., 859; For a more precise definition, see Eva Erman, 'Global Political Legitimacy beyond Justice and Democracy?' (2016) 8(1) Int Theory 29, 41, who views democracy as 'as a political organization or decision-making body that is considered legitimate if the rules that govern it are taken by those to whom the rules apply'.

their electoral community to foreigners even though domestic decisions may increasingly affect these people extraterritorially. This may also not be normatively desirable because foreigners are typically only affected in certain specific areas of regulation and unconcerned by the vast amount of general domestic issues.

However, because international democratic legitimation will probably remain an elusive ideal for some time to come, it may be worthwhile to ponder over alternative sources of legitimacy. To this end, it may be particularly enlightening to examine whether and why academic commentators consider the exercise of (extra-)territorial jurisdiction relying on the traditional bases as legitimate. In a next step, this examination may facilitate some general conclusions regarding the legitimacy for the exercise of jurisdiction, which may in turn prove useful for the construction of a new jurisdictional framework.

a) Territoriality, Nationality and Democracy

aa) Territoriality

There is no shortage of contemporary literature, which criticizes the primacy of territoriality within the existing system of jurisdiction, based on practical or normative considerations. However, surprisingly few international law scholars have bothered with examining the question, whether the exercise of public authority on domestic territory itself may be in need of justification in the first place. Admittedly, this is an inquiry that has proved difficult for even the most eminent political philosophers and this study does not pretend to be able to contribute to that debate. Nonetheless, certain insights of that debate may be helpful in identifying mechanisms to enhance the legitimacy of the exercise of extraterritorial jurisdiction.

The first important insight is that, unlike what critiques of extraterritorial jurisdiction implicitly presume, the application of territoriality does not guarantee democratic legitimacy. This claim becomes quite intuitive when one considers the vast number of people subject to territorial rule without having an equal say in participating in the normative formation of that rule. Foreign residents are usually not granted voting rights even if they have lived in a State for decades; Foreign owners of domestic companies or properties may be subject to all kinds of business and planning regulations

that they are not able to influence; Finally, visiting travellers have to abide by the same criminal laws as their domestic counterparts.

Thus, if ever territoriality could be equated with democracy, in the modern age of mobility, territorial jurisdiction is at best a rather imprecise proxy.[995] A more promising solution to the legitimacy problem may be found in the already mentioned idea of consent. John Locke most famously argued that when someone travelled or resided upon the territory of a State, that person tacitly consented to the exercise of public authority.[996] While this argument appears appealing in the first place, it suffers from a number of theoretical inconsistencies. For one, 'tacit' consent is a normative fiction and lacks evidence in most practical instances.[997] For the other, for this theory to work, it has to presuppose that State authority is territorially bounded, as otherwise, it cannot explain why someone would 'tacitly' consent to jurisdiction *only* when that person enters the territory of the State, making this a somewhat circular construction.[998]

There are many more conceptions of legitimacy and territoriality, but one last example should suffice to conclude the argument that territoriality is a much weaker mediator for legitimacy than generally assumed by international law scholars. According to Chehtman, the right of the territorial State to punish crimes is not grounded in democracy or consent, but rather in the collective interest of individuals within the State of having a system of criminal laws – a public good – in force, which enhances everyone's sense of dignity and security.[999] This conception is appealing, because interest sets a lower bar then consent: Arguably, even if someone entered the territory of a State with the sole purpose of murdering another person, that perpetrator shares the collective interest of having criminal laws in force because he would not want to be murdered or have his weapons stolen before he can commit his crime. But even this account is somewhat circular in the end. It cannot explain why the individuals in a State would have an interest in the criminal law of precisely the territorial State to be in force. The explanation can only be that the criminal laws

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995 Ford (n 119), 848 – 849.

996 John Locke, 'Second Treatise of Government', § 119 – 121; A similar argument has been more recently made by Volz (n 24), 216 – 217.

997 See on this Anna Stilz, 'Why do States have Territorial Rights?' (2009) 1(2) Int Theory 185, 193 – 194.

998 See for a more detailed consideration of the concept of consent, Lea Brilmayer, 'Rights, Fairness, and Choice of Law' (1989) 98 YaleLJ 1277, at 1303 – 1306.

999 Alejandro Chehtman, 'The Extraterritorial Scope of the Right to Punish' (2010) 29(2) Law and Philos 127, 133 – 134.

of another State are likely to be unenforceable in the territorial State and thus, the effectiveness of these laws would not add to the sense of dignity and security of the domestic community. However, the unenforceability of foreign laws on domestic territory is again nothing but a highly territorial assumption in itself.

bb) Nationality

Quite similar to the analysis regarding territoriality in the section above, the most intuitive answer for legitimizing extraterritorial jurisdiction based on the nationality of the regulatory addressee would be the principle of democracy. After all, it is primarily citizens who bear the right to participate in the political process through elections and other procedures and thus, to influence the normative content of the rules governing them.[1000] However, just like the analysis of territoriality, equating the nationality principle with democracy is at best an incomplete view. It at least misses the fact that not all States grant voting rights to all their overseas citizens and that practically, not all nationals living abroad may feel a connection to their home State strong enough to prompt them to participate in the political process.[1001]

Because of these difficulties with the principle of democracy, nationality jurisdiction is sometimes seen as justified based on the special relationship that links citizens to their home State, a notion commonly termed 'allegiance'. According to this conception, the regulatory power of States over their own nationals even abroad stems from the fact that they also offer protection, in particular diplomatic protection, to the same individuals. Thus, the situation resembles somewhat of a *quid pro quo*, where the accep-

1000 Brilmayer (n 998), 1298; Following this line of argument, Ireland-Piper sees a potential deficit in legitimacy when extraterritorial jurisdiction is extended beyond nationals to residents who have no right to vote, Ireland-Piper, *Accountability in Extraterritoriality* (n 113), at 26.

1001 See in this regard, Peter J Spiro, 'Perfecting Political Diaspora' (2006) 81(1) New York University Law Review 207, 211: 'Although many states restrict the franchise of nonresidents, the clear trend is toward allowing and facilitating greater electoral participation by external citizens. A few states provide external citizens with discrete legislative representation, while most assimilate external voters into existing internal territorial subdivisions (usually according to place of last residence). Although turnout among external voters has historically been low, there is evidence that such participation is becoming more consequential.'.

tance of nationality jurisdiction is the compensation in exchange for home State protection.[1002] However, this justification equally may not apply to all States, as some may not be willing or able to offer protection, for instance with regard to nationals who had to flee because of persecution.[1003]

cc) Conclusion

The point of this admittedly rather cursory exercise is to argue that even when it comes to the (almost) universally accepted jurisdictional principles of territoriality and nationality, the search for legitimacy is far from an undisputed matter. In fact, the legitimacy of territorial jurisdiction may have no easy theoretical answer without presupposing territoriality as the foundational ordering principle in international relations. From an empirical perspective, territorial jurisdiction may thus be perceived as legitimate because of a combination of factors, which include ideals of democracy as well as the concept of (tacit) consent, but also the collective interest of individuals found in a certain territory in the provision of a public good. Similar conditions apply to jurisdiction based on the nationality of the addressee, the legitimacy of which is also found in somewhat incomplete justifications based on principles of democracy and an exchange of mutual benefits.

Concepts such as consent, interest in the protection of the law and *quid pro quo* all contribute to the search for legitimacy in the exercise of jurisdiction, but none of them can claim to be conclusive. This may be an unsatisfactory result but it also takes away the pressure of having to find the one mechanism of legitimacy to justify all hard cases of extraterritorial jurisdiction. Rather, it shows that legitimacy is an issue of perception and nuance. What these concepts have in common, however, and what may arguably lie at the heart of territoriality and nationality based jurisdiction in international law, is the idea that the closer and more purposeful someone associates him- or herself with a certain State, the more that State is legitimized to coerce that person through an exercise of public authority. However, this purposeful association may only be indicated by factors such as territoriality or nationality and may certainly be rebutted. For instance, overseas British citizens are only entitled to vote in UK parliamentary

1002 Ryngaert, *Jurisdiction in International Law* (n 2), at 106.
1003 Chehtman (n 999), 140.

elections for up to 15 years after leaving the UK.[1004] Given that, it may be questionable whether extending nationality jurisdiction to citizens, who have never lived on UK soil and thus never had any voting rights, is justifiable. Thus, the issue is not one of territoriality or nationality, but rather one of proximity, in the sense of a purposeful association, between the regulator and the addressee or his/her conduct in question.

An opposite example may further clarify the argument: Suppose that a French national is working as a long-time spy exclusively for the German government on Russian territory, and that person commits or is the victim of a serious crime in Russia. In this case, few would consider it unreasonable if the German government initiated action against him, in case he is the perpetrator, or against the perpetrators, in case he is the victim. This would be so even if nominally, Germany can neither rely on territoriality nor nationality as a basis for jurisdiction. Rather, it is the activity as a spy for the German government that creates a specific connection between the regulator and the addressee, which possibly legitimizes the exercise of German public authority.

b) Universality and Community Interests

Whether it is interpreted as (democratic) consent or as part of a *quid pro quo* scheme, the legitimacy of the two most acknowledged bases of jurisdiction hinges on the existence of some sort of proximity, traditionally mediated through territory or nationality, between the regulating State and the addressee. However, the existence of some kind of connection is not the only criteria relied upon to construct the legitimacy of exercises of jurisdiction. Universal jurisdiction in particular, though somewhat controversial, seems to cover certain conduct that lacks any physical connection to the regulating State. True enough, at least with regard to core crimes under international law, universal jurisdiction can boast its legitimacy through the positive consent of States, either through treaty or custom.[1005] However, it is far less clear whether this consent of the home State also extends, without restrictions, to the individuals as norm addressees and

1004 See on the British effort to repeal the 15-year rule: Neil Johnston, House of Commons Briefing Paper on Overseas Voters, Number 5923, 25 March 2019, available at https://commonslibrary.parliament.uk/research-briefings/sn05923/, last accessed on 13 April 2022.

1005 See Ryngaert, *Jurisdiction in International Law* (n 2), 193 – 194.

whether it is sufficient to subject them to possibly harsh consequences. In addition, there exists some dispute over the precise catalogue of crimes subject to universal jurisdiction and States have asserted this kind of jurisdiction also outside of the well-recognized core crimes under international law.[1006]

Rather, the justification for universal jurisdictions is often argued based on an overarching community interest in criminalizing certain internationally reprehensible conduct.[1007] Indeed, when the Second Circuit claims that its authority over individuals in Paraguay stems from the fact that, just like pirates, torturers are to be treated as *hostis humani generis*, an enemy of all mankind, it is alluding its legitimacy to the existence and interests of such a common community.[1008]

While the universality principle is the most obvious form of jurisdiction, which relies on community interests as a legitimising factor, it is by no means the only example. This study has discussed at length that the approval of extraterritorial jurisdiction in the areas of anti-corruption and business and human rights stem, at least partly, from the notion that regulations in these matters are supported by a global recognition in fighting certain conduct. Within academic debate, several authors have further explored the possibility to adopt unilateral, extraterritorial action legitimised through the pursuit of a global common good. For instance, Ryngaert, in his seminal work on jurisdiction in international law, posits as his core thesis, that the interests of the international community should take centre stage in any jurisdictional analysis. In particular, when the State with the closest physical connection to a situation fails to adequately remedy the harm, a bystander State may assert extraterritorial jurisdiction in a subsidiary manner, if doing so benefits the global community as a whole. This does not only apply to the pursuit of international justice in the context of core crimes subject to universal jurisdiction. With regard to antitrust regulation for example, global welfare becomes the yardstick. Thus, third States may legitimately intervene, if the home State of an export cartel is not willing to take action against the anticompetitive behaviour and if the economic damage suffered overall is negative on global welfare.[1009]

1006 See above at, B.I.2f) The Universality Principle.

1007 Ryngaert, *Jurisdiction in International Law* (n 2), 126 – 128.

1008 *Filartiga v Pena-Irala*, 630 F 2d 876, 887 (2d Cir 1980); see also Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29(2) EJIL 427, 444.

1009 Ryngaert, *Jurisdiction in International Law* (n 2), for instance at 230.

There is, of course, debate over whether such an international community with a common purpose exists and whether it is possible to determine its interests without parochial subjective interpretation.[1010] To rephrase this argument in the words of President Guillaume, exercising universal jurisdiction would 'risk creating total judicial chaos. It would also be to encourage the arbitrary, for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community"'.[1011] In response to this well-founded criticism, some commentators have switched from moral considerations based on shared humanity to more functional, and supposedly more objective, arguments.[1012] Particularly, the idea that unilateral extraterritorial action may receive its legitimacy by solving the dilemma of providing global public goods has gained noticeable traction. Public goods are characterized by the notion that they are both non-excludable, meaning that no one can be excluded from their benefits, and non-rivalrous in their consumption, i.e. the goods do not deteriorate if more people use them.[1013] Prime examples of global public goods may be the world climate or the non-proliferation of nuclear weapons. Theoretically, the provision of global public goods constitutes a particularly salient problem, because cooperative international efforts in these areas are often elusive.[1014] Thus, to the extent that in certain areas the efforts of single, powerful States may suffice to mitigate this issue, unilateral extraterritorial action may be legitimate.[1015]

It should be pointed out however that while the concept of global public goods allows for a more fact-based determination than the elusive international community interests, it is still fraught with risk of subjective abuse. Because what a particular State may regard as global public goods and whether or not unilateral or international action is warranted is as

1010 See generally on this concept, Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours 217, 233.

1011 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 69), 43 (Judge Guillaume).

1012 Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1(1) Asian Journal of International Law 61.

1013 Krisch (n 10), 3.

1014 Ibid., 4.

1015 Some commentators claim that not only may extraterritorial action be legitimate, but also required, particularly in cases involving a human rights dimension, see above at C.V.3b) Extraterritorial Jurisdiction as a Matter of Obligation.

much a scientific as a political question.[1016] Concluding therefore, to the extent that universality may act as a factor legitimizing exercises of unilateral extraterritorial jurisdiction, extra attention has to be paid as to the determination of these international community interests or global public goods.

c) Proximity, Community Interests and the Rule of Law

The lack of a global demos and the improbability of extending domestic electoral processes to foreigners means that legitimacy in extraterritorial jurisdiction will have to be negotiated in fundamentally different ways.[1017] The sections above have identified two potential criteria, the proximity, i.e. the purposeful association between the regulating State and the addressee or the conduct in question, and the realization of community interests or values, notwithstanding the question whether they are grounded in (quasi)-universal moral considerations or the desire to maintain certain public goods. While these two strands of arguments bear certain resemblance with the often proposed dichotomy of 'input-' and 'output legitimacy', it is important to point out that they are in fact not exactly identical. In particular, proximity between the State and the regulatory subject in itself provides no input legitimacy, which is often equated to being included in participatory processes and which is precisely not granted only because of proximity.[1018] Rather, the more a State can boast significant connections to an individual and the more an individual purposefully associates him- or herself with a State, the more an individual has to expect to be burdened by regulations of that State in a certain way and the more likely it is that the acts of the State respect overall considerations of fairness.

In fact, several authors point out that apart from democratic (input-) legitimacy and effectiveness based (output-) legitimacy, a third mechanism may legitimise the exercise of public authority, the upholding of the rule

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1016 Finally, even if it is proven that the exercise of extraterritorial jurisdiction to uphold a global public good would result in net positive effects for justice or welfare, it would still create distributional effects that another State may not want to suffer.

1017 Simon Chesterman, 'Globalisation and Public law: A Global Administrative Law' in Jeremy M Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Connecting international law with public law. Cambridge University Press 2009), 88.

1018 Krisch (n 10), 6 – 7.

of law itself.[1019] The content of this principle is of course just as vague as the content of the other mechanisms of legitimacy and there is great debate in this regard beyond the well-accepted but trite requirement that public authority should be bound by law.[1020] While there may be formal and substantive components to the rule of law,[1021] Meyer correctly points out the commonality between all the different conceptions, which is to provide the individual, to a certain extent, protection against the State.[1022] In this regard therefore, legitimisation through the rule of law may overlap with the other function of public law, the limitation of exercises of public authority. Therefore, protecting the individual against State overreach and, more generally, upholding individual interest, form a third crucial component of a system of jurisdiction in international law based on the function of jurisdiction, i.e. the exercise of public authority in relation to individuals.

While the first two components, the proximity between the regulating State and the addressee or the conduct in question and the realization of community interests or values, feature prominently in academic debate, this last component may need some further elaboration. Therefore, the next chapter serves to appreciate the fact that already now, individual interests play a growing role when it comes to determining the reach of State jurisdiction. The considerations above concerning legitimacy through the protection of individuals and the upholding of individual interests are thus only continuations of a larger trend.

2. Individual Interests and State Jurisdiction

In a development parallel to the rise of shared global values and international community interests, State sovereignty has been increasingly curtailed by private rights and interests, a process beginning with the rise

1019 Armin von Bogdandy, 'Supranationale Union als neuer Herrschaftstypus: Entstaatlichung und Vergemeinschaftung in staatstheoretischer Perspektive' (1993) 16 Integration: Vierteljahreszeitschrift des Instituts für Europäische Politik in Zusammenarbeit mit dem Arbeitskreis Europäische Integration 210, 219 – 222; Meyer (n 983), 349.

1020 Tom Bingham, 'The Rule Of Law' (2007) 66 CLJ 67, 69.

1021 Formal components may include procedural safeguards such as participation, transparency and the possibility for judicial review, see below at D.II.4. Procedural Safeguards, Reasoning and Participation.

1022 Meyer (n 983), 352.

of international human rights and traveling to other areas of law from there.[1023] This development has been captured most passionately by Peters, who argues in favour of a paradigm shift, in which individuals bear *primary* international legal personality, possibly even independent from States.[1024] Whether or not one agrees with that proposition, the unquestionable strengthening of the position of individuals has been consequential in relation to the issue of State jurisdiction. The following sections explore the different ways in which individual interests are already now, within the traditional doctrine, shaping the reach of State jurisdiction. The focus is on three different but interrelated aspects, (1), how private party autonomy may possibly be engaged to shape State jurisdiction, (2), how individual fairness may serve as a principle restraining the exercise of jurisdiction and (3), how individual rights may lead to a duty for States to exercise jurisdiction. These already existing interactions between individual interests and the exercise of State competence call into question the belief that jurisdiction is strictly a matter of interstate relations and emphasise the argument in favour of a functional approach to jurisdiction.

a) The Potential for Individuals to Shape State Jurisdiction

The possibility for individuals to shape jurisdictional rules manifests itself across different subject areas. While it is most developed in relation to choice-of-law and choice-of-court agreements in private disputes, there are also examples in public regulatory law. Finally, individual consent may not only serve to extend the jurisdictional competence of a State to situations where it would have no regular basis, but in international investment law, it may carry the opposite effect and restrict the ordinary regulatory ambit of the State.

In matters of private international law, the decision whether a court will seize adjudicative jurisdiction and which law it will apply to a civil matter is generally grounded in considerations similar to those in public

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1023 See *Prosecutor v Tadic* (Jurisdiction), No IT-94–1-AR72, (2 October 1995), 35 ILM (1996), para. 97: '[…] the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach'.

1024 Peters, *Jenseits der Menschenrechte* (n 954), at 364.

international law, namely, territorial or personal connections of the litigants to the forum.[1025] However, unlike in public international law, courts in private disputes are increasingly willing to disregard sovereign connections and instead to enforce private choice-of-law[1026] or choice-of-court agreements[1027] even in the absence of other significant connections to the forum.[1028]

However, what this development means for the issue of jurisdiction under public international law is less settled. Fundamentally, one might question whether the possibility to choose the applicable law and forum in private international law says anything at all about public international law positions. It has been argued that these two bodies are distinct in that private international law is primarily concerned with issues of private fairness and not with the allocation of regulatory authority between States. Thus, choice-of-law and choice-of-court agreements are possible because private international law rules are not constrained by traditional principles of jurisdiction in public international law.[1029] It has already been elaborated above that this strict division between the two areas of jurisdictional law is artificial as private law also reflects considerations of public policy.[1030] It is submitted that this (increasingly recognized) confluence of private and public international law does not mean that civil prescriptive and adjudicative jurisdiction necessarily need to follow the same rules as criminal or regulatory jurisdiction.[1031] However, this is not an issue reserved to the difference between civil and criminal or regulatory jurisdiction. In fact, as this study has demonstrated, even between particular regulatory subject areas, application of jurisdictional rules may be inconsistent.

Mills, therefore, attributes great significance to the fact that increasingly, State authorities defer to individual choice-of-law or choice-of-court agree-

1025 Mills (n 14), 203 – 207.
1026 See e.g., for torts, Art. 14 of the Rome II Regulation (2007).
1027 See e.g., Art. 5 of the Convention of 30 June 2005 on Choice of Court Agreements (adopted 30 June 2015, entered into force 1 October 2015).
1028 See on this more generally, Mills (n 14), 230 – 233.
1029 Akehurst (n 42), at 177: 'It is hard to resist the conclusion that […] customary international law imposes no limits on the jurisdiction of municipal courts in civil trials'.
1030 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 407, reporters' notes 5; Svantesson (n 13), 84 – 85; see above at A.III.5. Regulation, Public Law and Jurisdiction.
1031 For civil prescriptive jurisdiction, Crawford and Brownlie (n 18), at 472; *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 407, reporters' notes 5.

ments in private international law. He claims that instead of arguing that private international law requires a distinct set of rules, the more consistent solution would be to accept that public international law recognizes, to a certain extent, individuals' power to shape the regulatory authority of States.[1032] One could also argue that a private party's choice of applicable law or forum would at least constitute a significant connection to the chosen State that is ordinarily to be respected also by public authorities.[1033]

These ideas have some merit, not least because similar examples can also be found in areas traditionally having a much stronger public law dimension. For instance, in the area of securities regulation, several US courts have acknowledged the possibility for private parties to contract out of US provisions, including the (strict) security fraud rules of the Securities Act, the Securities Exchange Act and RICO, despite the fact that these acts contained anti-waiver provisions.[1034] This jurisprudence has prompted Choi and Guzman to go one-step further and propose that issuers and investors to security transactions should be able to choose the particular securities regulation applicable to their transaction.[1035] In a similar vein, the previous chapter has already explored how in the area of export control regulations, US authorities have sought to extend their jurisdiction extraterritorially through consent by the purchaser abroad and this sort of agreement has been used to assert both prescriptive and enforcement jurisdiction.[1036] State practice and academic commentary on the validity of private submissions and agreements are contested but they unquestionably carry practical and possibly legal consequences.

1032 Mills (n 14), 233 – 234.

1033 Svantesson (n 13), 70.

1034 *Roby v Corporation of Lloyd's*, 996 F 2d 1353, 1366 (2d Cir 1993); to be fair, the court did not blindly follow the private agreement but examined the 'serious question whether United States public policy has been subverted by the Lloyd's clauses', namely the protection of American investors and deterring injuries. In the end, it concluded that because English law provided "adequate remedies", the contractual stipulations should be enforced. Other, similar cases include *Allen v Lloyd's of London*, 94 F 3d 923, 930 – 932 (4th Cir 1996); *Riley v Kingsley Underwriting Agencies*, Ltd, 969 F 2d 953, 957 – 958 (10th Cir 1992).

1035 Stephen J Choi and Andrew T Guzman, 'Portable Reciprocity – Rethinking the International Reach of Securities Regulation' 1997 Southern California Law Review 903.

1036 See above at C.III.4. Jurisdiction Based on Voluntary Submission; the inclusion of enforcement jurisdiction is especially problematic; see also Akehurst (n 42), 147: 'the consent of the individuals […] is irrelevant; the act is a usurpation of the sovereign powers of the local State, which cannot be cured by the consent of the private individuals'.

Finally, international investment law, an area with great significance to economic globalization, may provide the clearest example to just how much issues of State jurisdiction may be 'privatised'. The regulation of foreign direct investment is usually operated through two distinct but connected set of rules, a (typically bilateral) investment treaty between States and, in relation to any specific investment, a contract between investor and host State.[1037] This second type of State contracts has drawn significant attention because of the inclusion of 'stabilization' and 'choice-of-law' clauses that seek to ensure the protection of the investor against the host State.[1038] The possibility for private parties to agree on the application of a certain law without any territorial connection has already been treated above. What makes the present context more interesting, however, is that it is possible for a sovereign State, through a choice-of-law clause included in a contract with a private investor, to partly renounce its regulatory authority. This is significant because unlike choice-of-law agreements in private contracts or private submissions in export control cases, party autonomy here does not serve to expand State jurisdiction, but to curtail it. A similar effect is also achieved by stabilization clauses, in which the host State sometimes agrees to exempt foreign investors to changes to their legislative framework. Here again, the sovereign State, through private contract, is renouncing its power to assert regulatory jurisdiction *vis-à-vis* a private party in its territory.[1039]

b) Individual Fairness as a Principle Restraining the Exercise of Jurisdiction

Despite the fact that individuals or private entities often bear the cost for extensive jurisdictional assertions leading to concurrent or conflicting regulations, their interests have often been treated as secondary next to ordinary State interests. So far, the principles developed by jurisprudence and literature to restrain the exercise of State jurisdiction, such as comity

1037 Karsten Nowrot, 'Steuerungssubjekt und -mechanismen im Internationalen Wirtschaftsrecht (einschließlich regionale Wirtschaftsintegration)' in Christian Tietje (ed), *Internationales Wirtschaftsrecht* (2. Aufl. De Gruyter 2015), 109 – 110.

1038 See on this Crawford and Brownlie (n 18), 629 – 633.

1039 Alessandra Arcuri and Federica Violi, 'Reconfiguring Territoriality in International Economic Law' in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016* (T.M.C. Asser Press 2017), 198 – 200.

and reasonableness, overwhelmingly rely on the balancing of sovereign interests and deference to other States.[1040] Sure enough, the famous § 403 of the Restatement Third does include private considerations into its multifactor balancing test, but as discussed above, this approach should be rejected for other reasons.[1041] Under these circumstances, it is certainly surprising that in the revival of Council Regulation (EC) No 2271/96, the EU blocking statute, the safeguarding of individual interests takes centre-stage.[1042] According to the Explanatory Memorandum, the EU views the US sanctions against Iran as violating international law, 'in so far as they unduly affect the interests of natural and legal persons established in the Union'.[1043] The significance of this statement is that it makes individual interests the yardstick for gauging whether certain measures are normatively prohibited under *international* law.

To be sure, one might question whether such a change in focus makes any difference in practice since ordinarily, the individual interest of not being subjected to exorbitant or conflicting jurisdiction may largely be mediated through the interests of their respective nation State. For instance, if certain conduct that is required by a State's extraterritorial regulation is prohibited by the territorial State (e.g. through a blocking statute), it may raise issues under the principle of non-intervention. At the same time, these situations, sometimes referred to as foreign sovereign compulsion or true conflict, compromise individual rights since it is *de facto* impossible for the affected person to comply with both sets of rules at the same time.[1044] However, this alignment between individual and State interest may not always be the case. This point is illustrated by a number of US extraterritorial drug enforcement cases. In *United States v Cardales* for in-

1040 B.II. Principles Restraining the Exercise of Jurisdiction.

1041 See above at B.II.3. Reasonableness; According to *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 403 (2), the reasonableness of an exercise of jurisdiction depends *inter alia* on 'the connections […] between the regulating state and the person principally responsible for the activity […]' and on 'the existence of justified expectations that might be protected or hurt by the regulation'.

1042 On the background of this regulation, see above at C.II.1c)bb) US Sanctions against Iran.

1043 Explanatory Memorandum to Commission Delegated Regulation (EU) …/… amending the Annex to Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, C(2018) 3572 final.

1044 *Hartford Fire Ins. Co. v California* 509 US 764, 798 (1993).

stance, the defendants were seized on board of a Venezuelan flagged vessel some 150 miles south of Puerto Rico and charged with drug trafficking related offenses. They protested that the US constitutional Due Process Clause required that there be a nexus between their conduct and the United States. However, the First Circuit held that it was enough if the exercise of extraterritorial jurisdiction comported with international law principles, which was the case since Venezuela, the flag State, had explicitly consented to the search, seizure, and subsequent prosecution under US law.[1045] Equally, divergence between individual and State interest may occur in the opposite case, when an individual or private entity voluntarily submits itself to the application of foreign law without the consent of the home State, as was noticed in the examples on export control.[1046]

The increasing recognition by States, that individual fairness may diverge from home State interests of non-intervention and may thus constitute a factor restraining extraterritorial jurisdiction in its own rights is to be welcomed. This is particularly true in light of the considerations above, where upholding the rule of law has been identified as a factor legitimizing the exercise of public authority in general. However, this shift may not only be normatively warranted, given that individual and State interests may diverge, but it may also be more applicable in practice as in particular, courts are more used to interpreting issues of individual interests and rights than to balancing sovereign considerations. It may also make more nuanced decisions possible, as it may be easier to determine the intrusiveness or impact of a measure on an individual or private entity than in relation to a State, where a range of diplomatic and other political considerations might come into play.

In practice, given the wide assertions and inconsistent application of jurisdictional rules of extraterritoriality, the individual's interest to be able to know what the law is and foresee which laws might apply to his or her conduct in any given situation may provide a useful yardstick in this matter. Bingham views the principle that 'the law must be accessible and so far as possible, be intelligible, clear and predictable', as one of the core principles of the rule of law.[1047] Thus, if an individual could not have reasonably expected that certain extraterritorial regulations would apply under a particular foreign circumstance, this may raise issues under due process aspects. Several authors have examined this issue and proposed that

1045 *United States v Cardales*, 168 F 3d 548, 553 (1st Cir 1999).
1046 See above at C.III.4. Jurisdiction Based on Voluntary Submission.
1047 Bingham (n 1020), 69.

domestic and international law principles mirror these considerations to limit such unfair assertions of jurisdiction and possibly allow individuals to challenge such regulations.[1048] In conclusion therefore, the increasing recognition by States of individual rights and interests as equal to interstate sovereignty for the purpose of restraining the exercise of extraterritorial jurisdiction may not only be normatively more appealing, but also be better-suited for practical application.

c) Individual Rights Catalysing the Exercise of Jurisdiction

Individual interests may not only shape the jurisdictional reach of States through party autonomy or function as a principle restraining the exercise of (possibly exorbitant) jurisdiction, but also, in a third dimension, compel or obligate States to exercise extraterritorial jurisdiction in the first place. Such jurisdictional duties owed towards individuals may arise out of the international law concept of denial of justice or, more commonly, international human rights.[1049] A prominent example of this is the abovementioned *forum necessitatis*, which allows courts to exercise adjudicative jurisdiction absent any other connecting factor between the case and the forum, if doing otherwise would risk infringing the claimant's right to access to justice. *Forum necessitatis* has found modest acceptance in a number of cases in courts around Europe, the most high profile of which concerned a suit brought in France by ex-employees of a Gabonese mining company in relation to unjust employment termination and failure to provide compensation.[1050]

A comparable obligation to regulate extraterritorially, which stems from a duty to protect individual rights, seems to exist in the area of data protection.[1051] Article 8 of the ECHR not only requires States to refrain from arbitrary interference with individuals' private lives, but also establishes a positive obligation including 'the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'.[1052] In relation to data protection as part

1048 This idea is expanded in Colangelo, 'Spatial Legality' (n 48), at 77; Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) 9(4) ULR 68, 84.
1049 For a detailed account of both notions, see Mills (n 14), 213 – 226.
1050 See above C.V.5b) Practice in Europe.
1051 Uecker (n 140), 162.
1052 ECtHR, *K.U. v. Finland*, App No 2872/02, Judgment of 2 December 2008.

of the substantive content of Article 8 ECHR, this means that States not only need to justify their own data processing activities, but they have to establish an appropriate level of data protection *vis-à-vis* private companies engaged in the processing of individuals' data. For the maximum effective protection of individual rights, it should not make a difference whether the processor is domiciled within domestic territory or abroad. In other words, international human rights law may require States to regulate companies extraterritorially that are interfering with the enjoyment of data protection of individuals under their jurisdiction.[1053]

It is submitted here that such a duty to exercise extraterritorial jurisdiction to vindicate individual rights has not been conclusively established *de lege lata*. However, similar to the recognition of individual interests as a principle restraining the exercise of jurisdiction, the emergence and growing importance of fundamental rights should factor into the process of interest balancing.[1054] Under this conception, a State's possibility to regulate extraterritorially may have to be balanced against individual interests in a dual way, through a positive obligation with regard to the protection of fundamental rights and through a negative duty to refrain from undue interference. Such settings are not unknown in domestic situations and it comes as no surprise that they may play out in similar terms in transnational arenas. After all, increasing international personal and legal connections also mean that a multitude of foreign actors, in addition to domestic ones, may affect individuals' enjoyment of their rights.

3. Conclusion

This chapter has argued that it is possible to base the doctrine of jurisdiction in international law, which has traditionally found legitimation in State sovereignty, on a somewhat different theoretical foundation centred around the function of extraterritorial jurisdiction as an exercise of public authority, and in particular, the protection of individual rights and interests.

To this end, this chapter has examined the different grounds of legitimacy put forward by commentators to justify the exercise of public authority

1053 Uecker (n 140), 162; the regulation of foreign private companies with regard to data protection is discussed by Walter (n 986), 384 as an example of a modern concept of 'Steuerung' or 'steering' in public international law.

1054 Uecker (n 140), 200 – 204.

based on traditional principles of jurisdiction, such as territoriality, nationality and universality. It has demonstrated, that, far from being grounded in democracy, even these widely accepted principles of jurisdiction have to rely on a host of explanations. Rather, three cardinal considerations legitimizing and limiting exercises of (extra-)territorial jurisdiction emerge from the analysis, the proximity between the regulating State and the addressee or the conduct in question, the realization of community interests or the maintenance of global public goods and the upholding of individual interests as part of the rule of law.

This chapter has then dedicated closer attention to this last aspect: It has argued that already now, individual interests play a growing role in shaping the reach of State jurisdiction, either through the possibility of determining the proper jurisdiction through party autonomy, as a principle restraining the exercise of (possibly exorbitant) jurisdiction, or as a right compelling or obligating States to exercise extraterritorial jurisdiction.

III. A more Desirable Framework

As noted above, the territoriality based system of jurisdiction in international law leaves much to be desired both because it does not allow for the consideration of important interests apart from State sovereignty and because of its inefficacy of providing order in international relations. In particular, because there are no normatively consistent boundaries of territoriality, States have been able to nominally rely on territoriality while actually setting regulations with a global reach. It is clear that this situation in practice contradicts the purpose of the territoriality-based system of jurisdiction.[1055] However, because this study has particularly lamented the deficiency of the traditional approach in practice, it is the objective of this chapter to lay down the foundations for an applicable jurisdictional framework. Thus, this chapter proves that the considerations above, proximity, community interest and the protection of individual rights and interests, not only provide a good theoretical footing, but that they may be translated into practical variables and tests as well.

To this end, section 1 briefly describes which practical challenges such a new framework must meet in order to be successful in an increasingly

1055 See above at C.VI. Synthesis: The Deficient Territoriality-based System.

complex global order.[1056] It then proposes a number of concrete variables based on the three cardinal considerations legitimizing and limiting exercises of extraterritorial jurisdiction explored above (section 2) before explaining the relationship between these (section 3). Section 4 then goes on to examine certain procedural mechanisms to operationalize the framework. Section 5 puts the framework into practice by applying its principles to the complex regulatory mechanisms identified in part C of this study, which have proven to be particularly challenging for the territoriality-based system of jurisdiction. Section 6 finally anticipates and discusses potential objections to the proposed framework.

1. Practical Requirements and Objectives of the New Framework

The theoretical premise so far has been that, *de lege ferenda*, an exercise of extraterritorial jurisdiction should acknowledge the hybrid nature of extraterritorial jurisdiction, in that it also functions as an exercise of public authority. Therefore, the new framework should consider aspects of legitimation and limits inspired by domestic public law, alongside the still prominent category of State sovereignty. Practitioners, that is legislators, administrative agencies and courts, pondering the adoption of legal acts with extraterritorial implications, need to know whether these requirements are satisfied in any given case. While the theoretical considerations always lurk behind any exercise of extraterritorial jurisdiction, they contain principles that few people outside the academic sphere are familiar with. The following is therefore an attempt to flesh out terms and variables that have seen more action in practice. It is equally important to work out how these variables relate to each other in their application. In fact, this has been an issue for which § 403 of the Restatement Third was particularly criticized on, that its free multifactor balancing tests contained no reference whatsoever on how to prioritize or organize the different relevant aspects.[1057]

It is submitted here that, today, issues of extraterritorial jurisdiction are frequently solved through political and diplomatic channels. Nonetheless, the proposed framework relies exclusively on legal factors. Two reasons

1056 A similar approach is taken by Coughlan and others (n 158) at 300 though in addition, they also deal with the question when it is advisable for a State to exercise extraterritorial jurisdiction.

1057 See above at B.II.3. Reasonableness.

suggest this approach. On the one hand, it is important that any framework should be of some use to all three – the legislative, executive and judicial – branches of government involved in the exercise of extraterritorial jurisdiction. In this regard, it should be recalled that particularly in Europe, courts historically have had an uneasy relationship with discretionary balancing of sovereign interests and are more comfortable with rule-based principles.[1058] Moreover, if the framework is to potentially protect the interests of individuals, than the inclusion of political factors would contradict this goal. It is already hard enough to predict how rather open legal variables will be interpreted in practice; however, it would be near impossible for individuals to foresee political aspects in the exercise of extraterritorial jurisdiction.

In this regard, it should already be noted that a certain openness of the jurisdictional framework may be necessary. In fact, in a rapidly changing world shaped by economic globalization technological advances and new threats such as climate change, flexibility may be the most important requirement to any future-proof jurisdictional framework. It would be quite utopian to try to suggest legal principles that can capture every eventuality of complex regulatory mechanisms, today or in the future. Flexibility may be one of the reasons that jurisdiction based on territoriality survived such considerable time. It is arguable that without the recognition of the effects doctrine in the 1950s as an answer to the rise of the modern corporation, the current jurisdictional framework would have been abandoned much earlier. Today, long-settled rules are again in flux.[1059] Thus, a successful framework needs to accept that connections and interests, which legitimize a State to regulate, may change and hitherto unknown connections and interests may develop. How this framework is therefore applied and interpreted *in concreto* may be best found out through case-law and future academic discourse.[1060] In particular, it is expected that on a more granular level, the precise contours of the overarching principles proposed below may differ according to the specific subject matter and interests in question.

1058 Ryngaert, *Jurisdiction in International Law* (n 2), 172 – 173; advocating for greater reliance on rules, also Jeffrey A Meyer, 'Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law' (2010) 95 Minnesota Law Review 110, 120.

1059 See on this: Paul S Berman, 'Legal Jurisdiction and the Deterritorialization of Data' (2018) 71 Vanderbilt Law Review 11, 16.

1060 This approach is also advocated by Svantesson (n 13), 59 – 62.

It is equally clear that there is not one perfect solution to the balance between stability, based on fixed criteria and rules, and individual justice, which may require additional discretion and flexibility. Nonetheless, having considered some preliminary issues on what such a new framework might set out to achieve, the next section tries to fulfil, at least partly, these ambitions by looking at possible variables and tests for this purpose before analysing how these may interoperate in practice.

2. The Variables Determining the Legitimacy of Extraterritorial Jurisdiction

a) Proximity and Substantial Connection

This study has shown above that proximity, as one of the aspects legitimizing extraterritorial jurisdiction, is frequently mediated through factual connections between the regulating State and the addressee or the subject matter. Thus, the more substantial and more purposeful the connections between the two, the more likely extraterritorial jurisdiction will be perceived as justified. This is not surprising and in fact, most would argue that the existence of a connection between the regulating State and the subject of the regulation provides one, if not the most important variable for the normative assessment of exercises of jurisdiction.[1061] After all, it could be argued that the traditional bases of jurisdiction, territoriality, active and passive personality, the protective principle and even the effects doctrine are nothing more than mere applications of this core idea.[1062] According to Crawford therefore, the 'genuine connection between the subject-matter of jurisdiction and the territorial base or reasonable interests of the state in question' can even be summarised as the cardinal principle in this area.[1063]

The dominance of the concept of connection in relation to exercises of jurisdiction is also mirrored in practice, and, as shown above, there are only very few examples of 'extraterritorial' regulations that boast no connecting factor of any kind to the regulating State. Even extraordinary exercises of jurisdiction, such as economic sanctions based on the use

1061 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 407; Lowe and Staker (n 50), 295.
1062 Svantesson (n 13), 58.
1063 Crawford and Brownlie (n 18), 457.

of correspondent account banking can at least nominally advance some connection.[1064] An exception to this general finding may be assertions of jurisdiction based on private submission or consent of the affected. However, even in these scenarios it could be argued that the consent itself creates a purposeful connection between the State and the addressee to be regulated.[1065]

Thus, one might question whether falling back to the general variable of proximity would, in practice, make any difference compared to the traditional reliance on one of the enumerated jurisdictional bases. Several aspects indeed suggest that this approach would provide additional value to the doctrinal framework.

First and as already hinted at above, it allows for a more holistic analysis of the ties between an entire situation and the regulating State. Traditionally, the territoriality assessment has focused on (1) whether at least part of the conduct or the situation in question has occurred within domestic territory and (2) whether that territorial part of the conduct or situation is 'relevant' in a normative sense that it triggers the legitimate exercise of jurisdiction. This line of argumentation is for instance frequently used in relation to secondary boycotts levied against foreign companies. In these instances, the foreign companies are prohibited from trading with another third country, the primary target of the boycott, where non-compliance with this obligation may carry sensitive sanctions.[1066] Here, the territorial connection lies in the threatened sanctions themselves, which frequently include the withdrawal of domestic economic benefits or even a cut-off from the domestic market. In this example, the traditional line of argumentation generally leads to a piecemeal all-or-nothing solution: Either, one considers the territorial quality of the sanctions to be 'irrelevant' as it only relates to the enforcement of an otherwise extraterritorial prohibition, or, one considers it 'relevant', in which case all secondary boycotts would be permitted under the territoriality principle.[1067] This binary inquiry should give way for a more holistic approach, which allows the focus

1064 See above at C.II.3. Territoriality and US Dollar Transactions by non-US Financial Institutions.

1065 This is also argued by Svantesson (n 13), 70.

1066 On secondary boycotts, see above at C.II.4. Secondary Trade Boycotts.

1067 Colangelo, 'A Unified Approach to Extraterritoriality' (n 83), at 1044 offers a similar critique to the US presumption against extraterritoriality, which, according to him, localizes an entire multijurisdictional claim based on a single element. For some elaboration on the presumption against extraterritoriality, see above at B.I.2a)bb) The US Presumption against Extraterritoriality.

to shift to the more pertinent questions, more precisely, *what kind* of connection exists between the regulating State and the situation and *how strong and purposeful* this connection is.

Second, the reliance on an enumerated list of jurisdictional bases obscures the fact that there might be other types of connections creating proximity, but which do not neatly fit into one of the existing principles. For instance, Sec. 7 of the UK Bribery Act contains organizational duties applicable to all foreign companies in their global operations as long as they conduct at least part of their business in the UK. However, despite the indisputable existence of proximity between the foreign company and the UK through the 'business presence' of the company, Sec. 7 of the UK Bribery Act may not satisfy the requirements of neither territoriality nor nationality.[1068] Rather, the jurisdictional trigger of 'business presence' seems to be a hybrid combining elements of the two more traditional principles.[1069] To give another example, the application of the new EU GDPR to foreign data processors similarly seems to rely on a combination of acknowledged principles, in this case that of effects and personality.[1070] This aspect also differentiates the concept of proximity used here from the doctrine of 'genuine connection'. As elaborated above, genuine connection has been discussed as a principle possibly limiting exorbitant exercises of jurisdiction, which may otherwise rely on one of the enumerated bases. Proximity as used in this framework also serves the opposite: it expands extraterritorial jurisdiction to cases, in which traditional permissive principles would not apply.

Most importantly, one should not forget that the question, whether a connection exists (or how strong that connection is) between a State and the subject of regulation, is rarely a purely physical matter but that it is also a normative exercise. This is most clearly exemplified in jurisdictional assertions based on the use of correspondent account banking. As discussed above, most monetary transactions denominated in US dollar technically pass through US domestic banks because of the specific way the financial system was set up. This territorial connection is physically important, as any US bank involved in such a transaction has the possibil-

1068 The territoriality principle is not satisfied as the organizational duties prescribed by Section 7 of the UK Bribery Act would likely have to be implemented outside the UK.

1069 See above at C.VI.1c) Regulation of Conduct Based on Only Fleeting Territorial Connections or Based on Territorial 'Presence'.

1070 See Uecker (n 140), 177.

ity to halt the process and thus stop the US dollar transfer.[1071] On the other hand, however, if both the sender and the receiver of the transfer are located in third countries and both parties did not know about the specificities of the US banking system, then the (territorial) passage of financial data through the United States would seem rather random from the perspective of both parties. From a normative perspective therefore, proximity between the subject matter and the United States may not exist, because neither of the two private parties involved purposefully used the US banking system.[1072] A binary test that simply searches for the existence or not of certain connections obscures these nuances and may fail to recognize that a physically significant territorial connection, the location of financial data, may not be particularly important in relation to the entire situation after a normative analysis.

b) Legitimate Interest and the Subject Matter of Regulation

It has already been argued above that apart from proximity, extraterritorial jurisdiction may also be legitimised through the interest (or purpose) of the regulatory subject matter.[1073] Within the territoriality-centred doctrine on jurisdiction in international law, the regulatory subject matter and the underlying interest only play a marginal role. They are, in theory at least, irrelevant. To achieve this doctrinal purity, considerations of interests are sometimes disguised as arguments about the existence or not of territorial or non-territorial connections. Indeed, this tactic works well with regard to situations, in which the regulatory interest pursued overlaps with the underlying facts creating a relationship of proximity between the regulating State and the addressee. This is evidenced for instance in the case of the effects doctrine, where the negative externalities on domestic competition create a connection between the regulating State and the conduct while at the same time, the restriction of those externalities is the primary regula-

1071 See above at C.II.3. Territoriality and US Dollar Transactions by non-US Financial Institutions.

1072 Berman argues in a similar manner and terms this normative exercise the search for community affiliations, Berman, 'Legal Jurisdiction and the Deterritorialization of Data' (n 1059), 24 – 25.

1073 See also Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 459.

tory interest for such jurisdictional assertions.[1074] In these scenarios, there is not much gained through a separate analysis of regulatory interests.

However, the limits of this doctrinal purity is found especially with regard to the pursuit of certain, widely shared or internationally recognized interests. Here, the traditional approach can barely explain why certain regulatory objectives may justify broader assertions of jurisdiction over addressees or conduct, which lack a connection to the regulating State. For instance, with regard to universal jurisdiction, it is sometimes argued that the heinousness of the crimes subject to universal jurisdiction not only creates a legitimate interest, but also an actual connection, albeit a normative one, between the matter and any State willing to regulate.[1075] This is not an outrageous claim, because, as we argued, the notion of proximity and connection is as much subject to physical as it is to normative considerations. However, it is contended here that this argument still seems to be somewhat artificial. In particular, the recognition of universal jurisdiction over the crime of piracy, the defining feature of which is that it lacks physical connections to any State, advises against going down the road of normative interpretation. To argue that precisely this lack of physical connections leads to the development of normative proximity seems quite unpersuasive. Thus, as already discussed above, it would be more convincing to justify universal jurisdictions based on an overarching interest in criminalizing certain internationally reprehensible conduct rather than in the existence of a normative connection between the regulating State and the subject matter.[1076]

While the pursuit of certain interests may justify broader assertions of jurisdiction, it should be noted that just because a certain law, executive action or judgment is not meant to realize an international interest, does not automatically make it illegitimate. In fact, States in reality exercise jurisdiction in pursuit of a whole range of interests, only few of which are also 'international' in nature. These interests include not only aspects related to the traditional principles of sovereignty and self-determination such as national security and the interest to determine freely the political, economic, social and cultural structure but also the protection of the rights of individuals under the jurisdiction of the State.[1077] Thus, at the outset, as long as an activity may affect the State exercising jurisdiction, this State

1074 Ibid., Meng terms this Ordnungshoheit.
1075 This is the approach taken by Svantesson (n 13), 60.
1076 See above at B.I.2f) The Universality Principle.
1077 Ziegenhain (n 59), 246 – 427.

may have an interest in regulating that subject matter and it would be untenable to regard all these measures as generally illegitimate.[1078]

Instead, the following distinctions may prove to be useful:

First, if a State enacts regulation that pursues no legitimate interest of any kind and is only meant to produce mischief in a third country, this regulation may violate the principle of abuse of rights even if it can nominally advance a significant connection between the State and the situation in question.[1079]

Second, if a State pursues any interest at all, these may be categorized according to the physical location of the concern or the focus of the interest. On the one hand, there are extraterritorial regulations, the primary objective of which is to protect certain domestic interests from harm originating abroad, and on the other hand, there are those measures employed to remedy a genuinely foreign or global situation. We may term these two different types of regulation as inward-looking and outward-looking respectively.[1080] It is especially with regard to outward-looking regulations, in which the international recognition of the interest pursued may influence the legitimacy of these measures, as, by their nature, these interests do not have a domestic focus or a concern located within domestic territory. For these cases, it is often presumed that an otherwise questionable exercise of jurisdiction may be less contentious if it is designed to remedy a particularly weighty shared interest.[1081] This is the argument at the heart of the analysis of extraterritorial anti-corruption legislation, where this research has found that despite the often very intrusive measures, States have only very rarely offered protest in return.[1082] Thus, when the regulation of a particular subject matter is recognized as a global instead of a purely parochial interest, broader jurisdictional claims may be sustained.

1078 Ryngaert, *Jurisdiction in International Law* (n 2), 39.

1079 See above at B.II.1b) Abuse of Rights.

1080 See already above at C.I. Focus and Structure.

1081 See for instance Zerk (n 634), 213; Cedric Ryngaert and Marieke Koekkoek, 'Extraterritorial Regulation of Natural Resources: a Functional Approach' in Jan Wouters and others (eds), *Global Governance through Trade: EU Policies and Approaches* (Leuven Global Governance. Edward Elgar Publishing 2015), 265 – 268; Cooreman (n 38), at 138: '[…] jurisdictional boundaries can be more elastic when common norms are concerned'.

1082 See also Avi-Yonah (n 237), 17 – 20 who emphasizes that extraterritoriality is justified because the regulation of corruption requires extraterritoriality and the underlying norms are shared across jurisdictions.

The issue remains as to how one may determine how regionally or globally shared the regulation of a particular subject matter is. In the first place, States might refer to treaties that contain shared norms prescribing certain conduct, such as the UNCAC in the case of anti-corruption regulation.[1083] Where no specific treaties exist, States may also fall back onto other documents proclaiming a shared interest in the matter as well as soft law commitments, which for instance play a significant role in the area of environmental protection.[1084] Finally and as already mentioned above, recognized interests should not be limited to genuine *State* interests, but also extend to private and individual concerns. Thus, a jurisdictional exercise aimed at redressing human rights violations in a third country should not only look to the shared community interest of upholding human rights but also evaluate the position of the individual victim in an equal manner.[1085]

c) The Intrusiveness of the Measure

Lastly, the normative validity of extraterritorial jurisdiction cannot be reasonably assessed without some reference to the content of the measure at issue and to the question, whether and how it restrains the rights of other States and individuals or harms their legitimate interests.[1086] These considerations reflect possible limitations to jurisdiction as exercises of public authority and as already argued above, individual interests should feature in equal importance next to arguments of State sovereignty.

The essential variable to accomplish meaningful limitations may be that of 'intrusiveness', which already now has featured in some arguments about exercises of extraterritorial jurisdiction. The Sarbanes-Oxley Act provides an apt example in this regard. The Act prescribed rather strict organizational and transparency obligations on non-US issuers as well as foreign audit firms with US-listed clients. The EU strongly criticized these provi-

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1083 This is the central element of Meyer's approach to extraterritoriality who argues that courts should exercise extraterritorial jurisdiction only if the requirement of dual criminality is satisfied. With regard to corruption, see Meyer, 'Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law' (n 1058), 170.

1084 Cooreman (n 38), 140 – 148.

1085 See above in particular the concept of *forum necessitatis* at C.V.5. Transnational Human Rights Litigation.

1086 Compare also the central role intrusiveness takes up in the conception of Svantesson (n 13), 165; see also Ziegenhain (n 59), 246.

sions on a number of occasions. However, their main thrust of arguments was not focused on a lack of US territorial connection or a misguided domestic interest, but rather on the fact that the measures contained in the Sarbanes-Oxley Act were deemed to be ineffective, disproportionate and unnecessary.[1087]

Because measures with extraterritorial implications come in all kinds of shapes and designs, it is hard to give precise guidelines for the determination of their intrusiveness. With regard to (in a broad sense) economic regulation, a starting point would be that the more a measure requires its addressees to change their conduct and the more costs the measure causes, the more intrusive the measure is. This is true with regard to the individual or the company affected but also the home State, as measures that are more intrusive generally also lead to a stronger intervention with domestic regulatory frameworks.

Apart from the already mentioned Sarbanes-Oxley Act, an example illustrating this aspect is provided by different human rights related supply chain regulations discussed above. While the CTSCA and the UK Modern Slavery Act only require corporate disclosure as regards to whether certain efforts have been made to combat forced labour and human trafficking along the supply chain, the French law on 'devoir de vigilance' actually requires companies to implement oversight over the supply chain through concrete measures.[1088] Thus, it is rather straightforward to see that the compliance burden on companies (notwithstanding individual differences) is greater in the latter case.[1089]

In relation to this point, it is also important to note that States have certain tools at their disposal to limit the intrusiveness of their extraterritorial measures, in particular by injecting them with flexibility through the granting of exceptions or waivers. With regard to the interests of other States, the principle of mutual recognition may also go a long way. This principle allows another State, when the underlying conditions and standards are largely shared, to make its own determinations with regard to the precise content of its rules. In addition, by recognizing the regulatory

1087 See Comment by the EU Commission Internal Market Director-General Alexander Schaub to the Secretary of the SEC, https://www.sec.gov/rules/proposed/s74902/aschaub1.htm, last accessed on 13 April 2022; Zerk (n 634), 63.

1088 See above at C.V.4b) Mandatory Supply Chain Regulation and C.V.4c) Disclosure and Transparency Requirements.

1089 A similar analysis is undertaken by Dobson and Ryngaert (n 118), 331, with regard to EU regulations on maritime emissions.

framework of another State as essentially equal, mutual recognition shows a certain degree of deference and respect.[1090]

While the above holds largely true also with regard to domestic law, extraterritorial regulation includes another rather unique aspect that may have some bearing on its degree of intrusiveness. Because enforcement jurisdiction is in principle territorially circumscribed, extraterritorial prescriptions of conduct need to recourse to different means to lend them effect. Sometimes, extraterritorial regulations carry no rules of 'enforcement' of any kind while at other times, they may rely on private contractual mechanisms while again at other times, violations may be sanctioned with the withdrawal of domestic benefits, restriction of market access and other harsh territorial measures.[1091] Thus, exercises of extraterritorial jurisdiction differ in their strength of the disincentives provided to discourage their addresses to break the regulation, or in other words, in their degree of persuasiveness.[1092] Because of that, it could be argued that extraterritorial regulations with stronger persuasive force are more intrusive. This makes sense considering that the regulatory subjects are more likely to comply with the foreign prescription under the threat of more coercive sanctions and thus, that these regulations also lead to a stronger degree of interference with domestic affairs from a sovereignty perspective.

3. The Relationship between the Variables

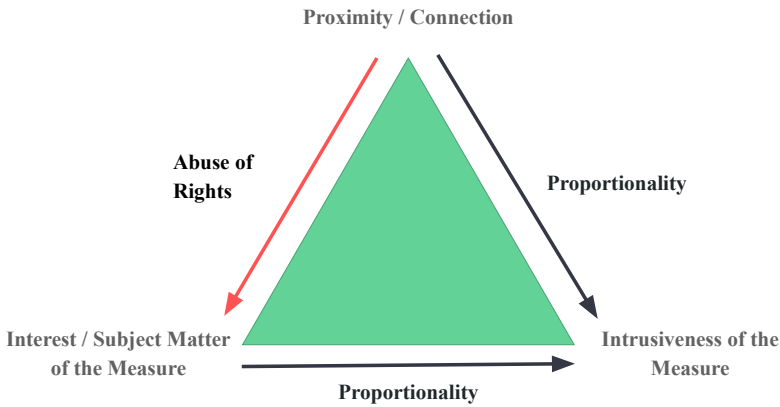
The three criteria identified above and their more precise conceptualization reflect considerations of legitimacy and limits to exercises of public authority *vis-à-vis* affected individuals and of State sovereignty in international relations. However, these criteria are not applied on a cumulative basis, but rather, their relationship with each other resembles a sliding

1090 This aspect of flexibility was one of the key factors in the WTO Appellate Body's decision with regard to the United States in Turtle/Shrimp. After striking down the initial measures, which required other countries to adopt 'essentially the same' regulations as the United States, for violation of the chapeau, the Appellate Body accepted subsequent changes that only required foreign regulatory programs to be 'comparable in effectiveness', see *United States – Import Prohibition of Certain Shrimp and Shrimp Products* – Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, 43–50.

1091 Svantesson (n 13), at 133 terms this bark and bite jurisdiction.

1092 See on this term: Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 82 – 87; Meyer (n 983), 203 – 208.

scale: The more proximity exists between the State and the subject matter of regulation, the more particular the pursued interests may be. Conversely, the more the regulation is based on a universally shared norm, the weaker the connection may be. Similar considerations apply in relation to the intrusiveness of the measure: Greater underlying proximity and overwhelmingly shared interest allow for regulations more intrusive to the rights and interests of the affected while regulations relying on fleeting connections or pursuing particular interests may need to tread lightly with regard to their intrusiveness. I have termed the first test, which assesses the relationship between the connection and the underlying interest of the regulation the 'abuse of rights' test and the second test, which asks whether in light of the connection and the objective, the regulation should be deemed too intrusive, the 'proportionality' test. In sum, the model can therefore be pictured as a triangle like this:



a) The Abuse of Rights Test

With regard to the 'abuse of rights' test, the pertinent question is whether the proximity or connection relied upon justifies the exercise of extraterritorial jurisdiction to pursue the specific objective at issue. This test lies at the heart of two extreme examples already discussed above: On the one hand, jurisdictional assertions that are not able to show a legitimate interest of any kind and are solely meant to disturb another State should

be regarded as such an abuse of rights.[1093] On the other hand, when the pursued interest is universally recognized through a shared and well defined norm, even the absence of any connection would not automatically lead to a dismissal of the jurisdictional claim as abusive.[1094] Between these two extremes of course lie the actually challenging cases that prompted this study in the first place. In this regard, it is important to remember that the abuse of rights test is just one of two steps to evaluate the legitimacy of extraterritorial jurisdiction to restrict its possible negative implications. Thus, as the name suggests, the bar to satisfy this test should not be set too high. In particular, with regard to outward-looking measures, according to the sliding scale principle, there should be no abuse of rights if these measures seek to 'enforce' a norm of universal recognition or otherwise a widely shared community interest.

The most problematic are those instances, in which States use rather questionable connections to pursue a unilateral interest. To strike the (necessarily) delicate balance here, it may be appropriate to seek inspiration in the US jurisprudence on personal jurisdiction, which concerns the very similar question, namely, what kind of contact justifies maintenance of litigation against an out-of-state defendant. In *International Shoe* and subsequent cases, the principle of due process has provided the bar to this question. It requires that an out-of-state person be subject to suit only if he or she enjoys 'certain minimum contacts with [the state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice"'.[1095]

How then, do US courts decide whether the exercise of long-arm jurisdiction is justified or not? *International Shoe* and subsequent cases distinguish between two categories, general or all-purpose jurisdiction and specific or case-linked jurisdiction, depending on the degree of contact, or

1093 See on this already at B.II.1b) Abuse of Rights.

1094 In these cases, it could be argued that the regulating State is a 'decentralized enforcer of an international law that covers the globe', see Colangelo, 'Spatial Legality' (n 48), 120 – 121; A similar conclusion is drawn by Cedric Ryngaert, *Selfless intervention: Exercising jurisdiction in the common interest* (Oxford scholarship online, First edition, Oxford University Press 2020), at 213: '[…] one of the main arguments in this monograph is that the legality of jurisdictional assertions resting on weak territorial links may be boosted by these assertions' very contribution to the common interest, and preferably by their embeddedness in, or relationship with international regulatory instruments'.

1095 *International Shoe Co. v Washington*, 326 US 310, 316 (1945).

proximity, between the defendant and the forum.[1096] The exercise of general jurisdiction is limited to 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities'.[1097] In other cases, only specific jurisdiction may be maintained in relation to the adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction', which has its basis in the 'activity or an occurrence that takes place in the forum State'.[1098] Put differently, unless general jurisdiction exists, a court may exercise personal jurisdiction only if the subject matter in question is in some way connected to the activity or the presence of the defendant in the forum.

While the 'minimum contacts' analysis concerns personal jurisdiction in US jurisprudence, it may be possible to transpose its underlying idea to our abuse of rights test. That is, unless the proximity between the State and the addressee of regulation is so close as to justify all-purpose jurisdiction, extraterritorial jurisdiction may only be exercised if the regulated subject matter and hence the regulatory interest is somewhat related to the specific connection relied upon. Otherwise, if the connection is completely detached from the regulatory interest, it would seem arbitrary to burden the addressee with normative commands that do not arise out of the purposeful association of the private person with the State. Meng similarly argues that the link or connection between a State and the subject matter of regulation is not mechanic, but rather entails a functional dimension. For instance, exercise of jurisdiction under the personality principle may permissibly only regulate such interests that are related to the special allegiance citizens owe to their nation State, but not beyond.[1099] Thus, it is arguably legitimate to extend domestic criminal laws to nationals abroad based on allegiance or to address nationals extraterritorially to uphold re-export restrictions for the sake of national security but not to regulate

1096 *International Shoe Co. v Washington*, 326 US 310 (1945); *Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US 915 (2011); *J. McIntyre Mach., Ltd. v Nicastro*, 564 US 873 (2011) see also John Drobak, 'Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in Goodyear Dunlop Tires and Nicastro' (2013) 90 Washington University Law Review 1707.

1097 *International Shoe Co. v Washington*, 326 US 310, 316 (1945).

1098 *Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US 915, 919 (2011).

1099 This concept of allegiance is problematic, as mentioned above at D.I.1a)bb) Nationality.

general commercial activity under this principle.[1100] The requirement of an inner relationship between the specific connection relied upon and the regulatory interest is particularly useful in analysing extraterritorial economic regulation. Thus, issuing stocks on a domestic exchange may provide the necessary connection to prescribe rules on corporate transparency disclosure obligations in order to pursue the interest of protecting domestic investors. However, while this finding arguably supports the extraterritorial application of the Sarbanes-Oxley Act, it may be an abuse of rights to use listing on stock exchanges as a connection to regulate unrelated contractual matters of the same corporation.

b) The Proportionality Test

The 'proportionality' test asks whether in light of the proximity between the regulating State and the addressee as well as the regulatory interest at issue, the regulation should be deemed disproportional because it is substantially too intrusive. Svantesson offers an example of how such a balancing test may be operationalized in practice with regard to the area of data protection. As a starting point, he distinguishes between different types of regulatory measures according to three different categories, the abuse prevention layer, the rights layer and the administrative layer.[1101] While the abuse prevention layer contains prohibitions on the unauthorized abuse of personal data, the rights layer guarantees individual positions such as the right of access and the administrative layer prescribes certain organizational obligations on the addressed enterprises, such as the designation of a data protection officer.[1102] While the underlying interest remains the same within all three layers, the protection of residents' individual data in the regulating State, the intrusiveness of the measures in the various layers differ. For a data processing company, creating the mechanisms to guarantee users a right of access or designating and training a data protection officer are arguably more burdensome than simply refraining from unauthorized sharing of data. As a result, Svantesson suggests that for the rights layer or the administrative layer to apply extraterritorially, the

1100 See Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 601 – 602.
1101 Svantesson (n 13), 193.
1102 Ibid., 192 – 193.

regulated operator must be especially close with the regulating State.[1103] Certain aspects of this approach, such as the particular scope of the layers, may be criticized.[1104] However, the general idea that there is a proportionality relationship between the intrusiveness of the measures on the one hand and the underlying connections as well as the regulatory interest on the other hand holds potential.

The preceding sections have already offered some indication with regard to how the strength of a connection, the weight of an interest as well as the intrusiveness of a measure may be assessed.[1105] As discussed above, determining the proximity between the State and the subject matter of regulation involves a normative assessment of the entire circumstances instead of a fragmented approach relying on specific bases. The weight of an interest (which includes the protection of certain individual interests as well) may be indicated in particular by how widely it is recognized to be a subject matter of importance among affected States. The intrusiveness of a measure significantly depends on its unique design and on how much the regulation requires the addressees to change their behaviour or displaces the affected State of its regulatory authority.

In addition, it is submitted that the legality of any jurisdictional assertion also depends at least partly on the regulatory framework within the affected State. State practice and academic commentators indicate that exercises of extraterritorial jurisdiction may be more contentious if the content of the measure is in conflict with existing forum State regulations.[1106] *Vice versa*, such measures should cause less protest if both States employ largely similar policies on the subject matter. One might justifiably wonder how this notion is consistent with the proportionality test just outlined above which primarily looks at characteristics of the extraterritorial measure itself without reference to external factors. In truth however, the proportionality test is well equipped to capture these differences through the intrusiveness prong. While the intrusiveness of a measure is determined by the specific design of the extraterritorial regulation, it is not possible to fully appreci-

1103 Ibid., 194 – 197.

1104 Uecker (n 140), 198 – 200.

1105 See above at D.II.2. The Variables Determining the Legitimacy of Extraterritorial Jurisdiction.

1106 See for instance *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 403(2)(h) lists as one consideration for analysing the reasonableness of exercises of jurisdiction 'the likelihood of conflict with regulation by another State'; Zerk (n 634), at 214 equally views the potential for 'regulatory conflicts' as a possible red light.

ate its effects on the rights or interests of other individuals (and States) without at least some considerations of their respective positions.[1107] Two commonly discussed situations shall exemplify this proposition.

aa) True Conflicts

'True conflicts' of law or 'foreign sovereign compulsion' describe a situation where one State extraterritorially prohibits certain conduct that another (the territorial) State compels.[1108] In this case, the addressee of the simultaneous regulations is caught between the proverbial rock and a hard place as it is logically impossible for him to fulfil both obligations at once. It comes as no surprise therefore that the affected individuals would perceive such measures as particularly intrusive to their interests as it seems inevitable to face sanctions in one place or the other. At the same time, these measures would usually present a strong intervention into the interests of the affected State as the State has specifically opted for domestic policies contradicting the extraterritorial regulation.[1109] Thus, extraterritorial regulations that cause such a true conflict without any possible exemption may regularly fail the proportionality test because they are overly intrusive to the interests of affected individuals and States. And indeed, States seem to have recognized the delicacy of this issue and the intrusiveness of asserting extraterritorial jurisdiction in these situations and frequently waive compliance obligations or sanctions for affected individuals caught in such a 'true conflict'.[1110]

1107 This aspect is also acknowledged by Uecker (n 140), 194.

1108 The terminology is not precise. Colangelo, 'Spatial Legality' (n 48), at 112 terms these situations 'absolute conflicts'; Ziegenhain (n 59), at 42 uses the expression 'true conflict' to describe a situation in which the interests of two States balance each other, so that both States may legitimately exercise jurisdiction over a certain subject matter.

1109 See Colangelo, 'Spatial Legality' (n 48), at 113, 'if foreign law compels the foreign activity, then overriding the application of foreign law would be tantamount to U.S. courts invalidating the public act of another sovereign in its own territory.'.

1110 See for instance, FCPA, § 78dd-1(c); *Hartford Fire Insurance v California* 509 US 764, 798 – 799 (1993).

bb) False Conflicts

However, the proposition that the intrusiveness analysis has to consider the positions of the affected individuals and States also runs in the other direction. Thus, the proportionality test should be commonly satisfied when the State exercising extraterritorial jurisdiction and the affected State have adopted essentially the same regulation with regard to the specific subject matter. From the individuals' perspective, the extraterritorial regulation in these cases proves less burdensome as in any event, they are bound by a norm of the same substance, the content of which they should know. The affront on the sovereignty of another State is equally mitigated as both States not only follow similar interests but have even adopted comparable norms. One could even claim that the State exercising extraterritorial jurisdiction is in fact administering 'vicarious' justice.[1111] For Meyer, these aspects are so important that he makes this concept, which he terms 'dual illegality', the cornerstone of his doctrine of US judicial application of extraterritoriality.[1112]

This approach convincingly explains why universal jurisdiction, which may be interpreted as a more advanced form of dual illegality, generally should not fail the proportionality test despite occasional protests in practice. Since all States and individuals are bound by the prohibition of certain core international law crimes, being subjected to the jurisdiction of another State should prove to be no additional interference with their rights and interests. On the other hand, exercises of universal jurisdiction to pursue perpetrators of such crimes are in the interest of the entire international community and thus carry a weighty interest. Another example in this regard can be found in the transnational regulation of foreign bribery where the UNCAC and the OECD Anti-Bribery Convention provide for reasonably clear norms that have been adopted in the majority of nations. In these matters again, exercises of extraterritorial jurisdiction do not offend the positions of affected individuals, and, since they also serve to uphold a largely converging global interest, should generally pass the proportionality test even if the connection relied on is rather weak. Also in practice, affected States have not protested FCPA enforcement actions even when they resulted in harsh sanctions for individuals and companies under their jurisdiction or when they were based on most tenuous connec-

1111 Ryngaert, *Unilateral Jurisdiction and Global Values* (n 10), 78.

1112 Meyer, 'Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law' (n 1058).

tions. Exceptions to this principle of 'false conflicts' certainly exist, such as if the procedural rules of the State exercising extraterritorial jurisdiction are particularly intrusive *vis-à-vis* the affected States and individuals.

However, false conflicts create another problem: While it may be relatively easy in practice to determine whether a true conflict exists, it may be much harder to ascertain whether the regulations of two States are similar enough to affect the proportionality analysis. Although this is a weighty consideration, it does not present an unsurmountable obstacle. In fact, much of the operation of dual illegality in practice may be aligned to the well-known criteria of double criminality in the law of extradition.[1113] For instance, the Ninth Circuit has held in this respect: 'When the laws of both the requesting and the requested party appear to be directed to the same basic evil, the statutes are substantially analogous, and [they] can form the basis of dual criminality.'[1114] If law enforcement agencies and courts have been able for generations to determine whether a pair of domestic and foreign law satisfies the requirement of double criminality, the adaptation of this principle to situations of extraterritorial jurisdiction should equally be in their capabilities.

4. Procedural Safeguards, Reasoning and Participation

The exercise of extraterritorial jurisdiction has the potential to give rise to conflicts of interest between the involved States and between the regulating State and the affected private parties. While the rules described above are capable of mitigating such risks, the mere design of a new framework will certainly not sway (in particular powerful) States away from conducting business-as-usual, seeing that they are by far the biggest beneficiaries of the cacophonous regime of State jurisdiction right now. One driver of change in this situation may be reciprocity, the concept that when one State abides by the rules of the game *vis-à-vis* another State, that other State may respond in kind. On the other hand, if one State regularly resorts to outrageous assertions of jurisdiction, it eventually risks to face a situation when the tables are turned. Thus, at least in the area of transnational anti-trust regulation, even though it was not possible to establish substantive standards, a number of Western States seemed to have enough appetite to establish at least a series of procedural obligations with

1113 Ibid., 167.
1114 See *Clarey v Gregg*, 138 F 3d 764, 766 (9th Cir 1998).

each other, including notification, consultation and goodwill to avoid conflict.[1115] There is thus reason to believe that the adoption of procedural safeguards may prove less political than the establishment of substantive standards, but that eventually, one may lead into another.[1116]

However, while it was the fear of reciprocal retaliation that drove the establishment of a consultation procedure between States, there are more fundamental values at stake that suggest the creation of procedural obligations. For one, low-level contact between domestic agencies and courts with their counterparts in other States may provide the necessary fine-tuning of the variables and tests developed above, which have been rather open to ensure their applicability across a wide range of areas. Thus, they may need more detailed configuration for each specific subject matter of extraterritorial regulation, a task which is arguably better in the hands of domestic regulators connected through international consultation. For the other, it has already been mentioned that procedural safeguards, which serve the upholding of the rule of law, provide another possible mechanism to compensate, at least to a certain degree, the democratic deficit of extraterritorial jurisdiction.[1117] This is particularly the case, when procedural obligations are not only established in the interstate relationship but also with regard to the affected private parties.

The improvement of legitimacy and accountability *vis-à-vis* the affected individuals thus poses certain requirements for the design of safeguards in relation to the exercise of extraterritorial jurisdiction. As already mentioned above, extraterritorial jurisdiction is by far not the only area of global governance, in which issues of legitimacy have arisen. Thus, the academic literature has already conceptualized a range of solutions, which improve rule of law standards and thus help to legitimize exercises of public authority. The emerging school of global administrative law in

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1115 Agreement Regarding the Application of Competition Laws between the Government of the United States and the Commission of the European Communities, (1991) 4 CMLR 823; (1995) 30 ILM 1487, [1995] OJ L 132; see also already above at D.I.1. Alternative Approaches to Solve Concurrent Jurisdiction.

1116 This is also the position of Ryngaert, *Jurisdiction in International Law* (n 2), at 215 who believes 'that a *reasonable* exercise of jurisdiction could spontaneously spring from a network of transnational governance and judicial cooperation. States will inform other States – and relevant private actors – that they intend to exercise jurisdiction over a particular situation. Foreign nations will comment on the proposed assertions, and the asserting States will presumably take foreign concerns into account.'.

1117 See above at D.II.1c) Proximity, Community Interests and the Rule of Law.

particular has focused on process to mitigate issues of democratic legitimacy and accountability by highlighting standards of transparency, participation, reasoned decision, and legality.[1118] Similar procedural principles are imaginable in the context of extraterritorial regulation and would for instance allow affected private parties to participate in the rule-making process of legal acts with extraterritorial effects. While this proposal may sound ambitious, there are concrete examples, for instance with regard to the EU process of designing its conflict minerals regulations.[1119] Even when participation cannot be ensured, providing a thorough reasoning to decisions that factor in the possible interests of foreign private parties affected by a particular law, administrative act or judgment may already go a long way in creating mutual understanding and prevent conflicts.[1120] With regard to procedural safeguards, the possibility for foreigners to contest extraterritorial regulations and have them reviewed may also provide relief for affected individuals.

In relation to this last point, the restriction of US constitutional rights to persons who have come within US territory or developed substantial connections with this country proves to be particularly problematic. While extraterritorial US economic sanctions are adopted without any prior notification against foreign individuals with no connection to the United States, these individuals, at the same time, may not be able to have these sanctions reviewed by independent courts afterwards.[1121] This incongruence between, on the one hand, the exercise of public authority and, on the other hand, the lack of judicial accountability strongly suggests the illegitimacy of US extraterritorial sanctions in this particular instance and should be addressed through domestic legislation. Finally, from a practical perspective, adding procedural safeguards to extraterritorial sanctions may be more realistic than to abolish this kind of regulation altogether.

1118 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3) Law and Contemporary Problems 15, 17; Battini (n 182), 75 – 80 also argues along these lines.

1119 See above at C.V.4b) Mandatory Supply Chain Regulation.

1120 Similar suggestions are made by Benvenisti (n 23) who grounds his 'minimum obligations' on the sovereignty of States, which he considers to entail a trusteeship not only for a State's own constituents, but also at some level for humanity at large.

1121 See on this already C.II.5. Protection of Individual Rights.

5. Application of the Framework in Practice

a) Market Access Regulation Conditioned on Extraterritorial Circumstances

The proposed conception of the abuse of rights test may prove useful in solving some of the jurisdictional conundrums identified in the analysis of actual practice of the United States and the EU, for instance, the weakness of the traditional doctrine to adequately deal with market access regulations conditioned on extraterritorial circumstances. As discussed above, States and academics have provided no coherent argument to assess these diverse measures, ranging from secondary boycotts such as the ISA, measures aimed at regulating climate change in the form of the Aviation Directive 2008/101/EC, or human rights conditionality in domestic procurement policies.[1122] According to the approach outlined above, there would be an abuse of rights if the connection relied upon, the access to domestic markets, does not justify exercising jurisdiction to pursue the particular regulatory interest.

A number of different situations should be distinguished here: In the first instance, if the interest pursued relates to the protection of domestic consumers, domestic territory or the domestic market from physical or economic harm, conditions imposed upon access should be deemed justified. In relation to these inward-looking measures, the domestic harm creates a particularly strong proximity between the regulating State and the private addressee. With regard to their own citizens and their own territory, States are principally free to determine the level of health, environmental or economic protection. Thus, merely establishing conditions to uphold these objectives and blocking access of products or conduct that undermine these objectives can hardly be construed as an abuse of rights.[1123] Though not determinative, this interpretation of the abuse of rights test also aligns well with a modern notion of the effects doctrine, which recognizes a basis for the exercise of jurisdiction to mitigate substantial adverse effects beyond traditional antitrust regulation.

Market access conditions that pursue outward-looking interests, where the subject matter or concern is located abroad, are harder to justify.

1122 See above at C.VI.1a) Market Access Regulation Conditioned on Extraterritorial Circumstances.

1123 For the protection of consumer health: Meyer (n 983), 216 – 218; for the protection of the domestic environment: Cooreman (n 38), 132 – 133.

According to the sliding scale principle, such measures would be unproblematic if they seek to 'enforce' a norm of universal recognition or otherwise a widely shared community interest. An example in this regard may be the EU Timber Regulation, which prohibits the placement into the internal market of illegally harvested timber. Illegal logging is a global cause to a variety of economic, environmental and social issues, as deforestation may negatively impact climate change and biodiversity.[1124] Thus, sustainable forest management has also been recognized as a concern in a number of international soft law documents, such as the Forest Principles[1125] and Chapter 11 on deforestation of Agenda 21.[1126] With regard to binding instruments, some timber species are listed under the appendices of CITES[1127] and forest management is also covered in the Convention on Biological Diversity.[1128] Thus, while there is no binding international consensus on illegal logging *per se*, the concern is hardly parochial and enjoys tremendous global support.[1129] In this regard, it should be noted that the EU, because of a lack of a universally accepted definition of illegal logging, chose instead to define the term according to the local law of the exporting country.[1130] Thus, it is convincing to argue that the EU, through the Timber Regulation, is indeed enforcing an interest that is both recognized at a global level and by the affected State itself.[1131] Finally, from the perspective of individual foreign operators, such trade restrictions create no additional compliance burden since the market access conditions are analogous to their domestic regulation, or, phrased in another way, the

1124 Cooreman (n 38), 249.

1125 United Nations Conference on Environment and Development, Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, A/CONF.151/26 (Vol. III).

1126 United Nations Conference on Environment and Development, Agenda 21.

1127 Convention on international trade in endangered species of wild fauna and flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 ('CITES').

1128 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

1129 Cooreman (n 38), 261.

1130 See above at B.II.2. Comity.

1131 Cedric Ryngaert, 'Whither Territoriality?: The European Union's Use of Territoriality to set Norms with Universal Effects' in Cedric Ryngaert and others (eds), *What's Wrong with International Law?: Liber amicorum A.H.A. Soons* (Nova et vetera iuris gentium. Brill Nijhoff 2015), at 439 raises some doubt whether exporting countries actually welcome the EU Timber Regulation despite its reference to local law.

regulated conduct is equally 'illegal' in both States. Thus, using market access as a connection to pursue a widely shared concern cannot be deemed an abuse of rights.

The most difficult cases are those instances, where market access is used to 'enforce' a unilateral or particular interest, such as in the case of the ISA. According to the considerations above, striking the right balance here depends on whether a relationship exists between the connections relied upon to regulate and the pursued regulatory interest so as to justify a particular kind of jurisdictional assertion. Legislation such as the ISA uses domestic economic benefits, such as the possibility to enter certain banking and property transactions with banks in the United States, as leverage. The purpose is to induce the (third country) addressees of the regulation to modify their business relationships with regard to the primary sanctions target according to US foreign policy preferences. In this case, the domestic benefits that may be withdrawn create proximity between the addressees of the regulation and the United States while disrupting business relationships with the primary sanctions target, and, more generally, the US policy of isolating certain governments, constitute the underlying regulatory interest. It would seem that there is no direct relationship between accessing the US market and upholding its foreign policy. Thus, provisions such as those in the ISA simply (ab)-use market access to compel a wholly unrelated conduct and should indeed be considered an abuse of rights.

However, the analysis may be different if, instead of isolating an allegedly hostile country, an interest is pursued that more closely relates to the connection relied upon. For instance, the United States uses regulations, which condition the maintenance of correspondent banking accounts by foreign banks in the United States on whether or not that foreign financial institution raises red flags with regard to the risk of money laundering.[1132] Here, it is possible to establish an inner relationship between the connection, the maintenance of banking accounts in the United States, and the regulatory interest, the prevention of money laundering. Furthermore, given the fungible nature of money one can well argue that banking transactions with money laundering institutions might compromise the domestic correspondent banking system, thus establishing an additional link between the connection relied upon and the subject matter of regulation. Given that, it could be argued that such a regulation would more likely pass an abuse of rights tests.

1132 USA PATRIOT Act of 2001 Pub. L. 107–56, § 311, codified at 31 U.S.C § 5318a.

b) Parent-based Regulation of Multinational Corporations

Largely similar considerations guide the application of the proposed framework to solve the issues posed by another frequently adopted regulatory mechanism, which utilises corporate parent-subsidiary structures to achieve extraterritorial effects. Given the ubiquity of multinational corporations, it comes as no surprise that both the United States and European States have extensively practiced this technique in multiple regulatory areas. Parent-based mechanisms cover a wide range of different measures, among others the direct regulation of foreign subsidiaries, holding domestic corporate parents strictly liable for conduct by their foreign subsidiaries and establishing certain policies that demand group-wide compliance. Focusing largely on territoriality, conventional doctrine has had a hard time to adequately capture the nuanced approach in practice.[1133] According to the framework proposed in the preceding sections, the normative validity would depend on whether the specific parent-based regulations satisfy the abuse of rights and the proportionality tests.

The abuse of rights test asks whether the specific proximity between the regulating State and the addressee or the subject matter justifies the exercise of extraterritorial jurisdiction to pursue the objective at issue. A strong indication for an abuse of rights exists if the connection relied upon to exercise jurisdiction is completely detached from the regulatory interest, as in this case, it would seem arbitrary to burden the addressee with normative commands that do not arise out of the purposeful association of the private person with the State. According to this standard, regulations pertaining to the establishment of uniform accounting, disclosure or similar compliance policies throughout a corporate group would usually constitute no abuse of rights. The regulatory objective of these measures is precisely to protect the interests of domestic investors, consumers and the public at large, who usually regard the group as a single enterprise with regard to its economic, environmental and social performance. Thus, there is an evident inner relationship between the exercise of extraterritorial jurisdiction based on corporate affiliation and the regulatory interest.[1134]

1133 C.VI.1b) Parent-based Regulation of Multinational Corporations.

1134 This is also the position of the *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 414.

The evaluation becomes more difficult in other cases. With regard to economic sanctions based on parent-subsidiary mechanisms,[1135] considerations similar to those, which led to a rejection of the ISA, may apply. There, it has been argued that while foreign companies that access the US market or receive other economic benefits undoubtedly enjoy a connection to the domestic territory, this connection does not seem to have any relationship with the business of the foreign company with other third States. Thus, such regulations may not pass the abuse of rights test. In the same vein, the parent-subsidiary structure does not immediately suggest that subsidiary companies abroad need to uphold the same unilateral foreign policy of the home State of the corporate parent. Rather, in this instance as well, there seems to be no necessary relationship between the connection relied upon to exercise extraterritorial jurisdiction and the regulatory interest at issue.

The situation may be somewhat different again with regard to parent-based regulations in the area of business and human rights. As discussed above, the abuse of rights test is also commonly satisfied when the regulatory interest itself is so weighty, so universally shared, that even minute contacts between the regulating State and the addressee or the conduct in question may legitimize an exercise of jurisdiction.[1136] This requirement seems to be generally satisfied with regard to recognized international human rights, although certain norms, such as those giving rise to universal criminal jurisdiction, may be considered particularly strong for this purpose. Thus, with regard to parent-based regulations in relation to the human rights obligations of foreign subsidiaries, the normative assessment may rather revolve around the question of proportionality. At this stage, it is necessary to examine the precise content of each regulatory measure, in particular, to which extent it requires the foreign addressee to adapt its conduct and to which degree it displaces the foreign subsidiary's home State of its regulatory authority. Thus, the more a regulation purports to directly target the foreign subsidiary without finding specific fault on the part of the domestic parent, the more intrusive this regulation is *vis-à-vis* both the norm addressee as well as the affected State and the more likely it is to be disproportionate. This may be the case for instance if the domestic parent is held strictly liable for subsidiary conduct or otherwise if the standard of supervision is so high that in practice, the domestic parent may

1135 See for such regulation for example, 31 C.F.R. § 560.215, above at C.II.2. The Extension of Personality-based Jurisdiction to Foreign Subsidiaries.

1136 D.II.3a) The Abuse of Rights Test.

not have recourse to a due diligence defence. So far, there is no indication in practice that courts in the United States or in Europe holding home State corporations liable for subsidiary conduct have crossed this high bar.[1137]

c) Regulation Based on Individual Consent of the Affected

The above analysis has shown that the individual consent of private parties to be subjected to a certain set of (State mandated) rules is gaining importance in the wider development of transnational regulation. The most controversial examples in this regard are certainly submissions concluded in the area of export controls, where the foreign importer of controlled goods regularly has to agree to be bound by the regulations of the original exporting State or to otherwise refrain from re-exporting the goods without prior administrative approval.[1138] While such extensions of State jurisdiction are now often tacitly accepted, they have once caused diplomatic uproar. Despite some scholarly debate on the topic, merging the role of individual consent into the traditional jurisdictional doctrine has been difficult.[1139] According to the here proposed framework, jurisdictional assertions based on private contractual submissions as well would have to satisfy the abuse of rights and the proportionality tests while recognizing the strength of individual interests to shape jurisdictional assertions.

As a starting point, it seems to make sense to divide cases of re-export control into two categories, depending on whether they refer to goods and technologies that are jointly listed through multilateral agreements, even if this happens through informal regimes such as the Wassenaar Arrangement, or those that are unilaterally controlled. The reason is that with regard to multilaterally regulated goods, the interest variable in the triangle framework becomes much weightier as both the original exporting country and the re-exporting country have a joint interest in suppressing the proliferation of the concerned goods. Thus, in light of the proportionality test, exercises of extraterritorial jurisdiction affecting multilaterally regulated re-export activities would usually fare better than with regard to export control of unilaterally listed items. In the former cases, the affected companies and individuals are in any case bound by a substantially similar

1137 See above at C.V.5c) Comparative Normative Analysis.
1138 See above at C.III.4c) Comparative Normative Analysis.
1139 See above at C.VI.2. The Restriction to Considerations of State Sovereignty.

rule in their forum State even without additional private consent. Thus, extraterritorial jurisdiction should not prove to be particularly intrusive and the existence of a contractual arrangement may further legitimize such exercises.

With regard to unilaterally controlled items, the question becomes whether the regulating State may refer exclusively to its contractual agreement to justify the exercise of jurisdiction *vis-à-vis* a foreign natural or juridical person. As elaborated above, consent of the private parties may mediate proximity between the regulating State and the re-export control matter in question.[1140] Moreover, it can be argued along the lines of the general principle of *volenti non fit iniuria* that no one may claim damages if he has knowingly and voluntarily consented into a certain act. Thus, the intrusiveness of regulatory measures in relation to the consenting individual is greatly diminished.[1141] It is true that measures based on private submission may still interfere with the regulatory choices of the forum State as was most clearly demonstrated in the *Pipeline* incident. However, as mentioned above, if the forum State fears that private submission by 'its' companies would displace its regulatory authority, there is nothing stopping the State to adopt measures, including blocking-statutes, limiting the possibility or authority of such contractual agreements.[1142] In general, therefore, the intrusiveness of extraterritorial measures based on consent should be rather minor in relation to both the State and the private party. Thus, such measures should usually pass the proportionality test and prove legitimate.[1143]

1140 See above at D.II.2a) Proximity and Substantial Connection.

1141 On a more theoretical level, one of the main arguments raised against extraterritorial jurisdiction is the fact that the affected were not possible in any way to participate in and influence the creation of the norm and thus that extraterritorial jurisdiction lack (democratic) legitimacy. However, one could argue that this deficiency does not pose a problem in the event of contractual submission, as there is undoubtedly an act of voluntary consent into the regulation. Thus, the lack of legitimacy is cured in these cases.

1142 See above at C.III.4c) Comparative Normative Analysis.

1143 The principle of consent may also provide additional insights to the problem of regulating along the corporate parent – subsidiary relationship. When a company incorporates under the laws of a certain State, the company accepts the applicability of the regulations of that State even if the company otherwise does no business at all there. When a company is incorporated under the laws of a certain legal system, all its rights and duties are derivative to the law of that State. Put differently, the company has explicitly consented to the application of the regulations of that State, see Brilmayer (n 998), at 1298. In the case of an independent subsidiary therefore, this legal person may be said to have

To be sure, the idea of private party submission has certain limitations. One the one hand, it must be reasonably possible for the participating private party to foresee what conduct is covered by the extraterritorial regulation. On the other hand, the party has to in fact consent into these specific matters. This was indeed one of the more critical issues during the *Pipeline* incident: European companies had already received the US controlled goods and technologies consenting to US regulations at a time when no export prohibitions were in place regarding the Soviet Union. However, when these regulations changed, the US sought to apply the new regulations based on the original agreements, which drew the criticism of retroactivity.[1144] This was particularly problematic because while some of these private contracts expressly contained provisions to also subject the private party to subsequent regulatory changes, the Pipeline orders were not limited to these instances.[1145] Thus, it could be argued that the original agreements did not cover these new regulations and that the extraterritorial jurisdictional assertions thus could not rely on consent.

Furthermore, as a general principle, for any consent to be legally valid, it has to be voluntary, which one can understand as to be free from duress, coercion or other undue influence. In the State – private party relationship, this might prove to be particularly difficult to assess, as private parties, sometimes even if they are large corporations, may not be able to resist a foreign State's command for submission. This may particularly be the case in relation to US export control where comprehensive contractual agreements may be the only way of obtaining the goods and technologies in question.[1146] Finally, as mentioned above, private party consent finds its limits in cases in which this very act would be contrary to domestic legislation, typically, when a blocking-statute or other mandatory national

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explicitly consented to the regulation of the State of incorporation. In principle therefore, its relationship to the home State of the parent corporation has to defer to this new bond, see Meessen, 'Extraterritoriality of Export Control' (n 539), 103. Even the ICJ, in *Barcelona Traction*, explicitly refers to consent when the Court submits that the exercise of diplomatic protection with regard to a corporation may need to take into account whether incorporation in the host State was forced upon the company, hinting at the concept of a defective consent, see *Barcelona Traction Light and Power Co, Ltd. (Belgium v Spain)* (n 126).

1144 Meessen, 'Extraterritoriality of Export Control' (n 539), 97.

1145 Stanley Marcuss and Mathias Stephen, 'U.S. Foreign Policy Export Controls: Do They Pass Muster under International Law' (1984) 2 Berkeley Journal of International Law 1, 16 with footnote 86.

1146 Ziegenhain (n 59), 161.

regulations exist.[1147] This caveat strikes the needed balance between individual and State interests: In those cases in which they do not neatly align, the home State still possesses the tools to compel compliance.

6. Pre-empting Some Potential Objections

As with anything as fundamental as State jurisdiction, no framework will be anywhere near the perfect solution and the proposal just outlined certainly does not pretend to be. In the end, managing such a complex endeavour will always involve trade-offs, between flexibility and predictability as well as between practical applicability and theoretical ambitions. In this regard, keen readers may criticise that the above developed and advocated variables and tests do not even fulfil their very own ambition of practical applicability. They will have already observed that the new framework, not unlike traditional doctrine, does not manage to eliminate the possibility for concurrent jurisdiction. After all, it is not unconceivable that two or more States may exercise jurisdiction over the same subject matter because none of the regulations applied to the matter fail either the abuse of rights or the proportionality test. This is fair criticism.[1148] However, two aspects should be mentioned in this regard.

First, a diligent application of the abuse of rights and the proportionality tests should reduce the number of instances of permitted concurrent jurisdiction over time. It is predicted that in matters that can boast no internationally accepted regulatory interest, the framework will likely result in a primary regulatory competence of the States most proximate to a certain situation. This is because failing to advance a substantial connection, any assertion of jurisdiction by a State will face greater hurdles in relation to both the abuse of rights and the proportionality test. In practice therefore, this result may be similar to Ryngaert's principle of subsidiarity, according to which the State with the strongest nexus to a case should generally be given jurisdictional primacy over the matter.[1149] However, if the determination, which single State has the strongest nexus to a given case, proves

1147 See the conflict caused by individual consent that runs counter to mandatory domestic regulations in: Rice (n 563).

1148 Ryngaert makes the quest for a solution that prevents concurrent jurisdiction one of the centrepieces of his work, see Ryngaert, *Jurisdiction in International Law* (n 2), 142 – 144.

1149 Ibid., 219 – 228.

to be particularly difficult itself, then the proposed framework allows for more flexibility while at the same time offering effective tools to restrain exercises of exorbitant jurisdiction.[1150]

Second, concurrent jurisdiction does not lead to international controversies in nearly all situations in which the issue arises. Rather, certain cases are more conflict-prone then others, for instance if the underlying substantial regulations differ from State to State, leading to conflicting commands for individuals caught in the middle, or if the threatened punishment in one State is much harsher than in another State, or if the nexus relied upon is perceived as particularly illegitimate by another State. It is precisely with regard to these issues, that the proposed framework has been developed and thus, such particularly counterproductive frictions should be largely eliminated by a thorough application of the variables and tests outlined. On the other hand, when the exercise of jurisdiction by a State respects both the abuse of rights and the proportionality test, the legitimate interests of both affected States and individuals have already factored in, and the added flexibility may indeed be handy in relation to enforcement matters.

Critics may further argue that with regard to conduct about which there already exists an internationally accepted regulatory interest, the proposed framework could allow too many States, even those with only loose connections, to assert jurisdiction based of the concept of false conflicts elaborated above.[1151] One need to only imagine the regulatory chaos when all or the majority of States concern themselves with the same situation, even if the underlying rules are harmonized.[1152] While the argument is appealing on a theoretical level, the practical probability of this happening is quite low. The experience with universal jurisdiction and extraterritorial jurisdiction in the area of anti-corruption shows that even in areas of overwhelming consensus, under- and not over-enforcement remains the more urgent issue.[1153] Given the natural restraints on regulatory and investiga-

1150 See for instance the particularly contentious Microsoft Ireland case; while Microsoft is a US company, the data is stored in Ireland. Does an order compelling Microsoft to disclose the Irish data by a US law enforcement agency have a stronger nexus to the US or to Ireland? See above at B.I.4. Territoriality-based Jurisdiction and the Internet.

1151 See above at D.II.3b)bb) False Conflicts.

1152 This risk is also acknowledged by Gruson (n 389), 764.

1153 According to Transparency International, as of 2020, only four parties to the OECD Anti-Bribery Convention are considered active enforcers of the Convention, see Transparency International, 'Exporting Corruption' Progress

tive resources to exercise jurisdiction extraterritorially, over-enforcement may also not become an actual problem in the future. Of course, there still might be individual cases that attract transnational attention and where several States with harmonized legal frameworks wish to intervene. However, given that the States would be pursuing the same regulatory interest in these cases, it is not improbable that through the development of notice and other procedural requirements or through simple negotiations, these States may come to an accord.

A second strand of criticism may be less concerned with the practical consequences of concurrent jurisdiction, but rather with the technical difficulties of applying the framework in the first place. In particular, one might argue that the proposed tests are too vague and that, for instance, it is utterly impossible to objectively determine whether in light of a certain connection and regulatory interest, extraterritorial jurisdiction of the subject matter in question is too intrusive. This is a serious observation. However, it is also an observation that has been raised in relation to proportionality tests for decades if not centuries. Yet still, these principles have seen fruitful application by the courts and arbiters in domestic and international law settings to balance complex competing interests.[1154] At the very least, the above proposed variables and tests provide a common language in the analysis of extraterritorial jurisdiction, along which reasoning may take place. It forces States to stop hiding behind labels of 'territoriality' and spell out the actual underlying concerns for and against asserting jurisdiction over a particular subject matter. Over time, the repeated use of this language will translate into a sense of which instances are to be regarded as acceptable and which as disproportionate or abusive.

In relation to this argument, one may also point out that, ultimately, the quality of the variables and tests proposed above depends on the person who is going to administer them.[1155] Thus, one might ask who is going to decide on these variables and tests in practice and remark that unlike in domestic law, there is generally no final arbiter in international law. Without such an authority, however, States could abuse these malleable criteria according to their particular conceptions of fairness and justify even exor-

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report 2020: Assessing enforcement of the OECD Anti-Bribery Convention, at 10, available at https://files.transparencycdn.org/images/A-slim-version-of-Exporting-Corruption-2020.pdf, last accessed on 13 April 2022.

1154 See already above at B.II.1c) Proportionality; For applications of this principle in international law, see also Peters, 'Verhältnismäßigkeit als globales Verfassungsprinzip' (n 226), 2 – 6.

1155 Svantesson (n 13), at 78 – 79 was faced with similar arguments.

bitant assertions of jurisdiction. There is no completely satisfying answer in this regard. The framework laid out in the previous sections remains silent on who is going to apply the variables and tests in practice. Thus, the task falls onto the same domestic and international institutions that decide right now whether an activity is territorial or not, such as domestic administrative agencies, courts or other dispute resolution bodies. It is true that these institutions may abuse the flexibility of the proposed framework and may succumb to a more parochial interpretation favouring their own political objectives at any certain time. However, this issue exists already in the present. As has been described extensively in previous chapters, US and European legislators, agencies and courts have often invoked territoriality as the jurisdictional basis when the actual connection to State territory has been marginal.[1156] Thus, there is no reason to believe that the abuse of rights and the proportionality tests are more prone to misinterpretation by States than are the territoriality, effects or protective principles. In a way, the lack of centralized authoritative decision mechanisms is a weak spot that afflicts large parts of international law and for which this study (unfortunately) offers no cure. However, one may still hope that over time, by adopting a common language of proximity, interests and proportionality and through procedural safeguards, a casuistry will develop that is able to guide the actions of States in the future.

If one does not subscribe to the belief that States are inherently prone to exploit international legal doctrines for their own benefit, one may still argue that even an impartial domestic judge may find it difficult to correctly apply these admittedly rather vague principles. This has been one of the most severe criticisms against the conception of reasonableness in the Third Restatement and it certainly is legitimate also in relation to the framework proposed above.[1157] However, in contrast to the criteria outlined by the Third Restatement, the variables and tests proposed above constitute *legal* standards that allow the determination of the appropriateness of jurisdictional assertions largely without recourse to political considerations. It is true that the proportionality test may have to also look at the interests of the affected State. However, this determination is to be made in general solely by referring to the existing regulatory framework of the affected State in place and how much its laws and standards differ from

1156 See above at C.VI.1c) Regulation of Conduct Based on Only Fleeting Territorial Connections or Based on Territorial 'Presence'.

1157 Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 638 – 639; Ryngaert, *Jurisdiction in International Law* (n 2), 167.

the ones of the State exercising extraterritorial jurisdiction. Ultimately, the reduction of the reasonableness assessment of the Restatement (Third) to only three variables and the elaboration of the relationships between them through tests do significantly limit the discretionary freedom in applying these principles and serve as useful guidance to the arbiters.

One final possible criticism should be addressed and that is that the new framework is not ambitious enough. After all, it does not pretend to bring about a paradigm-shift.[1158] The three variables discussed above, proximity between the State and the subject matter in question, the regulatory interest or concern pursued and the intrusiveness of the measure *vis-à-vis* the affected States and individuals, these are all known criteria to assess exercises of jurisdiction. In this regard, there is nothing new under the sun. However, governments, legislators and courts are rarely famed for their agility and the more radical a proposed departure is from the existing system, the less chance it has to be actually employed in practice. It was the objective of this research to produce practical guidance[1159] while maintaining academic coherence. A complete break with the existing system of State jurisdiction was never envisioned. Rather, the new approach hopes to slowly steer practitioners away from a binary and futile argument of territoriality versus extraterritoriality to a more holistic assessment of State jurisdiction.

More importantly however, these criteria were not drawn out of thin air, but they do reflect weighty theoretical considerations of public law. Thus, even though they are not new in their own right, their interpretation has been brought into a new context of examining extraterritorial jurisdiction as a problem of exercises of public authority by individual States in international law. It has been elaborated that the three criteria should be read as factors both legitimizing and limiting extraterritorial regulation. Bearing this background in mind, the variables and tests offered above will gain a different meaning in delimiting spheres of regulatory competence, which will eventually also lead to different results than the application of the traditional doctrine. Finally, this new perspective on extraterritorial jurisdiction will decrease counterproductive conflicts between States and protect the legitimate interests of individuals.

1158 It is in any case debatable what this term exactly entails, see Svantesson (n 13), at 77 – 78.

1159 On this goal, see above at D.II.1. Practical Requirements and Objectives of the New Framework.