C. Case Studies

I. Focus and Structure

There is, of course, no room to consider every possible substantive area of law in which exercises of extraterritorial jurisdiction have occurred. Therefore, this study necessarily had to focus on a selection of reference areas, from which a general conclusion as to the state of the territoriality-based system of jurisdiction may be synthesized. Such selection is naturally not completely objective. This study has settled on cases within the regulation of economic sanctions (chapter **II**) and export control (chapter **III**), transnational corporate bribery (chapter **IV**) and the prevention of and redress for corporate violations of human rights (chapter **V**). In each of these areas, sufficient practice in extraterritorial jurisdiction exists to conduct a meaningful assessment. These reference areas also have in common that States frequently utilise extraterritorial jurisdiction to unilaterally set regulations with a global reach. This is because the objectives and State interests within these areas often have an outward orientation, meaning that States seek to promote their municipal policies and regulatory standards to third countries. This is to be contrasted to substantive areas with a stronger inward orientation, where the primary interest of the State is the immediate protection of the domestic territory, its inhabitants or the domestic market.[259] This study expects that in relation to such outward-looking regulation, States have a stronger need to resort to complex regulatory mechanisms exploiting the traditional jurisdictional system.

However, these reference areas also fundamentally differ in the kind of interests they seek to realize. While the regulation of transnational corporate bribery and to a certain degree also export control concern objectives almost universally accepted in the international community, the same cannot be said about the enactment of economic sanctions. Rather, States resort to economic sanctions to 'enforce' a host of different moral, legal and political interests. Finally, prevention of and redress for corporate

259 Examples include competition law, the law of data protection and certain parts of securities law and environmental law. Extraterritoriality in these inward-looking regulatory areas may often be justified by an expanding view of the effects doctrine.

violations of human rights adds another dimension to the picture, in that regulations in this area not only seek to vindicate State interests, but also, in a triangular relationship, the rights of the victims of human rights violations. This study expects that even though States rely on comparable regulatory mechanisms of unilateral extraterritorial jurisdiction across some or all of these areas, the acceptance or rejection of such assertions by other States will depend on the nature of these interests.

The presentation of each regulatory area follows a similar structure. A brief introduction sets out the context of each substantive area, including which legal and political interests are at stake or need to be balanced. In particular, it will be investigated whether and what kind of an international framework exists to support the objectives of each area. The next sections in each chapter determine the practice in both the United States and in Europe in the respective subject matter by reviewing documents ranging from legislation, administrative acts, court decisions and other judicial documents including *amicus curiae* briefs to verbal acts such as protests and affirmations through diplomatic notes as well as other communications. The data gained through this analysis will be evaluated against the normative framework of jurisdiction under international law as set out in part B of this research.

Across all substantive areas, this part of the study reveals the deficiencies of the traditional, territoriality-based system of jurisdiction in international law (chapter **VI**). These inadequacies are twofold and they align with the two research questions set out in the introduction: First, this part establishes that the territoriality-based system of jurisdiction does not provide sufficient limits on the competences of States in practice. In fact, States are able to draw on a host of regulatory mechanisms to unilaterally set regulations with a global reach by exploiting the inconsistencies of territoriality. Second, the traditional system of jurisdiction also conflicts with actual practice because it does not allow for consideration of other important interests besides State sovereignty, in particular, the relationship between the regulating State and the addressee and the international community at large.

II. Economic Sanctions

1. Introduction

Economic sanctions 'have become a fact of international life'.[260] For instance, the EU alone has 45 regimes of restrictive measures in place at present.[261] While economic sanctions were historically related to situations of warfare – one may remember the early Greek example when Athens under Pericles sought to embargo the Spartan-allied state Megara during the Peloponnesian War[262] – they have morphed into versatile political tools and are now used to pursue a multiplicity of goals. According to the EU's Service for Foreign Policy Instruments for instance, the overarching objectives include promoting international peace and security, preventing conflicts, supporting democratic principles, the rule of law and human rights and defending the principles of international law.[263]

In achieving these objectives, economic sanctions become arguably more effective the more States implement identical measures. Unilateral sanctions are particularly prone to failure because in our globally interconnected market, targets of economic sanctions may easily thwart or circumvent such efforts by turning to other trading partners willing to fill in the economic vacuum caused by the sanctioning State. To mitigate this issue, the United States in particular has sought to adopt measures that not only affect the direct sanctioning target, but also third parties engaged in commercial relationships with the primary target. For instance, in its ongoing standoff with Russia, the United States is also targeting persons and companies, particularly in Germany, for their involvement in the construction of the Nord Stream 2 pipeline.

These measures form the focus of the subsequent analysis. They are especially controversial because of their perceived extraterritoriality: While

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260 Barry E Carter, 'Economic Sanctions' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press), para. 33.

261 See for an overview: EU Sanctions Map, available at https://sanctionsmap.eu/#/main, last accessed on 17 December 2020.

262 Bert Chapman, *Export Controls: A Contemporary History* (University Press of America 2013), 1 referring to Charles Fornara, 'Plutarch and the Megarian Decree' in Donald Kagan (ed), *Studies in the Greek historians: In memory of Adam Parry* (Yale classical studies vol 24. Cambridge University Press 1975), 213 – 220.

263 European Commission https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en, last accessed on 17 December 2020.

the adoption of unilateral economic sanctions in itself always entails a subjective moral and political judgment, imposing this evaluation on unconcerned foreign individuals or entities of third States raises particularly delicate questions of legitimacy. Given the outright egregiousness of some of the US sanctions, it often seems that these measures 'have to be' violating international law, particularly the customary international law rules of jurisdiction. Conversely, if there is one area of law for which the doctrine on prescriptive State jurisdiction should offer clear limits it would seem to be that of extraterritorial economic sanctions.

However, this chapter argues that customary international law principles of jurisdiction are not able to regulate these measures because they do not make a clear statement about when extraterritorial economic sanctions violate international law. On the one hand, there is no consistent practice, even within the EU, rejecting sanctions with extraterritorial effects. Rather, EU reactions to these jurisdictional assertions by the United States are grounded in political expediency and remain in the realm of inter-subjectivity. On the other hand, a legal doctrinal analysis with the customary international law principles of jurisdiction as the reference point equally offers no conclusive answer to the (il-)legality of extraterritorial economic sanctions. These two aspects are mutually reinforcing: The normative uncertainty allows States to pursue their individual political objectives while claiming the legal high-ground. At the same time, the inconsistent practice contributes to and fuels the controversy around the international legality of extraterritorial economic sanctions.

This chapter starts out with an overview of economic sanctions including the distinction between primary and secondary sanctions and an introduction into the framework of US sanctions in section 1. Sections 2 – 4 of this chapter analyse economic sanctions regulations with extraterritorial implications structured according to the principle of jurisdiction invoked to justify them. Among these measures are some of the most controversial economic sanctions ever imposed, including those targeting domestic controlled foreign subsidiaries and those intending to control financial services based on correspondent account banking. Section 5 puts the protection of foreign individuals into focus and asks how sanctioning States provide due process protection to the affected before section 6 offers some preliminary conclusions.

a) Economic Sanctions under International Law

Economic sanctions, according to a commonly cited definition by Lowenfeld, are 'measures of an economic – as contrasted with diplomatic or military – character taken to express disapproval of the acts of the target state or to induce that state to change some policy or practices or even its governmental structure.'[264] Carter adopted this definition but broadened its personal scope to include not only States, but also international organizations and non-State actors as potential senders and targets of economic sanctions.[265] Modern economic sanctions may span a wide variety of different measures, including limits on existing benefits, imports, exports, financial transactions or other activities.[266]

Depending on the originator of the measures, economic sanctions are commonly categorized as multilateral or unilateral. In this regard, collective measures authorized under chapter VII of the UN Charter occupy a special status in the architecture of economic sanctions as they are binding upon all member States and supersede other treaty obligations according to Arts. 25 and 103 of the UN Charter.[267] It follows that UN mandated sanctions prove rather unproblematic from a normative point of view as long as the Security Council acts pursuant to its authorities as set out in the Charter.[268] On the other end of the spectrum are unilateral or autonomous sanctions, imposed by individual States or regional organizations against third States or non-State targets.

Before we dive into the main argument of the chapter, it is essential to note that there is no clear rule of customary international law *against* unilateral economic sanctions *per se*.[269] This is important, because if unilateral economic sanctions – or at least certain categories thereof – were clearly incompatible with other, easier identifiable, legal principles, there would

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264 Andreas F Lowenfeld, *International Economic Law* (International Economic Law Series, 2nd ed. Oxford University Press 2008), 850.

265 Carter (n 260), para. 1.

266 Ibid., para. 6.

267 Matthew Happold, 'Economic Sanctions and International Law: An Introduction' in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law* (Studies in international law volume 62. Hart Publishing 2016), 1.

268 Ibid., 2; Nigel D White and Ademola Abass, 'Countermeasures and Sanctions' in Malcolm D Evans (ed), *International Law* (5th ed. Oxford University Press 2018), 543 – 544.

269 Carter (n 260), para. 29; Omer Y Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford Monographs in International Law, Clarendon Press 1988), 212 – 213.

be less need to discuss the specific problem of extraterritorial sanctions with regard to rules of jurisdiction. There are, of course, voices to the contrary who argue that economic sanctions are incompatible with the principle of non-intervention because they are measures of a coercive nature that seek to induce change within a target State regarding its political, economic or social system.[270] Notably the Charter of the Organization of American States and numerous General Assembly Resolutions suggest that economic sanctions may be illegal under customary international law.[271] However, as is rightly pointed out, State sovereignty includes the freedom to trade and accordingly, to also not trade with other States as long as no international (treaty) obligations are breached.[272] The extensive State practice strongly suggests that unilateral economic sanctions are generally accepted under customary international law, a view that is also supported by the ICJ opinion in *Nicaragua*.[273]

Depending on the scope of the measures, economic sanctions may be categorized as comprehensive, sectoral or targeted. At least at the UN level, comprehensive sanctions have somewhat fallen out of favour after

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270 White and Abass (n 268), 536; Natalino Ronzitti, 'Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective' in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016), 13.

271 Art. 20 of the Charter of the OAS provides: 'No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.' See also: UNGA Resolution 2131 (21 Dec 1965) A/RES/20/2131 (XX), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nation, UNGA Resolution 2625 (24 Oct 1970) UN Doc A/RES/2625 (XXV), Charter of Economic Rights and Duties of States, UNGA Resolution 3281 (12 Dec 1974) UN Doc A/RES/3281(XXIX).

272 Sarah H Cleveland, 'Norm Internalization and U.S. Economic Sanctions' (2001) 26(1) YaleJIntLaw 1, 53; Daniel H Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions' in Ali Z Marossi and Marisa R Bassett (eds), *Economic Sanctions under International Law* (T.M.C. Asser Press 2015), 86; In reality, of course, modern States are often restrained in their economic conduct by bilateral and multilateral treaties, in particular by investment treaties and the WTO framework. However, despite the fact that economic sanctions disrupt trade and investment flows, the compatibility of unilateral economic sanctions with these regimes remains largely 'untested'. See on this, Tom Ruys and Cedric Ryngaert, 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions' [2020] BYIL, 30.

273 ICJ, *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 (1986), 126.

the humanitarian catastrophe caused by the Iraq sanctions regime, which has ignited the discussion whether human rights limitations existed regarding the effects of coercive economic measures.[274] To avoid collateral damage, States and international organizations have subsequently moved away from such sweeping sanctions and began to target more specifically the individuals and organizations responsible for or associated with a reprehensible situation.[275]

Where the sanctions seek to induce change in the behaviour of a State, these 'smart' sanctions are often levied against the governing elite and leaders within the country, including the individuals designing or implementing the opposed policy. Indeed, all active UN and EU sanctions as of 2016 have had some sort of targeted component.[276]

However, targeted sanctions have also found broader usage distinct from economic sanctions in State-to-State relations, as they may also be levied against non-State actors, including terrorist networks and other criminal organizations.[277] Technically, smart sanctions usually involve the freezing of assets of the affected individuals and a broad prohibition on engaging with them, including travel bans.[278]

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274 Marc Bossuyt, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights' (2000); Michael Reisman and Douglas L Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) 9 EJIL 86, 103; see also for a moe extensive Analysis of this and related issues: Cleveland (n 272).

275 Lowenfeld (n 264), 875 – 876 describes the shift from comprehensive to smart sanctions during the Iraq regime.

276 Happold (n 267), 8.

277 See for instance UNSC Resolution 1382 (29 Nov 2001), UN Doc S/RES/1382 (2001).

278 Since smart sanctions are a relatively recent development, it is yet unclear whether they are capable of achieving their high objectives, inducing change in the behaviour of the responsible targets while alleviating the suffering of the general population, see White and Abass (n 268), 543; However, in a somewhat ironic twist, these 'smart' sanctions themselves have become subjects of legal scrutiny in relation to the protection of individual rights. On multiple occasions, courts have (albeit indirectly) found deficiencies in UN collective sanctions in particular with regard to procedural rights for the affected to effectively contest a wrongful targeting by the competent authority, see CJEU, C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351; For these cases see also below, at C.II.5b) Practice in Europe.

b) Primary and Secondary Sanctions

As already indicated, the effectiveness of unilateral sanctions is severely curtailed by third actors willing to step in and take up commercial relationships in the place of the sanctioning country. For instance, while the United States imposed sanctions on Sudan and thus prohibited its own citizens from dealing with the government accused of genocide, China has swept in and become Sudan's largest trading partner, thus weakening the US policy.[279] In these cases, States have sometimes sought to strengthen their primary economic sanctions against the direct target and to prevent sanctions 'busting' through third countries by also disrupting commercial relationships between Sudan and China. These measures, which seek to deter third parties (in our case China) from engaging with the actual sanctions target (Sudan) are sometimes referred to as 'secondary sanctions', as opposed to the primary sanctions solely concerning the target State.

Secondary sanctions can therefore be defined as any measure that regulates the economic relationship between two foreign actors. They may come in different forms, as there are multiple ways on how a regulation may 'persuade' a third party to uphold the primary sanction. Sometimes, the crucial fact may be that the third party is a subsidiary of a domestic parent company, thus the secondary sanction is based on a parental-control doctrine. Other times, third State companies are targeted because they make use of domestic means of communication, such as interbank monetary transfer mechanisms.

In academic literature, the term 'secondary sanctions' is used unevenly. Some authors restrict the concept to measures in which the sanctioning State imposes economic penalties – such as restrictions to market access – on third State actors that engage in commercial relationships with the primary target.[280] In our example above for instance, this may entail the United States prohibiting domestic persons from trading with Chinese companies that in turn deal with Sudan. However, in line with the broader concept adopted above, these measures are really only one specific category of secondary sanctions.[281] To avoid confusion, this chapter will use the term 'secondary trade boycott' for these particular regulations.[282]

279 Meyer, 'Second Thoughts on Secondary Sanctions' (n 151), 906.
280 See e.g., Perry S Bechky, 'Sanctions and the Blurred Boundaries of International Economic Law' (2018) 83 Missouri Law Review 1, 10 – 11.
281 A similar definition is used by Ruys and Ryngaert (n 272), 7.
282 See e.g. Meyer, 'Second Thoughts on Secondary Sanctions' (n 151), 926.

c) Overview of US Economic Sanctions

Unilateral US economic sanctions and the reactions of other States thereto form the core of the following analysis on extraterritoriality. Thus, it is worth to provide an overview of the complex legal framework governing this area of regulation, as it includes broadly framed and sometimes overlapping legislation, executive orders and implementing regulations.[283]

During the Cold War era, the Trading with the Enemy Act 1917 (**TWEA**)[284] provided the most important statutory basis for the imposition of economic restrictions. Among others, this authority was invoked for measures targeting China, North Korea and Cuba of which some are still in force today. In an effort to restrain the excessive powers granted to the President under TWEA, Congress limited the application of the act to times of war (though existing sanctions were to remain in place) and adopted a new statute, the International Emergency Economic Powers Act 1977 (**IEEPA**),[285] which subsequently became the core statutory authority for most economic sanctions in place today.[286] Sec. 203 of the act provides that, upon the declaration of a national emergency with respect to a foreign threat to the national security, foreign policy or economy, the president may impose a wide range of transaction restrictions, typically through executive orders. For instance, the first sanctions against Iran following the occupation of the Teheran embassy in 1979 were implemented through executive orders based on the IEEPA.[287] Although the declaration of national emergency may in principle only remain effective for the duration of one year, they can be, and in fact have been, renewed continuously.

Apart from the IEEPA and executive orders based on the statute, the US Congress has enacted a number of independent pieces of legislation codifying economic sanctions that may or may not interact with the executive orders. For instance, The internationally strongly criticized Iran and Libya Sanctions Act of 1996 (**ISA**) as amended by the Comprehensive Iran

283 For a more comprehensive overview over U.S. economic sanctions, see Meredith Rathbone, Peter Jeydel and Amy Lentz, 'Sanctions, sanctions everywhere: Forging a path through complex transnational sanctions laws' (2013) 44(3) Georgetown Journal of International Law 1055.

284 Trading with the Enemy Act, Pub. L. No. 65–91 (40 Stat 411), 12 U.S.C. §§ 95a – 95b and 50 U.S.C. App. §§ 1–44.

285 International Emergency Economic Powers Act 1977, Pub. L. No. 95–223 (91 Stat 2626), 50 U.S.C. §§ 1701 ff.

286 Lowenfeld (n 264), 892 – 893.

287 E.O. 12170 of November 14, 1979.

Sanctions, Accountability, and Divestment Act of 2010 (**CISADA**) and other statutes provided for entirely new kinds of restrictions on business with Iran.[288] On a lower level, these statutes and executive orders are mainly administered by the Office of Foreign Asset Control (**OFAC**), an agency within the US Treasury, which issues and updates regulations based on these measures. The core of the Iran sanctions for instance is codified in the Iranian Transactions and Sanctions Regulations (**ITSR**) and the Iranian Financial Sanctions Regulations (**IFSR**).[289] OFAC is also responsible for maintaining various sanctions lists, which contain the names of individuals and companies subject to targeted sanctions and with whom US persons are prohibited from dealing.[290]

OFAC is also the agency primarily responsible for the enforcement of economic sanctions. However, depending on the type of offense and the regulation violated, the US Department of Justice (**DoJ**), the Bureau of Industry and Security (**BIS**) and even individual State authorities may be involved.[291] While the IEEPA foresees both civil regulatory and criminal penalties for violation of executive orders based on the statute,[292] most cases against corporate offenders are settled through a variety of measures, including deferred prosecution agreements and guilty pleas. Importantly therefore, US enforcement actions based on sanctions violations, including their often controversial jurisdictional reach, are rarely argued and decided in court. While the United States maintains some sort of economic sanctions against a whole range of countries, non-State actors and individuals, the most controversial and economically significant programmes include those against Cuba, Iran and Russia.

288 Iran and Libya Sanctions Act of 1996, §§ 4, 5, Pub. L. No. 104–172, 50 U.S.C.§ 1701 (1996 & Supp. III 1997); Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111–195 (2010).

289 31 C.F.R. Part 560 and 31 C.F.R. Part 561.

290 See for instance the Specially Designated Nationals And Blocked Persons List, available at https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists, last accessed on 13 April 2022.

291 Bruce Zagaris, *International White Collar Crime: Cases and Materials* (2. ed. Cambridge University Press 2015), 214.

292 IEEPA, Sec. 206, 50 U.S.C. § 1705.

aa) US Sanctions against Cuba

Sanctions against Cuba, in particular in the form of the Cuban Asset Control Regulation (**CACR**),[293] have been in place since the early 1960s. Their scope is comprehensive as they prohibit virtually all transactions with Cuba or Cuban nationals as well as all transactions involving 'blocked' property, that is property in which Cuba or a Cuban national has any interest. Additionally, unlike many other sanctions programmes, the jurisdiction of the Cuban regulations explicitly extends to foreign incorporated subsidiaries of domestic companies.[294] However, the most significant development of the sanctions regime since its initial promulgation has been the adoption of the widely controversial Helms-Burton Act in 1996. In particular, the statute created a private claim of recovery against any person worldwide who was 'trafficking' in property, in which the claimant had an interest, if the property had before been 'confiscated' by the Castro government in Cuba.[295] In essence, this strongly extraterritorial provision meant that any foreign investor in Cuba could potentially be sued in US courts for transacting with Cuba or Cuban nationals if the transaction concerned property previously owned by the United States or its citizens.

bb) US Sanctions against Iran

Similar to its policy on Cuba, the United States also maintains a comprehensive embargo on Iran. While primary sanctions have existed since the Tehran hostage crisis in 1979, sanctions with extraterritorial implications have only been enacted through the aforementioned ISA. The ISA was intended to complement the previously existing executive orders as Congress feared that foreign investors engaging in Iran would diminish the effectiveness of US sanctions.[296] Thus, Sec. 5 (a) of the ISA prohibits investment by anyone, wherever located, into the Iranian petroleum sector, thought to be the country's major financial lifeline. Individuals and companies failing to comply with this provision could face a number of different sanctions, subject to executive discretion, including denial of assistance by

293 31 C.F.R. Part 515, Cuban Asset Control Regulation (CACR).
294 31 C.F.R. § 515.329.
295 Sec. 301 – 306, Cuban Liberty and Democratic Solidarity Act, Pub. L. No. 104–114, 12 (1996), 110 Stat. 785, 22 U.S.C. §§ 6021–6091.
296 Rathbone, Jeydel and Lentz (n 283), 1084.

the US Export-Import Bank, the denial of export licenses to that person, a prohibition for US financial institutions to grant loans to that person and a prohibition for US government agencies to procure goods from that person.[297] Similar to the Helms-Burton-Act, the ISA irritated other US trading partners because of its strong extraterritorial effects. However, in reaction to the growing nuclear threat posed by Iran, restrictive measures, applicable to both US and foreign persons and entities, were subsequently even tightened and expanded to other economic areas through CISADA, various executive orders and other pieces of standalone legislation over the years.[298]

Consequently, the adoption of the Joint Comprehensive Plan of Action (**JCPOA**)[299] between the P5+1 (China, France, Germany, Russia, the UK, and the United States), the EU, and Iran on 14 July 2015 marked a turning point in US sanctions policy. Under the JCPOA, colloquially known as the Iran Nuclear Deal, Iran committed to limit its nuclear activities in return for relief from certain economic sanctions maintained by the United States, the EU and the UN Security Council. While the EU lifted significant parts of its restrictive measures targeting Iran, the United States still maintained most of its primary sanctions even after the implementation of the JCPOA. However, presumably to coordinate action with the EU, the United States eased its extraterritorial sanctions directed towards non-US persons. Among others, under the JCPOA, the United States waived the application of the above-mentioned Sec. 5 (a) ISA.[300] Moreover, the adoption of the JCPOA led to the issuance of a new General License H by OFAC, which authorized most Iran transactions for domestic controlled foreign subsidiaries.[301]

However, less than three years after the implementation of the Iran Nuclear Deal, the US Government under President Trump claimed that Iran had violated the agreement and subsequently decided to withdraw from the JCPOA and to re-install lifted extraterritorial sanctions against Iran.[302]

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297 Sec. 5 (a) and Sec. 6 of ISA.

298 For an overview of the different legal authorities: Dianne E Rennack, 'Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions' (May 2018) https://fas.org/sgp/crs/mideast/R43311.pdf.

299 Annex A to UNSC Resolution 2232 (20 Jul 2015), UN Doc S/RES/2231 (2015).

300 See Sec. 4 and Sec. 4.3.2. of Annex II of the JCPOA.

301 See Sec. 17.5 of Annex V with Sec. 5.1.2 of Annex II of the JCPOA.

302 See Presidential Memorandum (8 May 2018), 'Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon', available at https://trumpwhitehous

Since the other parties to the Nuclear Deal, in particular the European nations, are still committed to preserve the agreement and by extension their economic interest in Iran, the recent US action has been strongly condemned.[303]

cc) US Sanctions against Russia

In response to the 2014 annexation of Crimea and the ensuing unrest in other parts of Eastern Ukraine, the United States, together with the EU and other States, imposed economic sanctions against the Russian Federation. The initial executive orders were based again on the IEEPA and targeted those individuals and companies deemed responsible for the Ukraine situation. Subsequently, standalone legislation was adopted to complement these measures. Of particular interest for the present research is the Ukraine Freedom Support Act (**UFSA**)[304] as the statute contained provisions similar to those of the ISA. They required the President to impose ISA-style sanctions on foreign investors involved in Russian crude oil projects, including the withdrawal of sanctioned persons from Export-Import Bank assistance, the prohibition of public procurement through sanctioned persons, as well as a ban on banking and property transactions with these persons. However, the UFSA's strong extraterritorial implications were somewhat mitigated by US President Obama, who, at the time of signing the bill, stated that he did not intend to impose the sanctions under UFSA at that time.[305]

US economic sanctions intensified significantly when it became clear that Russia had attempted to interfere in the 2016 US elections. In June 2017, the United States passed the Countering America's Adversaries

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e.archives.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/, last accessed on 13 April 2022.

303 See Joint statement from Prime Minister Theresa May, Chancellor Angela Merkel and President Emmanuel Macron following President Trump's statement on Iran, https://www.gov.uk/government/news/joint-statement-from-prime-minister-may-chancellor-merkel-and-president-macron-following-president-trumps-statement-on-iran, last accessed on 13 April 2022.

304 Ukraine Freedom Support Act of 2014, H.R. 5859, Pub. L. No. 113–272 (2014).

305 The White House, Statement by the President on the Ukraine Freedom Support Act, available at https://obamawhitehouse.archives.gov/the-press-office/2014/12/18/statement-president-ukraine-freedom-support-act, last accessed on 13 April 2022.

Through Sanctions Act (**CAATSA**),[306] which strengthened existing sanctions by codifying a number of executive orders, cutting back presidential discretion in the imposition of sanctions and widening their scope of application to cover even more Russian energy, intelligence and defence projects. Similar to ISA and UFSA, CAATSA contained provisions that allowed the imposition of sanctions against foreign economic operators. Sec. 232 of the CAATSA drew particularly hostile response from some European nations as it prohibited the investment by anyone into Russian pipeline projects, ostensibly targeting the Nord Stream 2 Pipeline.[307] Nord Stream 2 is a controversial project running from Russia through the Baltic Sea to Western Europe and would potentially allow Russia to cut off gas supply to the Ukraine without threatening supply of other European States. Therefore, the pipeline is politically strongly opposed by the United States but was initially supported by Western European nations, in particular, Germany and Austria. CAATSA has subsequently drawn strong criticism from these countries.[308]

2. The Extension of Personality-based Jurisdiction to Foreign Subsidiaries

a) Practice in the United States

With some notable exceptions, the personal scope of application of modern US economic sanctions is generally restricted to US persons, defined as 'any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States'.[309] This rule already provides for a rather broad interpretation of the personality principle as it extends to both permanent resident aliens and foreign branches of US entities. Especially the assertion of jurisdiction over foreign

306 Countering America's Adversaries Through Sanctions Act, H.R. 3364, Pub. L. No. 115–44 (2017).

307 CAATSA, Sec. 232.

308 Federal Foreign Office, Press Release, Foreign Minister Gabriel and Austrian Federal Chancellor Kern on the imposition of Russia sanctions by the US Senate, https://www.auswaertiges-amt.de/en/newsroom/news/170615-kern-russland/290666, last accessed on 13 April 2022.

309 See for example 31 C.F.R. § 560.314.

branches has at times led to conflict of jurisdiction situations with the State in which the branch operated.[310]

More controversially however, the United States also has a long tradition of extending its sanctions legislation to foreign subsidiaries incorporated abroad that are 'controlled' by US nationals. In 1942 for instance, Treasury issued an order under the TWEA that broadened the definition of the term 'persons subject to jurisdiction of the United States' to include 'any corporation or other entity, wherever organized or doing business, owned or controlled by [US] persons'.[311] As already mentioned above, even today, US economic sanctions contain jurisdictional extensions covering foreign incorporated subsidiaries of US companies, in particular the programmes targeting both Cuba and Iran.[312]

Even though the issue remains controversial, State practice suggests that US authorities see no legal barriers in enforcing these provisions. In 2014 for instance, OFAC initiated proceedings directly against the foreign subsidiary of a US corporation for violation of the CACR. The government agency alleged that CWT B.V. (**CWT**), a Dutch incorporated company, breached Cuban sanctions 'when its business units mostly outside the United States provided services related to travel to or from Cuba'.[313] It is certainly questionable why a Dutch company, which, by the own admission of OFAC, conducted business mostly outside of the United States, should be subject to US jurisdiction. The enforcement information by OFAC takes no issue with that, reasoning that under the TWEA and the CACR, CWT was brought under the jurisdiction of the United States after it became majority-owned by US persons in 2006. As with other similar allegations, the jurisdictional assertions were never contested in court: the case was settled, this time for the payment of almost USD 6 million.[314]

Apart from the Cuban sanctions, amendments of the Iran sanctions enacted in 2012 also affect foreign incorporated subsidiaries. Sec. 218 of

310 *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728.

311 TWEA, Sec. 5(b); US Treasury Public Circulary No. 18, 30 March 1942, 7 Fed. Reg. 2503 (1 April 1942).

312 See for instant, 31 C.F.R. § 515.329, Cuban Asset Control Regulation (CACR).

313 OFAC, Enforcement Information for April 18, 2014, https://home.treasury.gov/system/files/126/20140418_cwt.pdf, last accessed on 13 April 2022.

314 Ibid.

the Iran Threat Reduction and Syria Human Rights Act of 2012 (**ITRA**),[315] implemented through 31 C.F.R. § 560.215, provides that any

> 'entity that is owned or controlled by a United States person and established or maintained outside the United States is prohibited from knowingly engaging in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would be prohibited pursuant to this part if engaged in by a United States person or in the United States'.[316]

In effect, the provision prohibits US-controlled, foreign subsidiaries from engaging in businesses with Iran. Unlike the Cuban sanctions however, enforcement actions such as the imposition of fines are not to be directed against the foreign controlled subsidiary but restricted to the parent company, which is strictly liable for any violation of its subsidiaries.[317]

As already briefly mentioned, US economic sanctions against Iran targeting foreign subsidiaries of domestic corporations were lifted with the issuance of the General Licence H following the implementation of the JCPOA. However, this development did not suggest a change in US government attitude in the sense that it was rejecting jurisdictional assertions regarding controlled foreign subsidiaries. Rather, the explicit language of the JCPOA that the United States 'will license non-U.S. entities that are owned or controlled by a U.S. person' to engage in activities with Iran leads to the conclusion that the US government still claimed legal authority over controlled foreign subsidiaries, but simply decided to permit their transactions for political expedience.[318] The sanctions relief was necessary, as otherwise, EU based companies, now being encouraged to re-establish trade with Iran, could have found themselves bound by contradicting US rules. This conclusion is also supported by action from the Trump administration, which revoked the General License on 27 June 2018 after previously withdrawing from the Iran Nuclear Deal.[319] Thus, foreign companies controlled by US nationals are again obliged to comply with US

315 Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112–158.

316 See ITRA, Sec. 218, 31 C.F.R. § 560.215 from December 26, 2012; See also similar rules in Sec. 4 E.O. 16328 of October 12, 2012 and 31 C.F.R. § 561.202.

317 See 31 C.F.R. § 560.701 (a) (3).

318 See Sec. 5.1.2 of Annex II of the JCPOA.

319 See OFAC, Revocation of JCPOA-Related General Licenses, https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20180627, last accessed on 13 April 2022.

economic sanctions. In sum therefore, the short-lived sanctions relief does not support the conclusion that the US government will refrain from using control-based jurisdiction anytime soon, a fact that is also evidenced by its continued attitude towards the Cuban sanctions.

b) Practice in Europe

aa) The Personal Scope of EU Restrictive Measures

More often than not, the EU and its member States have viewed US jurisdictional assertions based on parental control with suspicion. Consequently, they have also refrained from exercising jurisdiction over non-EU subsidiaries. Since the Treaty of Lisbon, the authority to impose sanctions, in the EU termed restrictive measures, is vested in the Union under the Common Foreign and Security Policy in Art. 215 of the Treaty on the Functioning of the European Union. Since 2008, regulations implementing restrictive measures have a more or less unified scope of application. With regard to the personality principle, they apply to any person inside or outside the territory of the Union who is a national of a member State and to any legal person, entity or body which is incorporated or constituted under the law of a member State.[320]

Although the provision mentions neither controlled branches nor subsidiaries, the dominant view is that EU restrictive measures extend to branches as they are legally dependent parts of an EU company and thus 'incorporated or constituted under the law of a member State'.[321] Consequently, the wording suggests that subsidiaries incorporated in foreign nations are excluded.[322] This finding is confirmed by a systematic argument:

320 E.g. Art. 29 Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007; See further Tobias Schöppner, *Wirtschaftssanktionen durch Bereitstellungsverbote* (Zugl.: Münster, Univ. Diss, 2013. Schriftenreihe des Europäischen Forums für Aussenwirtschaft, Verbrauchsteuern und Zoll e.V. an der Westfälischen Wilhelms-Universität Münster vol 51, Mendel 2013), 110 ff.

321 Bastian Mehle and Volkmar Mehle, 'Die notwendige Einhaltung von EU-Embargoregelungen durch Unternehmen mit Sitz in Drittstaaten' (2015) 61(7) Recht der internationalen Wirtschaft 397, 398; see also FAQ of the Ministry of Foreign Affairs of Finland, https://um.fi/sanctions-questions-and-answers, last accessed 13 April 2022.

322 Ibid., 398.

Certain provisions of the EU regulations concerning Iran explicitly refer to control and ownership as criteria in determining whether a person is an Iranian entity and therefore a sanctioned target.[323] *E contrario*, one can infer that the Council of the European Union was aware of the difference between corporate branches and subsidiaries and thus deliberately excluded the latter. Along these lines, several member State authorities have stated that the scope of application of restrictive measures does not extend to foreign owned subsidiaries.[324] Similarly, the General Court (**EGC**) has held, in an *obiter dictum*, that restrictive measures do not affect the conduct of foreign financial institutions 'established in a non-member State and constituted under the law of that State.'[325] Exceptions to this general rule may exist if the foreign subsidiary is in fact an *alter ego* of the EU parent company or if the parent company is acting through its subsidiary precisely to evade restrictive measures, contrary to the prohibition of circumvention.[326] Still, the EU's approach firmly differs from the control-based jurisdiction employed by OFAC.

bb) Diplomatic Protest against US Assertions of Control-based Jurisdiction

While the EU does adhere to this more restrictive interpretation of the personality principle in its own sanctions regulations, it has failed to maintain the same consistency in protesting US prescriptive jurisdiction regarding controlled foreign subsidiaries.

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323 Art. 1 (m) Council Regulation (EU) No 961/2010 of 25 October 2010.

324 See FAQ of the Ministry of Foreign Affairs of Finland, https://um.fi/sanctions-questions-and-answers, last accessed 13 April 2022 and of the Belgian Foreign Public Service, http://diplomatie.belgium.be/en/policy/policy_areas/peace_and_security/sanctions, last accessed 13 April 2022.

325 CJEU, T-35/10, *Bank Melli Iran v Council of the European Union* [2013] ECLI:EU:T:2013:397, paras. 132.

326 See Art. 41 Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010; See also Marian Niestedt, 'Die Geltung des EU-Sanktionsrechts für Tochtergesellschaften und Niederlassungen' in Arnold Wallraff, Dirk Ehlers and Hans-Michael Wolffgang (eds), *Recht der Exportkontrolle: Bestandsaufnahme und Perspektiven: Handbuch zum Exportkontrollrecht.* zugleich Festgabe für Dr. Arnold Wallraff zum 65. Geburtstag (Schriften zum Aussenwirtschaftsrecht 2015), 262 – 264.

To be sure, the EC most notoriously did condemn the 1982 'Soviet Pipeline Regulations' by articulating a clear legal position regarding the control theory. The affair concerned the construction of a pipeline running from Western Siberia to Germany with the participation of various Western European firms. Following a crackdown in Poland, President Reagan, fearing that the pipeline project would strengthen Western European dependency on the Soviet Union, signed executive orders to prevent the realization of the project. Among others, the executive orders prohibited European companies to supply pipeline equipment to the Soviet Union if the equipment in question contained components of US origin, if it contained non-US origin components produced under US licences, or if the transaction involved any person subject to the jurisdiction of the United States, defined in the executive order to also include subsidiaries of US companies.[327]

Specifically, with regard to the assertion of jurisdiction over US controlled foreign subsidiaries, the EC argued that this measure could be based neither on the territoriality nor on the personality principle. According to the EC, territoriality was clearly not applicable because companies in the EC were not subject to the territorial competence of the United States.[328] The EC also rejected the personality principle because the EC based subsidiaries of US companies did not possess US nationality. In this regard, the EC argued that the nationality of corporations could not be determined based on control. Rather, according to *Barcelona Traction*, only two criteria were generally accepted to determine corporate nationality, i.e. the place of incorporation and the place of the registered office.[329] Thus, because the US executive orders lacked any recognized jurisdictional basis, it was illegal under international law.[330]

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327 15 C.F.R. §§ 376, 379 and 385, Amendment of Oil and Gas Controls to the U.S.S.R of 24 June 1982, 21 ILM (1982) 853, 865 – 866; For an analysis of the executive order with regard to the control of US origin components and components produced under US licenses, see below at C.III.3. Jurisdiction Based on the 'Nationality' of Goods.

328 European Community: Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, Presented to the United States Department of State on 12 August 1982, 21 ILM (1982) 891, 893.

329 See *Barcelona Traction Light and Power Co, Ltd. (Belgium v Spain)* (n 126), 36.

330 European Community: Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, Presented to the United States Department of State on 12 August 1982, 21 ILM (1982) 891, 893 – 894.

Likewise, the EU has reacted strongly against the re-instalment of Iran sanctions, including those targeting controlled foreign subsidiaries, after the failure of the JCPOA. In fact, the EU has currently reactivated Council Regulation (EC) No 2271/96, the EU blocking statute originally adopted in response to the ISA and the Helms-Burton Act.[331] To this end, the Commission has adopted Commission Delegated Regulation (EU) 2018/1100 to nullify the US regulations that currently extraterritorially affect EU companies.[332] In the explanatory memorandum to Commission Delegated Regulation (EU) 2018/1100, the Commission argues that the US measures, 'in so far as they unduly affect the interests of natural and legal persons established in the Union […]' are contrary to international law. However, the broadly framed explanatory memorandum does not distinguish between different sanctions measures so that it is unclear whether the Union took particular issue with control-based jurisdiction.[333]

Despite the examples mentioned above, the rejection of US jurisdictional claims based on the control theory does not seem to be a principled stance. Most notably, the EU did not react to the adoption of the ITRA in 2012 – implemented through 31 C.F.R. § 560.215 – even though these sanctions explicitly targeted controlled foreign subsidiaries. The lack of protest is significant because this was indeed the first time that any measure against Iran was extended to cover controlled companies abroad. The inconsistency of the EU's response is even more glaring because the EU currently protests Iran sanctions that were previously adopted through the ITRA in 2012, which were dropped after the implementation of the JCPOA, and then finally restored after the United States withdrew from the JCPOA. Thus, as far as the EU's rejection rests on international law, it could have raised the same reasons against the measures adopted through the ITRA in 2012, which the EU, however, did not react to.

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331 Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, [1996] OJ L 309/1.

332 Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, [2018] LI 199/1.

333 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; For an explanation of General Licence H, see above at C.II.1c)bb) US Sanctions against Iran.

cc) Jurisprudence with regard to US Assertions of Control-based Jurisdiction

European courts have also not formed a consistent position denouncing US regulation based on parental control even though they have frequently decided cases involving such practice. Typically, the decisions concern the non-performance of contracts or the non-satisfaction of other claims by US controlled subsidiaries or branches, allegedly because US embargo regulations bar them from fulfilling the claims. However, such lawsuits involving conflicts between US extraterritorial sanctions and host State contract law are regularly not decided using public international law arguments. Rather, the cases are usually resolved through conflict-of-law principles or the rule to not apply foreign public law provisions.[334]

The often-cited *Fruehauf* case in the 1960s constitutes an early example: Fruehauf was a French incorporated, US owned company that entered into a sales contract with goods eventually destined for China. Based on the control theory (and on the nationality of the company directors), the US Treasury ordered the American parent company to prohibit the execution of the contract due to economic sanctions on China. The French minority board members of Fruehauf sued in France and requested the court to give them leave to fulfil the contract. The Court eventually did decide in favour of the French board members; however, it reached its conclusion not by relying on international law grounds but rather on a balancing between the interests of the American shareholders and the imminent unemployment of 600 employees should Fruehauf not execute the contract.[335]

In contrast, only few court judgments explicitly refer to public international law: During the *Pipeline* incident, a private claim for performance was litigated before a Dutch court. In its opinion, the court gave judgment for the plaintiff, stating explicitly that the US regulation violated international law according to traditional principles of jurisdiction.[336] Considerations of public international law were also (partly) decisive in a 2011 German court case involving a bank transfer that was to be halted according to both US and EU regulations concerning the nuclear proliferation

334 See e.g. Art. 9 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

335 *Société Fruehauf Corp. v Massardy*, 1968 D.S. Jur. 147, 1965, 5 ILM 476 (1966).

336 *Compagnie européenne des Pétroles S.A. v Sensor Nederland B.V.*, The Hague District Court (17 September 1982), 22 ILM (1983) 66, 72.

activities of Iran. While the transaction was covered by similar US and EU regulations, the parties where disputing whether the defendant had to transfer the blocked funds to the German Central Bank, which was the required action for asset freezes in the EU. Even though the reasoning of the judgment is somewhat imprecise, it is clear that the court considered the extraterritorial US regulation as a potential violation of the sovereignty of other States and ruled that the EU regulation therefore had priority in this case.[337]

In more recent times, courts in Germany,[338] France[339] and the UK[340] have decided comparable cases with different outcomes. German courts have regularly ruled against giving effect to extraterritorial US sanctions. For instance, one case concerned a claim against an insurance company based on transportation damages sustained by Iranian goods. While the insurer admitted the damage was covered by the insurance contract in question, it refused to satisfy the claim as it has, in the meantime, become part of a US corporate group and fulfilling the claim would have contradicted US sanctions regulations. The insurer thus requested the court to give effect to US sanctions by voiding the contract. The court, however, was not persuaded and instead demanded satisfaction by the US insurer contrary to US embargoes.[341]

In contrast, the UK High Court of Justice recently ruled that a UK borrower may deny paying interest on a loan provided by an entity owned by a sanctioned person. The court argued that applicable US secondary sanctions constituted 'mandatory provisions of law' allowing for non-payment. This decision is particularly significant because the UK borrower in question was not even subject to US sanctions at the time of the judgment

337 OLG Frankfurt am Main, Judgment of 9 May 2011, 23 U 30/10.
338 LG Hamburg, Judgment of 3 December 2014, 401 HKO 7/14.
339 Cour d'appel de Paris (pole 5, ch 4), 25 February 2015, n° 12/23757.
340 *Lamesa Investments Ltd v Cynergy Bank Ltd* [2019] EWHC 1877 (Comm).
341 LG Hamburg, Judgment of 3 December 2014, 401 HKO 7/14; This decision is in sharp contrast to a more dated decision from the 1960s: There, the Federal Court of Justice rendered null and void contracts that violated US sanctions against the East bloc based on § 138 of the German Civil Code, the provision concerning legal transactions contrary to public policy and morals. Specifically, the court stated that: 'It is undisputed that the American embargo regulations are designed to uphold the peace and freedom of the West. The measures, therefore, were taken not only in the interest of the United States, but in the interest of the entire free Western World and therefore also in the interest of the FRG.' See BGH, Judgment of 21 December 1960, VIII ZR 1/60, reported in BGHZ 34, 169; translation in Lowenfeld (n 264), 910.

but would only potentially be sanctioned in case of performance.[342] The different outcomes in these cases suggest that even courts have not found a consistent approach to US sanctions.

c) Comparative Normative Analysis

The above analysis of relevant State practice has demonstrated that the United States frequently utilises the corporate relationship between domestic parent companies and foreign subsidiaries to extend its economic sanctions regulations. In particular, US sanctions against Cuba assume that all US-controlled foreign subsidiaries are unconditionally subject to US jurisdiction. Even though US sanctions against Iran similarly claim control-based jurisdiction, the situation is more nuanced here. Indeed, while the wording of 31 C.F.R. § 560.215 directly addresses foreign incorporated subsidiaries, the enforcement of this provision is restricted to the domestic parent company. It was further demonstrated above that the EU has failed to mount a consistent response rejecting US jurisdictional assertions *vis-à-vis* foreign subsidiaries. I will argue here that there are two reasons for this development: First, EU reactions to US sanctions are grounded in political expediency and remain in the realm of inter-subjectivity and second, the legality of assertions of jurisdiction over controlled foreign subsidiaries remains contentious under customary international law principles.

The EU has frequently voiced the most vehement protest against US sanctions when it disagreed with the United States not only in its legal analysis, but also more fundamentally in its economic and foreign policy position. This is particularly clearly illustrated with regard to Iran. Most notably, the EU has mounted no objection against the adoption of the ITRA in 2012, even though the act introduced, for the first time, sanctions against Iran targeting controlled subsidiaries. Conversely, the EU has voiced vocal opposition against the re-instalment of the same sanctions after the Trump administration withdrew from the Iran Nuclear Deal. Comparing the two episodes, it becomes clear that the different political landscape and the EU's willingness to protect its own businesses against US interference were likely the main drivers of EU action. While in 2012, both EU and US economic sanctions had largely aligned and companies on both sides of the Atlantic were winding down their Iran engagement,

342 *Lamesa Investments Ltd v Cynergy Bank Ltd* [2019] EWHC 1877 (Comm); however, see also *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728.

the interests were diametrically different after the US withdrawal from the JCPOA: Here, EU businesses had just started to re-invest in Iran, an engagement that was now threatened after the Trump administration broke away from the JCPOA.[343]

However, political alignment with the United States may not completely explain the EU's inconsistent reaction. In fact, the EU sometimes also failed to protest US control-based jurisdiction despite the existence of a fundamental policy disagreement. This was most notably the case in relation to the highly publicized CWT incident, where neither the Netherlands (where CWT is incorporated) nor France (where CWT has its global headquarters) protested against the heavy fine levied by OFAC for violation of US sanctions against Cuba. This is even more astonishing when taking into account the personal repercussions of this incident: Specifically, CWT France had previously directed its staff to comply with the US embargo and subsequently let go of two regional directors involved in the breach.[344] It seems, therefore, that a consistent response to US jurisdictional claims over controlled foreign subsidiaries is also complicated by normative reasons: In fact, whether these measures actually violate customary international law has remained controversial.

To be sure, there is indeed a strong position in academic commentary arguing that control-based jurisdiction should be generally considered a violation of international law: According to this position, exercises of jurisdiction have to satisfy either the territoriality principle or one of the exceptional bases legitimizing extraterritorial jurisdiction. Both are not the case here. On the one hand, measures such as the US sanctions against Cuba cannot be based on territoriality because the regulations strictly apply to foreign subsidiaries. On the other hand, this position also rejects the argument that extending jurisdiction to controlled subsidiaries can

343 See on this: European Commission, Press Release of 18 May 2018, 'European Commission acts to protect the interests of EU companies investing in Iran as part of the EU's continued commitment to the Joint Comprehensive Plan of Action', https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3861, last accessed on 13 April 2022. Note, 'Developments in the Law – Extraterritoriality' (2011) 124 HarvLRev 1226 at 1252 ff. also sees the EU's unified trading strength, which makes it more sympathetic to extraterritorial trade measures of its own, as a possible explanation for the lack of reaction against the extension of Iran sanctions by the United States.

344 Fabrice Bugnot, 'Carlson Wagonlit Travel: les dessous de l'affaire cubaine', *L'echo touristique*, http://www.lechotouristique.com/article/carlson-wagonlit-travel-les-dessous-de-l-affaire-cubaine,68314, last accessed on 13 April 2022.

be legitimized through the active personality principle: As was stated in *Barcelona Traction*, corporate nationality under international law (bar certain exceptions) does not follow the control theory.[345] Therefore, because jurisdiction over foreign subsidiaries can be neither based on territoriality nor on an exceptional principle, it violates customary international law.

While this position does seem to be sound at first glance, it may in fact be an oversimplification. Specifically, it could be argued that jurisdiction based on the control-theory is in fact just a variation of territoriality. For instance, 31 C.F.R. § 560.215, a regulation typically cited as an example of jurisdiction based on the control theory,[346] provides that any

> 'entity that is owned or controlled by a United States person and established or maintained outside the United States is prohibited from knowingly engaging in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran […]'.[347]

This measure strictly addresses foreign incorporated subsidiaries. Therefore, applying the same logic as above, it can be justified neither by the territoriality nor by the active personality principle.

However, we could compare 31 C.F.R. § 560.215 to this fictitious regulation:

> 'A US-based corporation is subject to penalties if any foreign entity that it owns or controls knowingly engages in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran'.

Such a provision would only address companies based within the United States. At first glance, therefore, this rule seems like a perfectly valid exercise of territorial jurisdiction. Crucially, however, it could be argued that this fictitious rule is in fact substantially identical to 31 C.F.R. § 560.215. Because even though the fictitious regulation does not explicitly prohibit foreign subsidiaries from business with Iran, these subsidiaries will refrain from engaging with the sanctioned target to not jeopardize the

345 For this conclusion see Cedric Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7 Chinese Journal of International Law 625, 633; Beaucillon (n 26) 116 – 118; see already above at C.II.2 b)bb) Diplomatic Protest against US Assertions of Control-based Jurisdiction.

346 See Meyer, 'Second Thoughts on Secondary Sanctions' (n 151), 966; Ruys and Ryngaert (n 272), 19.

347 31 C.F.R. § 560.215.

parent company. The domestic US parent company will also direct all its controlled subsidiaries to stop any businesses with the sanctioned target. In effect therefore, both regulations should achieve the same substantial result.

In fact, every direct assertion of jurisdiction over a foreign subsidiary could be rephrased as a territorial regulation addressing the domestic parent company and holding it strictly liable for the conduct of its foreign subsidiaries abroad. However, when we are confronted with two substantially identical regulations, why should we consider one regulation a prohibited exercise of control-based jurisdiction and the other a perfectly valid example of territoriality? Would it not be more consistent to consider both 31 C.F.R. § 560.215 and our fictitious rule an exercise of territorial jurisdiction or to consider them both illegal assertions of control-based jurisdiction?

It could be argued that the actual and the fictitious regulation presented above are not completely identical because the fictitious rule seems to limit enforcement actions to domestic companies whereas 31 C.F.R. § 560.215 would – in principle – also allow for enforcement directly against the foreign subsidiary. However, this (potential) difference only concerns the possible target of enforcement actions and thus the scope of *enforcement* jurisdiction. The behaviour giving rise to such enforcement actions, i.e., the behaviour that is regulated through both the actual and the fictitious regulation, is the conduct of the foreign subsidiary abroad. The *prescriptive* reach of both regulations is thus the same. In reality, 31 C.F.R. § 560.215 is identical to our fictious rule even from an enforcement perspective because the provision actually restricts enforcement actions to the domestic parent companies. Nonetheless, 31 C.F.R. § 560.215 is widely considered as a prohibited exercise of control-based jurisdiction by the literature.[348]

Because the *prescriptive* reach of both the actual and the fictitious regulation is the same, consistency demands that they be treated the same way under international law. This is a point which has also been acknowledged by the widely regarded Restatement Third.[349] Accordingly, the Re-

348 Meyer, 'Second Thoughts on Secondary Sanctions' (n 151), 966; Ruys and Ryngaert (n 272), 19; additionally, the scope of enforcement jurisdiction is ultimately identical for both the actual and the fictitious regulation. In fact, for both regulations, physical enforcement is limited to the territorially-based corporate parents. This follows from the international law principle prohibiting extraterritorial enforcement.

349 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 414, Comment a).

statement argues that this kind of jurisdictional assertion cannot solely be assessed based on whether the regulation formally addresses the domestic parent company or the foreign subsidiary. Rather, the Restatement suggests that the legality of such assertions of jurisdiction can only be judged by considering a host of material circumstances, with the formal addressee being only one relevant factor. This seems to be the right approach as otherwise, the legality of extraterritorial sanctions would be reduced to a question of smart wording. Thus, not all assertions of jurisdiction targeting foreign subsidiaries should be regarded as illegal, and not all assertions of jurisdiction targeting domestic parent companies as legal, under customary international law.

To sum up this section, three conclusions may therefore be drawn. First, the normative status of control-based assertions of jurisdiction such as 31 C.F.R. § 560.215 remains unresolved; in fact, if the United States wanted to avoid criticism that 31 C.F.R. § 560.215 was violating customary international law, it could simply reformulate the regulation as a strict liability criterion in relation to the domestic corporate parent and achieve the same substantial result. Second, EU reactions to these regulations remain inconsistent and are largely determined by converging or diverging foreign policy objectives and the desire to protect domestic businesses against extraterritorial foreign regulations. Finally, the unclear legal status may also explain why courts in Europe deciding on those issues have generally eschewed public international law arguments and rather resorted to private conflict-of-law rules to handle these cases.[350]

3. Territoriality and US Dollar Transactions by non-US Financial Institutions

a) Practice in the United States

The United States not only adheres to a wide interpretation of the personality principle, which is extended to include domestic controlled foreign subsidiaries, but it also has a broad view of the territoriality principle, which serves as the doctrinal justification to bring most of the world's financial transactions within US jurisdiction. OFAC and other US agen-

350 For a US case using private international law, see *Chase Manhattan Bank v State of Iran*, 484 F. Supp. 832 (SDNY 1980) where the court had to decide on a preliminary injunction to stop a lawsuit in the UK.

cies have used this jurisdictional hook to successfully pursue numerous foreign financial institutions including the French Crédit Agricole[351] and BNP Paribas as well as the Dutch ING Bank[352] for sanctions violations. All of these cases have in the end led to settlement agreements between OFAC and the affected banks, often resulting in the banks paying fines in the hundreds of millions or even billions. Up to now, the banks have readily paid those expensive prices and refrained from challenging OFAC's jurisdictional assertions in court, presumably to avoid being cut off the important US financial market.[353]

The statutory basis for these far-reaching legal actions seems innocent enough: On the one hand, most embargo programs directed against a country as a whole (as in the case of Iran, Sudan and Cuba) contain a prohibition of direct or indirect exportation and re-exportation of goods, technology or services *from the United States* to the designated countries.[354] On the other hand, US targeted sanctions against individual subjects typically require the blocking of all economic resources of a designated person and the prohibition extends to 'all property and interests in property […] that are in the United States [or] that hereafter *come within the United States*'.[355] This asset block (sometimes also termed freeze) does not only prevent any move or transfer of existing funds that would result in a change thereof but also prohibits any kind of business transaction in which the designated person has an interest.

The United States interprets these two rules as encompassing almost any (physical or financial) transaction with or on behalf of sanctioned subjects even if the transaction merely passes through US territory. Specifically, OFAC has interpreted the facilitation of US dollar payments from or to sanctioned countries, individuals and entities as both a prohibited exporta-

351 See Press Release, DoJ, 'Crédit Agricole Corporate and Investment Bank Admits to Sanctions Violations, Agrees to Forfeit $312 Million' (20 October 2015), http://www.justice.gov/opa/pr/cr-dit-agricole-corporate-and-investment-bank-admits-sanctions-violations-agrees-forfeit-312, last accessed on 13 April 2022.

352 See Press Release, DoJ, 'ING N.V. Agrees to Forfeit $619 Million for Illegal Transactions with Cuban and Iranian Entities' (12 June 2012), http://www.justice.gov/opa/pr/ing-bank-nv-agrees-forfeit-619-million-illegal-transactions-cuban-and-iranian-entities-0, last accessed on 13 April 2022.

353 Suzanne Katzenstein, 'Dollar Unilateralism: The New Frontline of National Security' (2015) 90 Indiana Law Journal 293, 312 f.

354 E.g. 31 C.F.R. § 560.204 (ITSR) and 31 C.F.R. § 538.205 (Sudanese Sanctions Regulations).

355 See e.g., Sec. 1 (b) E.O. 13382 of 1 July 2005; Sec. 1 E.O. 13599 of 5 February 2012.

tion or re-exportation of services *from the United States* and as dealing with property and interests in property that have *come within the United States*.[356] Therefore, the office claims jurisdiction over practically all money transfers worldwide, as long as they involve US dollars.

To understand OFAC's legal analysis in relation to payments in US dollars, it is very helpful to take a closer look at the mechanisms and operations of wire transfers. In its simplest form, both the sending party (originator) and the receiving party (beneficiary) of the funds have accounts at the same bank. In this case, the bank can settle the claims by debiting the originator's account and crediting the beneficiary's account (book transfer). However, if the involved parties have accounts at different banks, the process becomes more complicated. To move the money, the banks may maintain a correspondent relationship, which means that they operate correspondent accounts of each other. In this case, the sending bank will debit the originator's account and credit the correspondent account of the receiving bank. The receiving bank will in turn credit the beneficiary's account. Finally, if the involved banks do not maintain such a relationship, they may still transfer the funds if both banks have established accounts at a third, intermediary bank, which then settles the transaction.[357]

For US dollar transactions, banks have gone one-step further and established two centralized clearing systems, CHIPS (Clearing House Interbank Payment System) and Fedwire (Federal Reserve Wire Network), to communicate and to settle money transfers. In essence, both CHIPS and Fedwire are connected to the Federal Reserve Banks in the United States, which therefore have become something of intermediary banks for almost all US dollar transactions.[358] Thus, even when a French bank sends money to an Iranian bank, the funds will be technically crossing US banks as long as they involve US dollars. Similarly, when foreign financial institutions omit reference to sanctioned parties in their payment messages (also

356 See e.g., Department of the Treasury, Settlement Agreement between OFAC and BNP Paribas SA of 30 June 2014, COMPL-2013–193659, paras. 18 ff. https://home.treasury.gov/system/files/126/20140630_bnp_settlement.pdf, last accessed on 13 April 2022.

357 Barry E Carter and Ryan M Farha, 'Overview and Operation of the Evolving U.S. Financial Sanctions, Including the Example of Iran' (2013) 44(3) Georgetown Journal of International Law 903, 905 ff.

358 Sebastian v Allwörden, *US-Terrorlisten im deutschen Privatrecht: Zur kollisions- und sachrechtlichen Problematik drittstaatlicher Sperrlisten mit extraterritorialer Wirkung* (Studien zum ausländischen und internationalen Privatrecht v.313, Mohr Siebeck 2014), 55.

referred to as 'stripping') and thus cause US banks to clear the transaction, the United States claims jurisdiction based on the effects doctrine where the effect is a violation of US sanctions by the deceived US bank.[359]

As already mentioned, US enforcement actions of economic sanctions regulations based on correspondent banking accounts located in the United States are rarely litigated in court as the cases are often settled. Thus, the legally and politically controversial case *United States v Zarrab et al* offers a rare judicial opinion on the issue. The case revolved around a criminal prosecution against several Turkish businesspersons and government officials concerning an elaborate multibillion-dollar scheme to evade Iran sanctions during the period 2010 through 2015. The case had received immense public attention across the Atlantic and even led to a diplomatic standoff between the United States and Turkey. In essence, the allegations claimed that Reza Zarrab and his associates facilitated payments on behalf of the Iranian government, which were processed by the US financial system.[360] Among others, Zarrab was charged with conspiracy to violate the IEEPA and 31 C.F.R. § 560.204 of the ITSR, which prohibits 'the exportation, reexportation […] directly or indirectly, from the United States […] of any […] services to Iran […]'.

Several times, the defence raised the issue of extraterritorial jurisdiction: For instance, Zarrab, in a motion to dismiss before the US District Court for the Southern District of New York, argued that the acts, transferring funds from a Turkish to an Iranian bank, only touched the United States *en route* when the funds passed through US banks and that they were thus overwhelmingly, if not entirely foreign. Therefore, the case had to be dismissed because the allegedly violated US statutes did not cover extraterritorial conduct.

The court, however, was not convinced and denied the motion to dismiss: Mirroring OFAC's interpretation, it found that Zarrab's conduct amounted to an exportation of services from the United States and that therefore, there was a sufficient domestic nexus.[361] In establishing the territorial nature of Zarrab's conduct, the court discussed several precedents supporting its conclusion. For instance, the court argued that the Second Circuit had previously held in *Licci v Lebanese Canadian Bank* that wiring

359 Susan Emmenegger, 'Extraterritorial Economic Sanctions and Their Foundation in International Law' (2016) 33 Arizona Journal of International & Comparative Law 631, 654 ff.

360 Superseding Indictment, *United States v Zarrab*, No. 15-cr-867, (SDNY 2016).

361 *United States v Zarrab*, No. 15-cr-867, 2016 WL 6820737 (SDNY 2016), 17.

funds from a Lebanese bank to Hezbollah through correspondent accounts established at a New York bank constituted aiding and abetting of terrorist activities within US jurisdiction.[362] Additionally, however, the court argued that even if Zarrab's alleged conduct were to be considered extraterritorial, it could still apply the IEEPA and the ITSR to such conduct because any presumption against extraterritoriality would be overcome by the United States' interest in defending itself.[363]

The district court's position on the IEEPA was later also confirmed by the Second Circuit.[364] Taken together, these judicial opinions suggest that there is at least some support within the judiciary for OFAC's theory that the United States may exercise territorial jurisdiction over money transfers between two foreign countries clearing through US correspondent accounts.

b) Practice in Europe

The US interpretation of territorial jurisdiction in relation to US dollar transfers 'passing through' US-based correspondent accounts has remained a singular practice in the world. Specifically, the EU and its member States, despite the Euro being the world's second largest reserve currency, have not endorsed such a wide view of territoriality. However, there is some indication that the UK is taking an equally broad stance towards jurisdiction based on money transfers. In any case, the above-mentioned US theory has not seen any explicit rejection by States in Europe and has even been (tacitly) accepted in the practice of certain States.

According to the standard jurisdictional clause, EU sanctions regulations apply within the territory of the Union, including its airspace, on board any aircraft or any vessel under the jurisdiction of a member State and more broadly, to any legal person, entity or body in respect of any business done in whole or in part within the Union.[365] Even though the wording 'in whole or in part within the Union' seems broad enough to cover the transfer of funds between two foreign banks if the money at some

362 *Licci v Lebanese Canadian Bank*, No. 15–1580 (2d Cir 2016), at 25; See below for extensive analysis of ATS litigation, at C.V.5a) Practice in the United States.
363 *United States v Zarrab*, No. 15-cr-867, 2016 WL 6820737 (SDNY 2016), 18.
364 *United States v. Atilla*, No. 18–1589 (2d Cir. 2020), 16 – 18.
365 E.g. Art. 29 Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007, [2010] OJ L 281/1.

point also traverses EU financial institutions, which would precisely be the position of the United States,[366] in practice, member State authorities have up to now refrained from pursuing foreign individuals and institutions the same way OFAC has done.

The situation is somewhat different in the UK: According to guidance issued by the Office of Financial Sanctions Implementation (**OFSI**), a new government agency created in 2016 specifically tasked with overseeing the implementation and enforcement of financial sanctions, the agency claims 'authority' over any breach with a UK nexus, which may explicitly 'be created by such things as […] transactions using clearing services in the UK'.[367] This interpretation seems to closely mirror OFAC's playbook on jurisdictional reach. In fact, the agency's powers seem to have been generally inspired by OFAC: For instance, OFSI may impose 'civil' monetary penalties of up to £ 1 Million or 50 % of the value of the sanctioned transaction, whichever is greater. Similarly, financial sanctions are now one of the offences for which a deferred prosecution agreement can be made, reminiscent of the practice of OFAC.[368] It seems therefore reasonable to expect that the OFSI may take a similarly broad view on territoriality in relation to money transfers through correspondent accounts.

At this point, one might question whether the apparently different jurisdictional scope assumed by OFAC and OFSI on the one hand and EU member State authorities on the other hand is really nothing more than a criminal law / administrative law divide. While both OFAC and OFSI rely on administrative or civil penalties, sanctions enforcement in EU member States is predominantly in the hand of criminal authorities.[369] Possibly, criminal authorities view themselves bound to a stricter interpretation of jurisdictional rules as potential infringements of individual rights and due

366 According to at least one commentator, the sanctions apply to a transaction between two third country institutions if they conducted part of their negotiation in a hotel located within the Union, see Mehle and Mehle (n 321), 399.

367 OFSI, Monetary penalties for breaches of financial sanctions: Guidance of April 2021, paras. 3.6 – 3.7.

368 OFSI, UK Financial Sanctions: General Guidance, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685308/financial_sanctions_guidance_march_2018_final.pdf, last accessed on 13 April 2022.

369 See for instance for a German prosecution of an Iranian citizen for alleged sanctions violations: BGH, Order of 23 April 2010, AK 2/10, reported in BGHSt 55, 94, paras. 24, 25.

process may weigh heavier in criminal processes.[370] However, from the perspective of international law, such considerations generally do not affect the scope of State jurisdiction. Rather, it should be irrelevant whether jurisdiction is asserted by an administrative or a criminal authority (or by civil courts for that matter).[371] For the specific area of economic sanctions, the IEEPA provides for both administrative and criminal penalties and the court in *United States v Zarrab* similarly did not consider a different jurisdictional doctrine because it was handling criminal charges.[372]

Although enforcement levels in Europe are substantially lower, the EU as well as its member States have not voiced any substantial critique against the actions of US authorities.[373] This comes even more as a surprise considering that European banks have been one of the major targets of OFAC's activity. Only in the case of BNP Paribas with its record 8.9 billion USD fine has France, the company's home State, sent a letter of protest to President Obama. However, the letter apparently did not mention any jurisdictional issues but solely criticized the fine for being disproportionate.[374] Considering that subsequently, the *French Autorité de contrôle prudentiel et de résolution*, BNP Paribas' regulator at home, has found no violation of the company against French, EU or UN sanctions, one might expect that the issue of extraterritoriality or at least conflicting legal requirements would have been brought up in the letter.[375] Whether this restraint was due to a belief that US authorities had indeed acted compliant to international law jurisdictional limits and whether it reflected *opinio iuris* is unclear. Again, it could simply have been a converging foreign policy view at that time between the United States and the EU regarding States such as Iran and Sudan that prompted European countries to tread lightly.

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370 However, issues of due process may also arise in civil matters Colangelo, 'Spatial Legality' (n 48), 94 – 104; *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v Rogers* 357 US 197, 211 (1958).

371 See Samuel L Hatcher, 'Circuit Board Jurisdiction: Electronic Payments and the Presumption against Extraterritoriality' (2020) 48 Georgia Journal of International and Comparative Law 591, 598; See also above at A.III.5. Regulation, Public Law and Jurisdiction.

372 See above at C.II.3a) Practice in the United States.

373 This has also been noted by Ruys and Ryngaert (n 272), 23.

374 M Rochan, 'French President Hollande Defends BNP Paribas in Letter to President Obama', *International Business Times*, http://www.ibtimes.co.uk/french-president-hollande-defends-bnp-paribas-letter-president-obama-1451262, last accessed on 13 April 2022.

375 See Emmenegger (n 359), 634 – 635 citing the French press.

There is also at least one instance in which a European regulator has tacitly accepted US territorial jurisdiction in relation to US dollar transfers. In particular, the Swiss financial authority FINMA specifically investigated whether BNP Paribas (Suisse) SA had adequate risk management in place for compliance with *US sanctions*. It found that the bank had in various ways violated US regulation and thus failed the requirements for adequate organization under Swiss supervisory law.[376] FINMA has likewise reprimanded Credit Suisse in 2009 for similar conduct. In a more detailed report about this case, FINMA stated that it regarded OFAC regulations as '*extra-territorial*' but seemingly accepted OFAC's legal analysis and did not question OFAC's jurisdictional authority. FINMA further elaborated that it would not enforce US regulations as a matter of principle, but still demanded from the violating banks that they adhere to US sanctions in the future.[377]

c) Comparative Normative Analysis

While OFAC's assertion of territorial jurisdiction in relation to financial transactions 'passing through' US bank accounts has remained a specific feature of 'American Exceptionalism', the preceding section has shown that it has not caused widespread State protest so far and that at least the UK is pondering a similar practice. As with the extension of US sanctions to foreign subsidiaries based on the control doctrine, I will argue here that analysing these measures according to the traditional framework of jurisdiction yields no unambiguous result: In fact, while there are strong arguments against the legality of correspondent account jurisdiction under international law, there are equally convincing arguments to the contrary.

376 Press Release, Swiss Financial Markets Supervisory Authority, 'Inadequate Risk Management of US Sanctions: FINMA Closes Proceedings Against BNP Paribas (Suisse)' (1 July 2014), https://www.finma.ch/en/news/2014/06/mm-abschluss-verfahren-bnp-paribas-suisse-20140701/, last accessed on 13 April 2022.

377 FINMA, 'Processing of USD payments for countries and persons sanctioned under the OFAC-Rules', (16 December 2009), https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/8news/medienmitteilungen/2009/12/20091216-bericht-cs-usbehoerden.pdf?la=en, last accessed on 13 April 2022.

In academic commentary, OFAC's theory that correspondent account jurisdiction can be justified either through territoriality or the effects principle is overwhelmingly rejected.[378]

I concur with this opinion as far as the effects principle is concerned. OFAC argues that it may assert jurisdiction based on the effects principle because through the act of 'stripping', i.e., the practice of concealing identification data of sanctions targets from payment messages, European financial institutions cause prohibited payments to pass the US financial system undetected which in turn causes the involved US banks to (unknowingly) violate economic sanctions. However, it is doubtful whether this practice satisfies the requirements of the effects principle, in particular considering the limitations of this doctrine. First, outside the field of antitrust regulation, using effects to justify jurisdiction is heavily controversial in international law.[379] Second, even proponents of the doctrine usually require that the effects to be qualified by characteristics such as *direct or substantial* in order to trigger jurisdiction.[380]

The practice of stripping does not seem to result in such direct or substantial effects.[381] Specifically, since the US banks involved in the clearing process supposedly did not know about the scheme, they are not at risk of civil or criminal enforcement measures themselves and suffer no reputational damage. Likewise, there is no quantifiable damage to the US economy: The domestic banking and payment system did not become less reliable or more expensive to use. Even if the practice of stripping did incur additional costs for US banks, as they had to maintain more complex compliance systems, this effect seems to be indirect at best. The only party that undoubtedly suffers a direct and substantial damage is OFAC itself,

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378 See Emmenegger (n 359), 654 ff; Thilo Rensmann, 'Völkerrechtliche Grenzen extraterritorialer Wirtschaftssanktionen' in Arnold Wallraff, Dirk Ehlers and Hans-Michael Wolffgang (eds), *Recht der Exportkontrolle: Bestandsaufnahme und Perspektiven: Handbuch zum Exportkontrollrecht.* zugleich Festgabe für Dr. Arnold Wallraff zum 65. Geburtstag (Schriften zum Aussenwirtschaftsrecht 2015), 104 – 106; For the FCPA see also: Natasha Wilson, 'Pushing the Limits of Jurisdiction Over Foreign Actors Under the Foreign Corrupt Practices Act' (2014) 91 Washington University Law Review 1063, 1079.

379 Crawford and Brownlie (n 18), 463; see also above at B.I.2b)bb) The Effects Principle in Other Areas of Substantive Law.

380 See Beaucillon (n 26), 120 – 121; *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 402 Comment d); Akehurst (n 42), 154; For a statute that requires a qualified effect for its application see: Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a(I)(A).

381 Emmenegger (n 359), 656; Rensmann (n 378), 105 – 106.

whose ability to control US dollar transactions to embargoed destinations is seriously impaired.[382] However, it is exactly the question whether OFAC has authority over these transactions that needs to be answered in the first place, which means this argument is circular and not particularly helpful.[383]

While OFAC's jurisdictional claims are not covered under the effects doctrine, I am much less convinced that they cannot be simply based on plain-old territoriality. In this regard, some commentators point out that the clearing of US dollar banking transactions through correspondent accounts in New York provides such a minute territorial nexus that it is insufficient to sustain the exercise of territorial jurisdiction: In today's globalized economy, transactions regularly pass through the territories of multiple nations due to modern communication systems, sometimes even without the participants' knowledge. In the case *United States v Zarrab* for instance, defendants claimed that the wire transfer did not actually move any goods, but that, much like data in cyberspace, the only thing that is physically happening is a change of accounting entries within banks.[384] Indeed, the objections against OFAC's interpretation of territoriality are similar to those offered against jurisdictional claims founded on internet-based data processing.[385]

However, this position cannot convincingly explain precisely *why* the clearing of financial transactions in New York is insufficient for assuming territoriality. According to most authoritative interpretations of the territoriality principle, this basis is satisfied when at least one constituent element of the conduct to be regulated occurred in the territory of the State.[386] Moreover, the question which elements are to be considered constituent for a crime is not answered by international law, but rather by domestic law.[387] In this regard, the sanctioned money transfer in *United States v*

382 This point is further illustrated by the fact that most criminal complaints relating to sanctions violations through US dollar transfers also allege the defendant to have conspired to defraud an agency of the United States.

383 See Emmenegger (n 359), 656.

384 See above at C.II.3a) Practice in the United States.

385 Paul S Berman, 'Global Legal Pluralism' (2007) 80 Southern California Law Review, 1182: 'In an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all.'.

386 *Restatement (Fourth) of the Foreign Relations Law of the United States* (n 42), § 408 comment c; Harvard Research Draft (n 71), 495; International Law Commission (n 3), p. 521, para. 11.

387 Ryngaert, *Jurisdiction in International Law* (n 2), p. 78.

Zarrab could be considered a typical cross-border offence. The funds are first sent from a Turkish bank to a US counterpart, are then transferred to a different US bank account before they continue to their destination somewhere in Iran. According to the constituent elements doctrine, the United States is in principles free to determine that the part of the offence taking place in the United States is a constituent element giving rise to US jurisdiction.[388]

That indeed a crucial part of the offence is committed under US jurisdiction is furthermore confirmed by a related consideration: There is no doubt that in those moments where these funds – *en route* to the sanctioned destination – are booked onto a US account, OFAC would have jurisdiction over these funds.[389] However, if that is the case, there is no reason why OFAC should not also have jurisdiction over the conduct that brought the funds within its reach in the first place as well as over the conduct that causes the funds to eventually leave the United States.

Another way to look at OFAC's jurisdictional claims is through the theory of innocent agency: For instance, German courts have assumed territorial jurisdiction over a perpetrator abroad if he had acted through an innocent third party within Germany: Because the third party's conduct is attributed to the perpetrator abroad, the territoriality of the conduct is also attributed.[390] It seems arguable that we are faced with a substantially similar situation here as the US banks operating the correspondent accounts could be regarded as innocent agents of the sending and receiving party of the sanctioned money transfer. In this case, the territorial acts of the innocent US banks would be attributed to the perpetrators abroad, bringing them under the jurisdiction of the United States.

The problem with accepting correspondent account jurisdiction thus seems to be less of a doctrinal one, but more of a practical one: It simply

388 In this case therefore, Turkey, Iran and the United States could claim jurisdiction, see also the related example by Akehurst (n 42), 152, in which X in State A writes a fraudulent to Y in State B who then sends money to X in State C, giving rise to jurisdiction in State A, B and C over the fraudulent conduct.

389 See for instance Michael Gruson, 'The U.S. Jurisdiction over Transfers of U.S. Dollars between Foreigners and over Ownership of U.S. Dollar Accounts in Foreign Banks' [2004] Columbia Business Law Review 721, 734: 'If a dollar transfer is cleared […] at a Federal Reserve Bank in the United States, there is little doubt that the dollars being transferred are under the control of a U.S. person and that the transferor and the transferee have an interest in the funds being transferred. Thus, the executive orders apply and do not have any extraterritorial effect.'.

390 Federal Court of Justice, BGH, Order of 27 August 2019, 5 StR 196/19.

seems outrageous that the United States could claim almost limitless jurisdiction as long as the dollar is still the world's leading currency.[391] In this regard, commentators frequently reject the notion that correspondent accounts may sustain territoriality because in their view, the US nexus is not 'sufficiently strong', 'substantial' or 'reasonable'.[392] What is certainly correct about this line of thought is the argument that jurisdictional assessments should take into account substantial aspects such as the materiality of the connection, the content of the regulations at issue, the personal circumstances of the affected natural or juridical persons and the consequences of jurisdictional assertion. What is much less clear, however, is whether such considerations fit into the doctrine of constituent elements or whether a solution is rather to be found outside the traditional framework *de lege lata*.

4. Secondary Trade Boycotts

Secondary trade boycotts, as mentioned above,[393] refer to measures in which the sanctioning State imposes economic penalties – such as restrictions to market access – on third State actors that engage in commercial relationships with the primary target of the sanctions. The rationale behind these sanctions is to induce change in the behaviour of the third State actors towards the primary target. The third State actor is forced to either abandon its relationships with the primary target, or risk being cut off the market of the sending State.[394] As with other economic sanctions with extraterritorial effects, it is primarily the United States that utilises this type of regulation (see below **a**)). Even though European States have at times sharply criticized US secondary trade boycotts, certain targeted sanctions enacted by the EU may in effect achieve quite similar results (see below **b**)). While a growing number of commentators regard secondary trade boycotts as permitted under international law, the doctrinal status of these measures remains unresolved (see below **c**)).

391 Emmenegger (n 359), 656.
392 Ruys and Ryngaert (n 272), 22; Rensmann (n 378), 105; Emmenegger (n 359), 655; see also Berman, 'The Globalization of Jurisdiction' (n 179), 330.
393 See above at C.II.1b) Primary and Secondary Sanctions.
394 See e.g., Bechky (n 280), 10 – 11.

a) Practice in the United States

The United States has been a strong proponent of secondary trade boycotts, often to the irritation of its allies: In 1996, the United States passed the Helms-Burton Act to almost universal condemnation. In Title III, the Helms-Burton Act created a private right of action for US citizens allowing them to claim damages from any person who was 'trafficking' in property, in which the claimant had an interest, if the property had before been 'confiscated' by the Castro government in Cuba.[395] Additionally in Title IV, the Helms-Burton Act allowed the denial of entrance into the United States of officers or controlling shareholders of companies that 'traffic' in property, which was previously owned by US citizens. The act was especially targeting foreign investors who were active in Cuba. For instance, shortly after its promulgation, a Canadian cooperation was sanctioned under the Act for operating a nickel mine in Cuba, which before had belonged to a New Orleans company.[396] To mitigate the effects of the Helms-Burton Act, US presidents have continuously waived the application of Title III (the private right of action) since its entry into force. This suspension was ended for the first time in 2019 by former President Trump.[397]

The United States seemed to have grounded the Helms-Burton Act and especially its controversial Title III on both the effects doctrine[398] and the protective principle.[399] However, as in the case of US dollar transactions passing through correspondent accounts, it is difficult to imagine how

395 Sec. 301 – 306, Cuban Liberty and Democratic Solidarity Act, Pub. L. 104–114 (110 Stat. 785), 22 U.S.C. §§ 6021–6091 (1996).

396 The Irish Times, 'US bans Canadian mining executives over company's investments in Cuba', https://www.irishtimes.com/news/us-bans-canadian-mining-executives-over-company-s-investments-in-cuba-1.66468, last accessed on 13 April 2022.

397 Secretaría de Relaciones Exteriores, Position of the Mexican Government on Ending Suspension of Title III of the Helms-Burton Act, https://www.gob.mx/sre/prensa/position-of-the-mexican-government-on-ending-suspension-of-title-iii-of-the-helms-burton-act, last accessed on 13 April 2022.

398 Sec. 301 (9) of the Helms-Burton Act states:
'International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory'.

399 Sec. 2 (28) of the Helms-Burton Act states:
'[f]or the past 36 years, the Cuban government has posed and continued to pose a national security threat to the U.S.'.

dealing in confiscated property has a *direct* and *substantial* effect in the United States: Should the expropriation undertaken by Cuba have been illegal under international law, then further 'trafficking' would not alter or diminish the claims of the United States or its citizens. It is true that the subsequent use or transfer of the confiscated property in some cases might complicate its return to the original owner, but this can hardly be characterized as a direct or substantial effect.[400] As for the protective principle, commentators point out that the United States has failed to demonstrate a direct threat posed by Cuba to the security, integrity or other fundamental interests of the United States.[401]

Shortly after the Helms-Burton Act, the United States passed the ISA, which, as already mentioned, prohibited anyone, wherever located, from making investments exceeding USD 40,000,000 into the Iranian petroleum sector.[402] Failure to comply with this provision could lead to different penalties, including a possible prohibition for US financial institutions to grant loans to and a prohibition for US government agencies to procure goods from that person.[403] As with the Helms-Burton Act, the President may waive sanctions if it is in the national interest. Indeed, in 1998, the French company Total was granted a waiver to develop the Iranian South Pars gas field and in subsequent years, no determination has been made against any European company.[404] However, starting from 2010, ISA and its successor legislations have been enforced on multiple occasions against other third State persons, including Chinese, Singaporean, Israeli and Venezuelan companies.[405] The ISA sanctions have been subsequently amended and tightened through other legislative acts, which lowered the value bar of USD 40,000,000, increased the number of sanctions to be imposed and added new sanctions to the catalogue, the most significant

400 See for this result also Beaucillon (n 26), at 122; See also Werner Meng, 'Wirtschaftssanktionen und staatliche Jurisdiktion – Grauzonen im Völkerrecht' (1997) 47 ZaöRV 269, at 301.

401 Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (n 345), 642; Meng, 'Wirtschaftssanktionen und staatliche Jurisdiktion – Grauzonen im Völkerrecht' (n 400), 305.

402 See above at C.II.1c)bb) US Sanctions against Iran.

403 See above at C.II.1c)bb) US Sanctions against Iran.

404 Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (n 345), at 649.

405 Fact Sheet, Office of the Spokesman of 24 May 2011,https://2009-2017.state.gov/r/pa/prs/ps/2011/05/164132.htm, last accessed on 13 April 2022; Press Release of 31 July 2012, https://home.treasury.gov/news/press-releases/tg1661, last accessed on 13 April 2022.

one may be a general prohibition for US financial institutions to transact with sanctioned parties.[406] As already discussed, ISA style sanctions have also been adopted more recently to target Russia, specifically through the above-mentioned UFSA and CAATSA.[407]

Given the US record of extending domestic law to situations with only questionable ties to its territory, one might be surprised to find that the United States is less than shy to react when it finds itself on the receiving end of allegedly extraterritorial regulation. However, this was precisely the case when the United States, in 1977, started to adopt formal measures protesting the Arab boycott of Israel.[408] The Arab boycott of Israel, just like the ISA, is a typical example of a secondary trade boycott: The Arab League Council not only prohibited any transaction with persons in Israel, of Israeli nationality and of persons working on behalf of Israel, but it also demanded that foreign firms complied with these rules if they wanted to continue business with the Arab world.[409] Moreover, non-compliant foreign firms could be blacklisted themselves so that the Israel boycott also extended to these companies.[410]

b) Practice in Europe

As in the 1982 *Pipeline* case, the promulgation of the Helms-Burton Act and the ISA has prompted strong negative responses across the Atlantic Ocean, which resulted in the initial adoption of the EC/EU blocking statute, Council Regulation (EC) No 2271/96 of 22 November 1996. The regulation, explicitly stating that a third country had enacted laws that intended to influence the conduct of EC persons and thus violated in-

406 Sec. 102 of CISADA; Sec. 201 of ITRA.
407 See above, at C.II.1c) Overview of US Economic Sanctions.
408 Ribicoff Amendment to the Tax Reform Act of 1976, Pub. L. 94–455 (90 Stat 1649), 26 U.S.C. § 999 (2005); Export Administration Amendments of 1977, Pub. L. 95–52 (91 Stat 242), § 117 (1977).
409 Mestral and Gruchalla-Wesierski (n 152), 151.
410 Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (n 345), 640; James Friedberg, 'The Arab League Boycott of Israel: Warring Histories, International Trade, and Human Rights' in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press 2015), 56.

ternational law, sought to nullify those extraterritorial effects.[411] Persons subject to the EC regulation were prohibited from complying with the Helms-Burton Act and the ISA as well as related orders. In addition, EC entities shall have the right to recover damages suffered because of those acts. The UK for their part had already passed a blocking statute in 1980, the British Protection of Trading Interests Act, which mainly aimed at US antitrust enforcement, but which was also invoked in the case of US Cuba sanctions.[412] At the same time, the EC initiated proceedings against both the Helms-Burton Act and the ISA according to the Dispute Settlement Understanding of the WTO. The cases were suspended in 1997 after both parties reached an understanding in which the United States agreed to suspend the application of the two acts against EU member State persons.[413] EU protest against both acts continued into the 2000s: For instance, in an official statement in 2001, the Commissioner for External Relations regretted the extension of ISA by the United States for another five years.[414] Equally, EU member States have constantly criticized the US embargo against Cuba in the UN, referring among others to the extraterritorial effects and the undue interference it created for EU citizens.[415]

Similarly, the EC protested a selective purchasing law from the state of Massachusetts, which barred the state from buying goods or services from any person doing business with Burma as identified on a 'restricted purchase list' maintained by Massachusetts. In an *amicus curiae* brief supporting a legal action against this legislation, the EC described the

411 Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

412 Harry L Clark, 'Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures' (1999) 20 University of Pennsylvania Journal of International Economic Law, 87; On the Protection of Trading Interests Act 1980, see also Lowe (n 100).

413 European Union and the United States, 'Memorandum of Understanding concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act', 36 ILM (1997) 529.

414 Statement by Commissioner for External Relations, Chris Patten, https://ec.europa.eu/commission/presscorner/detail/en/IP_01_1162, last accessed on 13 April 2022.

415 European Union, 'Explanation of Vote at the at the 74th Session of the United Nations General Assembly on the Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba', https://www.eeas.europa.eu/eeas/eu-explanation-vote-united-nations-general-assembly-resolution-embargo-imposed-usa-against_en, last accessed on 13 April 2022.

Massachusetts Burma Law as a 'secondary boycott' as well as 'extraterritorial' and contended that the regulation 'constitutes a direct interference with the ability of the EU to cooperate and carry out foreign policy with the United States.'[416] While the Union submitted that the US and EU positions on Burma aligned because of the nation's human rights and democracy record, the EU has explicitly refrained from imposing sanctions on Burma at that time and rather opted to withdraw Burma's access to generalized tariff preferences. The US Supreme Court finally struck down the state legislation, though on grounds unrelated to extraterritoriality and thus ended this direct confrontation between the EU and the United States on this issue.[417]

However, as in the case of the extension of personality-based jurisdiction to controlled foreign subsidiaries, the European reaction to US sanctions has been far from consistent. Specifically, the EU has protested neither against the expansion of ISA through CISADA in 2010 and ITRA in 2012 nor against UFSA and related Russia sanctions in 2014. Conversely, some member States have reacted strongly to the technically similar CAATSA in 2017.[418] Germany and Austria sent a formal note of protest after the US Senate adopted the proposed sanctions bill.[419] They particularly deplored the inclusion of gas pipeline projects into the scope of activities that give rise to possible sanctions as companies of both countries were heavily invested in the Nord Stream 2 pipeline.[420] According to the diplomatic note, Germany and Austria viewed the CAATSA as 'illegal extraterritorial sanctions', which were primarily motivated by the economic objective of maintaining sales of American liquefied natural gas into the European

416 See *National Foreign Trade Council v Baker*, 26 F Supp 2d 287 (D Mass 1998), *amicus curiae* Brief in support of Plaintiff.

417 See *Crosby v National Foreign Trade Council* 530 US 363 (2000).

418 The act was first introduced into Congress as S. 722 – Countering Iran's Destabilizing Activities Act of 2017.

419 Federal Foreign Office, Press Release, Foreign Minister Gabriel and Austrian Federal Chancellor Kern on the imposition of Russia sanctions by the US Senate, https://www.auswaertiges-amt.de/en/newsroom/news/170615-kern-russland/290666. Apart from political expedience, a different reading highlights the growth of the EU's own institutional capacity due to successive integration as the driving factor behind the EU's reaction (or rather inaction), see Note, 'Developments in the Law – Extraterritoriality' (n 343), at 1255. This argument claims that the modern EU with one of the largest 'single market' in the world has a tremendous self-interest to influence foreign behaviour, thus leading to restraint in critique of other nation's supposedly 'extraterritorial' regulation.

420 CAATSA, Sec. 232 and Sec. 235.

market by preventing European nations from diversifying their energy supply network.

Finally, certain targeted sanctions of the EU itself may in fact achieve quite similar effects to US secondary trade boycotts. This is the case when EU targeted sanctions are not imposed on the primary sanctions target, but instead on third State entities that merely assist a primary target. For instance, while Council Implementing Regulation (EU) No. 503/2011 implementing the restrictive measures against Iran mostly included Iranian persons and entities on its sanctions list, it also sanctioned a number of UAE and Malaysian entities for the explicit reason that they have procured items for sanctioned Iranian programmes.[421] As mentioned above, the objective of secondary trade boycotts is to induce change in the behaviour of third State actors towards the primary target.[422] In this regard, it could be argued that adding third State entities to a sanctions list for assisting a primary target achieves a similar effect: Because third State entities now have to fear that their assistance of a primary target of the economic sanctions may result in their addition to the sanctions list, they may be persuaded to abandon their ties with the primary sanctions target to preserve their relationship with the EU.

c) Comparative Normative Analysis

As demonstrated in the preceding section, the practice in relation to secondary trade boycotts has been wildly inconsistent. For instance, this is evidenced by the actions of the United States, which has condemned the Arab boycott of Israel even though it is adopting very similar measures against targets such as Cuba and Iran. While the EU has so far refrained from explicitly enacting secondary trade boycotts, some of its primary sanctions may in fact exert comparable influence on third-State targets. Furthermore, the EU and its member States have protested US secondary trade boycotts only selectively. As is the case with control-based jurisdiction as well as correspondent account jurisdiction, this inconsistent practice is rather a reflection of subjective political motives than normative analysis.

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421 Annex I B Council Implementing Regulation (EU) No 503/2011 of 23 May 2011 implementing Regulation (EU) No 961/2010 on restrictive measures against Iran [2011] OJ L 136/26.

422 See above at C.II.4. Secondary Trade Boycotts.

When the EU failed to protest US secondary trade boycotts, the reason is likely to be found in a general conformity of EU and US foreign policy with regard to Iran from 2010 – 2012 and with regard to Russia in 2014. It is submitted that in both cases, the transatlantic partners have closely coordinated their efforts, aligned their timetables and largely targeted the same industries and individual targets, leading to legal cohesion.[423] This needs to be contrasted with the harshly worded diplomatic note that Germany and Austria filed with the United States during the CAATSA episode. While the two States also did condemn the measures on international law grounds, it is more likely that the diplomatic note was mainly driven by foreign policy, particularly when considering that both countries did not protest similar secondary trade boycotts in the same bill targeting other economic areas outside of energy supply.

However, secondary trade boycotts are not only heavily controversial from a policy standpoint, their normative status under the international law rules of jurisdiction is also far from clear. In fact, a strong legal position has re-emerged which claims that secondary trade boycotts like the ISA or the CAATSA do not raise any *jurisdictional* issues. According to these commentators, the crucial part about the ISA is not that it seeks to prohibit business relationships of anyone in the world with Iran, but rather that acting contrary to these rules may result in restricted or denied access to the US domestic market and economic benefits. Thus, they claim that the ISA and subsequent legislation in fact contain trade restrictions addressing domestic operators: Domestic companies and government agencies are prohibited from certain dealings with third State persons, if these third State persons in turn conduct business with the primary sanctions targets.[424] Therefore, the ISA should rather be likened to, for instance, a restriction for domestic companies on the importation of goods that have been produced abroad adhering to subpar environmental standards. One author summarized these thoughts in a remark about the Arab Boycott when he commented, 'there was, in fact, nothing extraterritorial about their acts. All they said was "We in this country will not deal

423 Note, 'Developments in the Law – Extraterritoriality' (n 343), at 1254.

424 See Meyer, 'Second Thoughts on Secondary Sanctions' (n 151), 951; Meng, 'Wirtschaftssanktionen und staatliche Jurisdiktion – Grauzonen im Völkerrecht' (n 400), 292 – 293; regarding the ISA, see Vaughan Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and d'Amato Acts' (1997) 46 ICLQ 378 at 386 who admits that although the sanctions do not raise 'legal' issues, they are 'inappropriate'.

with you if you do these things abroad.'"[425] Of course, if one understands Sec. 5 (a) of the ISA as a territorial trade condition, the EU restraint is easily explained given the fact that the Union is one of the largest proponents of such restrictions worldwide.[426]

Related to this argument is Meyer's observation that secondary trade boycotts should not be treated with great difference to traditional primary sanctions because both types of measures bar domestic entities from dealing with a foreign individual or country to induce certain changes in policy or otherwise. He argues that were secondary trade boycotts incompliant with international law because of jurisdictional issues, then all economic sanctions would have to be illegal.[427] In relation to this argument, the normative difference between primary and secondary sanction may be especially blurred with regard to those EU targeted sanctions that 'blacklist' third State individuals and entities because of their affiliation with the primary target of the economic sanctions. While these measures are directly imposed against the intended target (and thus 'primary') they are 'secondary' in that the choice of the individual target is related to its dealings with the principal State or entity sanctioned.

To be sure, a possible normative distinction may be established as these targeted sanctions enacted by the EU do not actually have the purpose to 'regulate' foreign behaviour in a strict sense: Unlike US measures, they do not provide the 'if you engage in illegal activities with the primary sanctions targets, we will sanction you' kind of legal obligation that characterizes secondary trade boycotts.[428] In this regard, it has been argued

425 Harold G Maier at the Second Annual International Business Law Symposium, 'Trading with Cuba: The Cuban Democracy Act and Export Rules' (1993) 8 Florida Journal of International Law 335 at 374.

426 See more generally Anu Bradford, 'The Brussels Effect: The Rise of a Regulatory Superstate in Europe' (2012) 107 Northwestern University Law Review 1.

427 Meyer, 'Second Thoughts on Secondary Sanctions' (n 151), at 955 and 958; see already above at C.II.1b) Primary and Secondary Sanctions; In this regard, most authors do not consider primary economic sanctions problematic under international law rules of jurisdiction even though they seek to achieve change abroad. It is argued that technically, sanctions are only regulating the behaviour of domestic persons, barring them from dealing with the sanctioned targets, see also Judson Bradley, 'The Legality of Executive Orders 13628 and 13645: A Bipartite Analysis' (2015) 29 Emory International Law Review 705 709; Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) Journal of World Trade 353, 385.

428 Sec. 1 (a) (iii) of the Executive Order 13382 of June 28, 2005 Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters.

above that it is the quintessence of regulation to command private parties, through the application of rules, to act or to refrain from acting in certain ways and to enforce such duties in case of breaches.[429] Secondary trade boycotts attempt to regulate (third State) persons to perform a specific conduct through market access conditions. In contrast, the targeted sanctions by the EU do not carry a legal obligation for third State actors. It seems that the – at most – implicit threat of economic consequences does not transform these targeted sanctions against third State actors into secondary trade boycotts.

The fact that secondary trade boycotts attempt to impose legal obligations onto third State actors is also the reason that the (still) mainstream literature considers these measures to be illegal under international law. According to this position, one cannot argue that secondary trade boycotts such as Sec. 5 (a) of the ISA are simply territorial measures, which only regulate the behaviour of domestic persons. In their opinion, this argument confuses prescriptive and enforcement jurisdiction: It is true that a denial of export licenses, a prohibition for domestic banks to maintain accounts with a foreign party or the restriction of participation in public procurement are domestic measures. But – and this is the essence of the argument – these territorial measures constitute the *enforcement* of a prescriptive norm, in our case the prohibition for a foreign commercial entity to conduct business with the primary sanctions target. However, it is precisely this prescriptive rule imposed onto a third State actor that cannot be justified under international law: As we have seen for the Helms-Burton Act, it is hard to ground the prohibition of maintaining business relationships between two foreign entities on either the effects principle or the protective principle.[430] Therefore, because there is no prescriptive jurisdiction under international law, the enforcement of these regulations, even through territorial measures, would be illegal.[431]

However, let us assume for argument's sake that the denial of an export license or the limitation of trade engages *enforcement jurisdiction* under international law.[432] The problem is obviously that this would put *any* market access regulation that is contingent on extraterritorial behaviour

429 Katz Cogan (n 52), 324; see above at A.III.5. Regulation, Public Law and Jurisdiction.

430 See above at C.II.4a) Practice in the United States.

431 Bradley (n 427), at 727; Carlos M Vázquez, 'Trade Sanctions and Human Rights: Past, Present and Future' (2003) 6 JIEL 797, 814; Rensmann (n 378), 103 – 104.

432 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5) seems to follow this approach as well.

under severe international law pressure. Consider for example a regulation that restricts the import of t-shirts produced abroad using child labour: Using the above logic, one could claim that denying the import is merely an enforcement measure complementing the prescriptive norm that requires companies abroad to refrain from using child labour. However, even this regulation would likely be incompliant with international law as there is no jurisdictional basis allowing for the prohibition of child labour abroad (unless one finds that the prohibition of child labour warrants universal jurisdiction).[433]

Some commentators have therefore put forward more sophisticated proposals to conceptualize whether and when market access conditions should be regarded as raising issues of jurisdiction. Bartels for instance suggests that trade measures should not be considered purely territorial (with the implication that they would have to satisfy principles of extraterritorial jurisdiction under international law) if the measures are defined by something located or occurring abroad.[434] In relation to Sec. 5 (a) of the ISA and similar secondary trade boycotts, this is easily shown as the application of domestic sanctions such as a restriction on public procurement is defined by the relationships of the third State actor with Iran. Meng on the other hand suggests a somewhat stricter criterion and argues that trade measures (or any measure really) should only be considered extraterritorial if they produce (intended) coercive effects, as contrasted to mere factual effects.[435] However, while it could be argued that Sec. 5 (a) of the ISA and similar secondary trade boycotts produce intended coercive effects, he has denied in later writings that this provision raises issues of jurisdiction, signalling a somewhat inconsistent application of his criterion.[436]

While Bartels and Meng seek to establish formal frameworks to determine when domestic market access conditions raise issues of jurisdiction under international law, Vazquéz follows a different strategy. While he considers such measures as generally extraterritorial, they may nonetheless be justified if the conduct they seek to influence is regulated by internationally recognized norms because in this case, the enacting State does

433 Lowe and Staker (n 50), at 308 consider that '[i]t is quite possible to redraft every offence so as to make it a crime to enter the State having done *x*, *y*, or *z* before entry' and that '[t]here is no theoretical answer to this problem'.

434 Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction' (n 427), 381.

435 Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 86.

436 Meng, 'Wirtschaftssanktionen und staatliche Jurisdiktion – Grauzonen im Völkerrecht' (n 400), 292 – 293.

not unilaterally impose its own standards on behaviour abroad.[437] This approach has some appeal as regulations such as Sec. 5 (a) of the ISA that merely seek to advance domestic foreign policy goals would not pass muster while the regulation restricting the import of t-shirts produced using child labour would not raise jurisdictional issues. However, even this view may be unduly restrictive: The point of setting trade restrictions is often to surpass internationally recognized norms or to influence conduct where a binding international norm has not yet emerged.[438] Vazquéz' position would thus severely limit the options of States to protect their fundamental values in the face of international commerce.

In conclusion, the normative question surrounding secondary trade boycotts such as Sec. 5 (a) of the ISA remains unresolved. While the EC has historically rejected them as outright impermissible under the doctrine of jurisdiction under international law, a growing group of academic commentators likens them to other domestic trade conditions. However, this argument has equally come under attack as the status of such domestic trade conditions remains contested. Especially in relation to Sec. 5 (a) of the ISA, some argue that withholding domestic market access and economic benefits concerns the enforcement of an extraterritorial rule, for which one of the bases of prescriptive jurisdiction must be present. While other authors follow a more nuanced approach to trade measures and acknowledge that they should be legitimate in certain circumstances, they are not in agreement regarding the precise formal or substantive requirements. Therefore, both practice and academic opinion remain divided on the issue of secondary trade boycotts particularly when they are analysed in light of other trade measures with extraterritorial implications. In this regard, it seems that the rather formal criteria of the currently dominant jurisdictional framework offer no satisfactory answer.

5. Protection of Individual Rights

Being powerful coercive measures, economic sanctions have always been viewed with suspicion by international lawyers with a strong focus on the protection of individual rights. As already mentioned, the recent shift at the UN level from comprehensive sanctions to 'smart' sanctions targeting specific individuals and entities was prompted in part by the humanitar-

437 Vázquez (n 431), 817.
438 Scott (n 10), at 114.

ian disaster that the Iraq sanctions inflicted on the local population.[439] In recent years however, these targeted measures themselves have been subject to vehement critique that they violate the human rights of the affected individuals. This debate has cast doubt on the legitimacy of these regulations, even though they emanate from the high authority of the UN Security Council. Commentators and courts have criticized that these regimes provided only limited procedures for individuals to challenge the measures taken against them, that the measures and their extensions did not provide any notice and that the measures were taken on the basis of classified information to which the affected had no or at best limited access.[440] Within the EU, the discussion eventually culminated in the highly publicized judgments of the EGC and CJEU in *Kadi I* and *Kadi II*.[441]

It is outside the scope of this section to retrace the debate as a whole. However, it is clear that States employing targeted economic sanctions against individuals may face similar scrutiny related to the protection of fundamental rights as the UN Security Council. Under traditional doctrine, this issue is not strictly connected with the competence of States to exercise extraterritorial jurisdiction under international law. Whether a State offers mechanisms of judicial review and redress to affected persons has no bearing on the prescriptive reach of its laws. However, this section demonstrates that this issue indeed does have an extraterritorial dimension. Specifically, this section shows that whether affected persons have recourse to certain individual rights may also depend on whether these individuals are located within or outside of the State's territory. We will return to these findings in later chapters when we discuss in more detail the normative relationship between the scope of individual protection and the scope of State jurisdiction.

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439 See above C.II.1a) Economic Sanctions under International Law.

440 See Bardo Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights' (2006) 3 International Organizations Law Review 437; Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72(2) Nordic Journal of International Law 159.

441 CJEU, C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351 and CJEU, C-584/10 P, *Commission and Others v Kadi*, [2013] ECLI:EU:C:2013:518; On *Kadi I*, see Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional core values and international law – finding the balance?' (2013) 23(4) EJIL 1015 - 1024.

a) Practice in the United States

Individual challenges against targeted sanctions in the United States have been mounted in the domestic arena long before similar UN measures have received increased scrutiny. For the purposes of this research, it is interesting to note that most individuals affected by domestic asset freezes are actually not nationals or residents of the United States but rather aliens connected to a primary sanctions target (e.g. Iran). Under US law therefore, the question emerges whether non-resident aliens would have recourse to constitutional protections at all, considering that for non-nationals, protection under the Constitution was only available in a territory-bound manner.[442] Phrased in another way, the issue is whether the US Constitution applied extraterritorially when the underlying coercive measure (targeted economic sanctions) took extraterritorial effects.

The leading precedent on the extraterritorial application of the US Constitution is *United States v Verdugo-Urquidez* concerning the Fourth Amendment's restraints on search and seizure. Mr. Verdugo-Urquidez's home in Mexico was subject to a search by US drug enforcement agencies without a warrant and the evidence found was later introduced into court proceedings in the United States. Verdugo-Urquidez objected, arguing that using the illegally obtained evidence at trial would violate his Fourth Amendment rights. The Supreme Court, however, denied the challenge, stating that '[a]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.'[443] This, however, was not the case as Verdugo-Urquidez's only connection with the United States was his imprisonment on US territory. Accordingly, the Fourth Amendment did not apply to the search and seizure of his property in Mexico.

Courts have subsequently used this analysis in cases in which non-resident aliens applied to be removed from targeted economic sanctions programmes: For instance, in *People's Mojahedin Org. of Iran v US Dep't of State*, the Court of Appeals for the District of Columbia Circuit has relied on *Verdugo* to deny the petitioner organization, which has been designated as a foreign terrorist organization, recourse to the Due Process Clause

442 Kal Raustiala, 'The Geography of Justice' (2005) 73 FordhamLR 101, 118.
443 *United States v Verdugo-Urquidez* 494 US 259, 271(1990).

of the Fifth Amendment because petitioner was a foreign entity without property or presence in the United States.[444]

The exact scope of when an alien has 'developed substantial connections' to activate constitutional protection is still inconclusive. The language in the opinion of *People's Mojahedin Org. of Iran* seemed to suggest that the presence of property within the United States would be sufficient to trigger Fifth Amendment rights. This interpretation would of course extend due process rights to a significant number of affected individuals and entities, as mostly those with 'blocked' property in the United States would raise challenges against a sanctions order. However, subsequent court decisions have granted constitutional protection only if another (territorial) connection with the United States existed apart from the presence of property.[445] In the *Kadi* proceedings in the United States, the court explicitly left unanswered the question of whether property could trigger at least the limited application of the Constitution.[446]

b) Practice in Europe

In the European Union, individual rights protection against targeted sanctions is mainly provided by the CJEU. In fact, challenges against targeted sanctions have resulted in a particularly prolific jurisprudence of the courts

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444 *People's Mojahedin Org. of Iran v US Dep't of State* 182 F 3d 17, 22 (DC Cir 1999); To be sure, the inapplicability of the Constitution does not leave the affected individuals and entities completely without protection as they still have access to the statutory mechanisms of administrative and judicial review, albeit with only very limited grounds to reverse an adverse listing decision, see Rachel Barnes, 'United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence' in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law* (Studies in international law volume 62. Hart Publishing 2016), 204.

445 See *Al-Aqeel v Paulson*, 568 F Supp 2d 64 (DDC 2008) citing *Nat'l Council of Resistance of Iran v Dep't of State*, 251 F 3d 192, 201 (DC Cir 2001). In this case, plaintiff was the controlling officer of an Oregon corporation and in this role, he travelled to the United States. He also assisted the organization in its acquisition of property in Missouri, among others.

446 *Kadi v Paulson*, Civil Action No. 2009–0108 (DDC 2012); it should also be noted that the 'substantial connections' for Fifth Amendment purposes is not to be equated with the 'minimum contacts' requirement established for the determination of personal jurisdiction; see on this: *In re Terrorist Attacks on September 11*, 2001, 740 F Supp 2d 494, 507–08 (SDNY 2010); See also *In re Terrorist Attacks on September 11*, 2001, 538 F 3d 71 (2d Cir 2008).

unparalleled by other jurisdictions.[447] In the case concerning *Bank Mellat*, the question emerged whether the bank, which the Council claimed was an emanation of the Iranian State and therefore a government entity, could claim EU fundamental rights protection.[448] However, in contrast to the position in the United States, the mere physical location of the affected individual or the presence of territorial ties with the Union has never been a factor in determining the level of protection. This is in line with modern interpretations of the scope of application of the EU Charter of Fundamental Rights, which is explicitly 'addressed to the institutions, bodies, offices and agencies of the Union' without claiming territorial limitations like the ones found in international human rights treaties.[449] Thus, whenever the EU acts, its fundamental rights follow, irrespective of the location of the affected.[450]

At least when it comes to targeted sanctions, this approach seems to be more consistent than the US position, which claims that its regulations apply to situations with only fleeting connection to the United States but is reluctant to extend constitutional rights to non-resident aliens. One possible explanation may be that the US Constitution has a much stronger focus on the status of the individuals under its protection than the EU Charter of Fundamental Rights, which is more concerned with limiting the power of State authority.[451] From the EU perspective, there is no doubt that the Union has acted within its territories and directly caused the violations of fundamental rights, which therefore triggers the application of the charter. In *Boumediene* however, the US Supreme Court has shown its willingness to relax the requirements for the extraterritorial application

447 For a summary of the jurisprudence, see Luca Pantaleo, 'Sanctions Cases in the European Courts' in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law* (Studies in international law volume 62. Hart Publishing 2016).

448 CJEU, Case T-496/10, *Bank Mellat v Council* [2013] ECLI:EU:T:2013:39, paras. 35 – 46.

449 Art. 51 (1) of the EU Charter of Fundamental Rights.

450 Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014), at 1682; In note 7 of Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25(4) EJIL 1071.

451 See Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territory in American law* (Oxford University Press 2009), at 170.

of constitutional rights and adopted a more functional approach.[452] It remains to be seen whether this approach will also level the playing field in challenges against individual sanctions in the future.[453]

6. Conclusion

The analysis above has shown that the phenomenon, which commentators have tried to capture with an expression as simple as 'extraterritorial sanctions', constitutes in fact an immensely complex web of measures engaging very different mechanisms. We have seen that the United States has dominated State practice in the area of extraterritorial economic sanctions while other nations so far have (mostly) restricted themselves to reacting against these assertions of jurisdiction. In particular, legislators, regulators and courts in the United States have tried to stretch the applicable scope of their rules using a variety of different triggers. These include a theory based on parental control over foreign subsidiaries, a territorial hook based on the specific mechanism of US dollar transactions, nearly all of which technically cross US banks and finally, secondary trade boycotts that carry trade restrictions as possible consequences of violation.

Perhaps most surprisingly, this chapter has established that European States have reacted rather inconsistently to US assertions of extraterritorial jurisdiction: It is a myth that US extraterritorial sanctions are universally and continuously condemned, a myth that has its roots in historical incidents such as the *Pipeline*-memorandum and the EC/EU blocking statute against the Helms-Burton Act and the ISA. To be sure, European States still *do* protest certain US sanctions, such as when the Union reactivated said blocking statute against Iran sanctions after the failure of the JCPOA or when Germany and Austria voiced their opposition to the expansion of Russia sanctions targeting the Nord Stream 2 Pipeline. At the same time, however, the EU has remained conspicuously silent on the extension of Iran sanctions in 2010 and 2012 as well as the enactment of extraterritorial sanctions against Russia in 2014 in light of the situation in Eastern Ukraine. Similarly, there is no record that European States have protested US sanctions based on correspondent account jurisdiction. While France did protest the fines levied against BNP Paribas because of their dispropor-

452 *Boumediene v Bush*, 553 US 723 (2008).

453 *Ibrahim v Department of Homeland Security*, 669 F 3d 983 (9th Cir 2012) offers a glimpse into the functional approach adapted to sanctions cases.

tionality, it avoided the questions of extraterritoriality. Switzerland even accepted US jurisdiction and instead focused on the reputational damage suffered by its own financial system as a result of the US sanctions breach.

As Beaucillon has correctly pointed out, these inconsistencies do not particularly help in establishing the positive law.[454] This chapter has argued two mutually reinforcing reasons for this development. On the one hand, the inconsistent response by European States is explained by political convenience. US sanctions are protested against on grounds of extraterritoriality when the two blocs differ on the fundamental policy issues addressed by the sanctions. Therefore, because economic sanctions as tools of 'enforcement' in international law serve a host of domestic policy interests, the response necessarily has to differ according to these interests. On the other hand, however, this chapter has concluded that the legal status of most US sanctions measures is far from settled in international law. Assessing the US State practice against the normative background established in part B offers no conclusive answer to the (il-)legality of extraterritorial economic sanctions.

Specifically, this chapter has entertained the idea that the most controversial jurisdictional triggers used by the United States are all arguably only variations of territoriality: First, the assertion of jurisdiction against controlled foreign subsidiaries is materially identical to the (undoubtedly) territorial regulation imposing strict liability on domestically incorporated parent companies for the conduct of their dependent subsidiaries abroad. Second, the usage of the US financial system is arguably an essential constituent element of monetary transfers denominated in US dollars which therefore justifies the exercise of territorial jurisdiction over such transfers. Third, there is a growing number of scholarly opinions that equate secondary trade boycotts such as those of the ISA with 'regular' territorial restrictions to trade. Further to this last point, there is also a body of EU sanctions which may achieve similar 'trade-chilling' effects as US secondary trade boycotts. Thus, it is arguable that the territoriality principle of customary international law actually allows the United States to unilaterally set regulations with a global reach, in stark contrast to the objective of the territoriality-based system of jurisdiction. The uncertain legal status of US extraterritorial sanctions under customary international law principles of jurisdiction renders these principles functionless in regulating the actions of States and in providing order in international relations.

454 Beaucillon (n 26), 125.

Finally, this chapter has examined the protection of due process rights of individuals affected by these coercive measures. While this issue is not strictly connected with the scope of State jurisdiction under international law, it does have an extraterritorial dimension. In particular, we have seen that the US jurisprudence restricts constitutional rights to those with a substantial connection to the United States. Foreigners, who are frequently the targets of economic sanctions, are therefore more restricted in exercising their due process rights. This approach of the United States is inconsistent with their own aggressive regulatory extraterritoriality.

Because economic sanctions serve to pursue a wide range of different interests, they often do not stand in isolation. For instance, country-based sanctions programs are often accompanied by general export control regulations. Moreover, the shifted focus of economic sanctions towards financial institutions means that these rules are often enforced alongside more internationally harmonized anti-corruption regimes. Similarly, the above-mentioned case of *Licci v Lebanese Canadian Bank* has shown a clear connection between economic sanctions and human rights litigation under the ATS. Further analysis of these related areas in the following chapters may therefore also benefit the discussion of extraterritorial economic sanctions.

III. Non-Proliferation and Export Control

1. Introduction

Non-proliferation, i.e., the prevention of the spread of certain weapons and other security sensitive goods, materials and technologies, is one of the most pressing international security challenges.[455] Non-proliferation may relate to both weapons of mass destruction (**WMD**s) including nuclear, biological and chemical weapons, and conventional weapons including small arms and light weapons.[456] Additionally and of growing importance for international trade and commerce, non-proliferation also refers to the

455 Certain aspects of international security can be characterized as global public goods, see Krisch (n 10). This concept is discussed in more detail below at D.II.1b) Universality and Community Interests.

456 On limits posed by international law on the trade in SALWs, see Zeray Yihdego, *The Arms Trade and International Law* (Studies in international law vol. 15, Hart Pub 2007).

regulation of dual-use items, i.e. goods that have legitimate civilian applications but may also be used for military purposes, for instance as precursors to WMDs or to facilitate human rights violations such as surveillance equipment. More recently, both the rise of non-State actors[457] as well as the rapid emergence of new technologies pose particular challenges to non-proliferation regulation: On the one hand, in the aftermath of the 9/11 terrorist attacks, States have been increasingly focused on preventing WMDs and related dual-use technologies from falling into the hands of terrorist groups.[458] On the other hand, the rapid emergence of new technologies such as 3D printing, which makes it possible to produce weapons from a distance, exacerbate the need for non-proliferation regulation to adapt quickly.[459]

One of the most central instruments to curb the spread of weapons systems is to control the transfer of sensitive goods and technologies, often termed as export control or strategic trade control.[460] The objective of these regimes is to limit trade in such items to friendly or reliable end users.[461] A particular risk to export control policies is posed by the issue of diversion, i.e., when the first recipient of the controlled items in a reliable country decides to re-export or re-transfer these items to an unwanted end user. Trying to prevent such diversions naturally raises specific problems of extraterritoriality: Once the controlled goods and technologies have been exported, they are no longer within the territory of the original exporting State and the exporting State is no longer able to exercise territorial juris-

457 Non-State actors may be defined as individuals or entities not acting under the lawful authority of any State, see Security Council Resolution 1540 (2004), adopted on 28 April 2004, S/RES/1540 (2004); For Katz Cogan (n 52), 344 – 345, the rise of non-State actors is one of the main reasons for what he describes as the regulatory turn in international law.

458 See for instance, The White House, National Security Strategy 2017, at 8: 'We would face grave danger if terrorists obtained inadequately secured nuclear, radiological, or biological material'.

459 Esmée de Bruin, 'Export Control Regimes—Present-Day Challenges and Opportunities' in Robert Beeres and others (eds), *NL ARMS Netherlands Annual Review of Military Studies 2021* (NL ARMS. T.M.C. Asser Press 2022), 43.

460 For the debate on terminology, see Sibylle Bauer, 'Internationale Entwicklungen in der Exportkontrolle' in Arnold Wallraff, Dirk Ehlers and Hans-Michael Wolffgang (eds), *Recht der Exportkontrolle: Bestandsaufnahme und Perspektiven: Handbuch zum Exportkontrollrecht.* zugleich Festgabe für Dr. Arnold Wallraff zum 65. Geburtstag (Schriften zum Aussenwirtschaftsrecht 2015), 74 – 75.

461 This means that export control regulations are often directed towards States and non-State entities that are in any case subject to wider embargo policies or economic sanctions; See on these, above at C.II. Economic Sanctions.

diction over these items. Still, it may have an interest in ensuring that the exported goods and technologies do not fall into unwanted hands. On the other hand, the receiving party, State or non-State, may want to use the goods to achieve certain economic or military goals, including by granting third parties access to the items. During the Cold War, this conflict has led to deep diplomatic clashes between the United States and its European allies on extraterritoriality, culminating in the *Pipeline* incident. Although such strong confrontations have fortunately not occurred after the end of the Cold War, the underlying issues remain and are more problematic than ever.

This chapter starts out with an overview of various international efforts and instruments to regulate the proliferation of sensitive goods, technologies and materials, highlighting export control as a growing concern of international governance (section 2). It will also be shown that while these instruments may have broad scopes of application, they do not justify the exercise of extraterritorial jurisdiction. The core of this chapter, section 3 and section 4, then analyses two specific techniques used to extend domestic jurisdiction to the importing country with regard to further re-exports or re-transfers. On the one hand, particularly the United States argues with a jurisdictional authority *qua* origin of the exported articles (section 3) while most countries engaging in export control seek to extend their legal capacities by requiring importers to voluntarily submit to domestic export regulation (section 4). Section 5 concludes that while there is legitimate practical need for extraterritorial export control, current international law principles are rather hostile towards these regulatory mechanisms.

2. International Instruments

As already discussed, the export control of strategic and security sensitive goods, materials and technologies is one of the most important mechanisms to counter the proliferation of certain weapons and related materials. Thus, although export control has always primarily been a matter of national security and domestic foreign policy,[462] essential parts of these regimes are determined by obligations derived from a host of fragmented international and multilateral instruments. In general, three different types

462 See for instance the findings made by the US Congress in the Export Administration Act of 1979 ('EAA'), Pub. L. 96–72 (93 Stat 503), Sec. 2, 50 U.S.C.app. § 2401.

of measures govern the non-proliferation policies in international law, i.e., binding international treaties, informal multilateral export control regimes and finally, measures imposed by the Security Council.[463]

a) International Treaties

Historically, the most significant international treaties related to non-proliferation all concerned WMDs and the materials to manufacture them, including the Treaty on the Non-Proliferation of Nuclear Weapons (**NPT**),[464] the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (**BTWC**)[465] and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (**CWC**).[466] While the respective treaties differ in their precise scope and design, they all reflect the common problem underlying technology export controls, i.e., the balance between the security interests of the exporting State and the economic interests of the receiving State to peacefully use the controlled technology.[467] As mentioned above, this balance is also at the heart of many disputes on the extraterritoriality of unilateral measures in this field.

The NPT, the first treaty in this series, is particularly problematic in this respect: Its non-proliferation duties are inherently discriminatory as they

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463 Michael Bothe, 'Proliferation of Weapons of Mass Destruction: A Problem of Extra-Territoriality' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Queen Mary studies in international law. Martinus Nijhofff Publishers 2012), 491 f.

464 Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 ('NPT').

465 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adopted 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163 ('BTWC').

466 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45 ('CWC').

467 See for instance Oliver Meier, 'Dual-Use Technology Transfers and the Legitimacy of Non-Proliferation Regimes' in Oliver Meier (ed), *Technology Transfers and Non-Proliferation: Between Control and Cooperation* (Routledge global security studies. Routledge/ Taylor & Francis Group 2014), 4.

divide State parties into two categories and limit the possession of nuclear weapons to a specific group of States, the nuclear-weapons States. This was thought necessary to stabilise the strategic power balance between the United States and the UK on the one hand and the Soviet Union on the other hand through mutual deterrence. This bipolar construction was later replaced by a multipolar concept of stability after France and China joined the treaty as nuclear-weapons States.[468] With regard to these nuclear-weapons States, Art. I of the NPT establishes an absolute prohibition on the transfer of nuclear weapons and explosive devices as well as the transfer of control of any such weapons and devices to any other recipient. Non-nuclear-weapons States on the other hand may not receive them, manufacture or otherwise acquire them.[469] As a corollary to these unequal obligations, the treaty establishes the inalienable right of all States to develop the research, production and use of nuclear energy for peaceful purposes.[470] Thus, ensuring that nuclear material and technology transferred for peaceful purposes are not diverted into military programs becomes a primary objective of the NPT. However, to achieve this objective, the NPT did not explicitly rely on the establishment of decentralised trade control mechanisms but rather opted for the creation of a specialized international organization, the International Atomic Energy Agency (**IAEA**), which monitors compliance with the NPT through the conclusion of safeguards with non-nuclear-weapons States.[471] Nonetheless, multiple non-nuclear-weapons States were able to divert nuclear materials into military programs,[472] which has sparked the adoption of additional multilateral and domestic export control measures.

In contrast to the NPT, both the BTWC and the CWC are non-discriminatory as they prohibit any State to develop, produce, stockpile or otherwise acquire the respective weapons and related materials. Both instruments also establish prohibitions on the transfer of regulated items for military purposes to any person whatsoever. At the same time, both Conventions grant State parties the right to participate in, the 'fullest possible

468 Bothe (n 463), 492 f.
469 NPT, Art. I, II.
470 NPT, Art. IV (1).
471 NPT, Art. III.
472 For instance, in 1974, India was able to successfully test a nuclear explosive device, Philippe Achilleas, 'Introduction Export Control' in Dai Tamada and Philippe Achilleas (eds), *Theory and Practice of Export Control: Balancing International Security and International Economic Relations* (SpringerBriefs in Economics. Springer 2017), at 6; Bothe (n 463), 496.

exchange' of regulated materials, equipment and technologies for peaceful purposes.[473] In this regard, both Conventions also rely on export control as an (additional) system to balance the objectives of non-proliferation and economic development. Within the BTWC regime, the Sixth and the Seventh Review Conference, interpreting Art. III of the Convention, called for the implementation of effective domestic export controls.[474] The CWC addresses the issue of export controls in the treaty itself and requires State parties to review their existing national legislation in the field of trade in chemicals.[475]

Apart from the treaties concerned with the regulation of the non-proliferation of WMDs, the recently adopted Arms Trade Treaty (**ATT**) deserves special mention as the most far-reaching international instrument dealing with the transfer of conventional weapons. The ATT's scope includes a broad range of different weapons and an extensive definition of regulated activities, covering export, import, transit, trans-shipment and brokering.[476] In particular, prohibited activities include the transfer of conventional arms contrary to Security Council resolutions or other international agreements as well as in situations where a State party has knowledge that the transfer will lead to the commission of violations such as genocide or crimes against humanity.[477] While these provisions mainly reflect existing obligations under international law, the ATT also requires State parties to maintain an export control system under their jurisdiction. It even specifies certain characteristics of the system, as the State must, before the authorization of exports, consider several factors including the potential impacts of the export on international peace and security as well as the risk of serious human rights violations.[478] Of particular interest for our purposes are the ATT's provisions regarding the prevention of the diversion of weapons for illicit purposes. While the treaty does not mention extraterritorial jurisdiction, the ATT provides for the possibility for the original exporting State to adopt a range of preventive measures, which include the requirement to submit end-use certificates or even post-

473 BTWC, Art. X; CWC, Art. II (9).
474 Sixth Review Conference of the States Parties BTWC, 'Final Document of the Sixth Review Conference', (2006) BWC/CONF.VI/6; Seventh Review Conference of the States Parties BTWC, 'Final Document of the Seventh Review Conference', (2012) BWC/CONF.VII/7.
475 CWC, Art. XI (2) (e).
476 Collectively referred to as 'transfer', ATT, Art. 2 (2).
477 Ibid., Art. 6.
478 Ibid., Art. 7 (1).

shipment inspections.[479] This provision is further flanked by an obligation to cooperate and share information with each other to combat possible diversions. The provisions of the ATT regarding export controls are therefore far-reaching and evidence of an evolving international attitude that sees unregulated arms trade as a particular global issue.

b) Informal Multilateral Regimes

Because the provisions concerned with export control within the above-mentioned international treaties (in particular with regard to dual-use goods) are vague and indeterminate in nature, interested States have concluded a number of informal multilateral regimes to coordinate their policies in this matter. There are now four major multilateral export control regimes. Of those, three are concerned with specific WMDs, related technologies and their means of delivery (the Nuclear Suppliers Group, the Australia Group, and the Missiles Technology Control Regime), while the Wassenaar Arrangement addresses exports of conventional weapons and dual-use goods.[480] These regimes are generally constituted by the major exporting countries, which means that they are exclusively concerned with the supply side of the trade in weapons and other sensitive technology.

Apart from providing a forum for member States to regularly meet and share proliferation relevant information, the main purpose of these networks is the development and coordination of common guidelines as well as control lists, i.e., lists of sensitive items the transfer and re-transfer of which need to be monitored.[481] These lists, often containing detailed technical descriptions of the items, are then to be implemented in domestic regulation.

Some of the guidelines published by these networks contain recommendations for national export control measures, and importantly, at times endorse the assertion of extraterritorial jurisdiction. For instance, the rec-

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479 Ibid., Art. 11 (1), (2); see also Stuart Casey-Maslen and others, *The Arms Trade Treaty: A commentary* (Oxford commentaries on international law, First edition, Oxford University Press 2016), 11.52 f.

480 Bruin (n 459), 34 – 35.

481 Masahiko Asada, 'The Role of the Security Council in WMD-Related Export Control: Synergy Between Resolution 1540 (2004) and Sanctions Resolutions' in Dai Tamada and Philippe Achilleas (eds), *Theory and Practice of Export Control: Balancing International Security and International Economic Relations* (SpringerBriefs in Economics. Springer 2017), 30.

ommendations on arms brokering legislation mentions the possibility for member States of the Wassenaar Arrangement to establish licensing requirements for nationals engaged in brokering activities regardless of where these activities take place.[482] Similarly, another agreement established under the Wassenaar Arrangement encourages participating States to adopt legislation preventing their nationals and entities registered in their territory from transporting arms in third countries.[483] Both documents thus recommend States to assert extraterritorial jurisdiction based on the nationality principle.

The Participating States of the Wassenaar Arrangement have also addressed the issue of diversion and re-export for both conventional military as well as dual-use items.[484] For instance, the 'Statement Of Understanding On Implementation Of End-use Controls For Dual-use Items'[485] contains guidance for States to adopt effective and flexible end-use controls. Among other things, States are encouraged to require the submission of end-use certificates and may – if appropriate on a case-by-case basis – demand assurance that the final end-user shall not conduct re-exports without approval from the government of the original exporting country.[486]

However, the Wassenaar Arrangement as well as the other informal regimes, due to the sensitive nature of the regulatory area in question, are all designed as legally non-binding political commitments. Therefore, the overall effectiveness of these arrangements is somewhat questionable, in particular, because decision-making in these fora is generally based on consensus,[487] and there are no enforcement mechanisms with regard to partic-

482 Participating States of the Wassenaar Arrangement, Best Practices for Effective Legislation on Arms Brokering, 1 (b), https://www.wassenaar.org/app/uploads/2019/consolidated/Best-Practices-for-Effective-Legislation-on-Arms-Brokering.pdf, last accessed on 13 April 2022.

483 Participating States of the Wassenaar Arrangement, Elements for Controlling Transportation of Conventional Arms Between Third Countries, Element 2, https://www.wassenaar.org/app/uploads/2019/consolidated/4-Elements-for-Controlling-Transportation-of-Conventional-Arms.pdf ,last accessed on 13 April 2022.

484 Wassenaar Arrangement, Public Documents Vol. III, Compendium of Best Practice Documents, https://www.wassenaar.org/app/uploads/2019/12/WA-DOC-19-PUB-005-Public-Docs-Vol-III-Comp.-of-Best-Practice-Documents-Dec.-2019.pdf, last accessed on 13 April 2022, pp. 76 – 87.

485 Ibid., p. 80.

486 Ibid., pp. 86 – 87.

487 Bauer (n 460), 78.

ipating States that do not adhere to the common standards.[488] Thus, unless the best practice documents and statements issued by these regimes are adopted by more formal institutions such as the IAEA or the Organization for the Prohibition of Chemical Weapons,[489] these recommendations are not legally binding and can in no way serve as a basis under international law for the exercise of extraterritorial jurisdiction.

c) Security Council Resolutions

The instruments analysed so far have distinct weaknesses: On the one hand, international treaties contain vague and indeterminate provisions on non-proliferation export controls; on the other hand, informal multilateral regimes lack effective enforcement mechanisms and participation by the majority of (non-exporting) States. At least with regard to WMDs, these weaknesses are partly mitigated by Security Council Resolution 1540. The resolution, which forms part of a sequence of measures reacting to the 9/11 terrorist attacks, seeks to prevent non-State actors form acquiring and developing WMDs, including their means of delivery.

To this end, paragraph 1 of the resolution creates the universal mandate for all UN member States to refrain from supporting non-State actors seeking to develop or otherwise acquire WMDs. Paragraph 2 of the resolution obligates States, in accordance with their national procedures, to adopt and enforce appropriate effective legislations prohibiting such conduct. Finally, paragraph 3 of the resolution calls on all member States to establish domestic measures to prevent the proliferation of WMDs, including by establishing controls over 'related materials'. Specifically, States shall establish and maintain laws and regulations to control proliferation-relevant export, transit, trans-shipment and re-export, including end-user controls.[490] 'Related materials' in Resolution 1540 refers to dual-use goods and are defined as 'materials, equipment and technology covered by relevant mul-

488 Cindy Whang, 'The Challenges of Enforcing International Military-Use Technology Export Control Regimes: An Analysis of the United Nations Arms Trade Treaty' (2015) 33(1) Wisconsin international law journal 114, 130 – 131.

489 Thilo Marauhn, 'Global Governance of Dual-Use Trade: The Contribution of International Law' in Oliver Meier (ed), *Technology Transfers and Non-Proliferation: Between Control and Cooperation* (Routledge global security studies. Routledge/ Taylor & Francis Group 2014), at 58.

490 Security Council Resolution 1540 (2004), adopted on 28 April 2004, S/RES/1540 (2004).

tilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery'.[491] While the resolution does not explicitly specify the 'multilateral arrangements', this term is likely referring to the export control regimes discussed above.[492] However, this does not make the control lists adopted by these arrangements mandatory on all UN member States. As paragraph 6 of Resolution 1540 shows, States are rather encouraged to develop their own national control lists.[493]

The universal ambit and binding nature of Resolution 1540 prompt the question whether paragraph 2 and/or paragraph 3 of the resolution legitimizes the establishment of extraterritorial laws, including extraterritorial export control regulation.

Volz, for instance, argues that the obligation under paragraph 2 of the resolution to adopt and enforce appropriate (criminal) laws legitimizes the use of extraterritorial jurisdiction to prohibit non-State actors to manufacture, acquire, possess, develop, transport, transfer or use WMDs. He submits that the *effet utile* of the measures requires that any UN member State has the competence to punish any non-State actor found on domestic territory for having engaged in the prohibited conduct. This includes the case that a foreigner had violated the prohibitions abroad and is only later present on the territory of the member State. The punishment of non-State actors for their conduct abroad, however, would only be possible if Resolution 1540 granted member States the competence to establish *prescriptive* jurisdiction over such foreign conduct.[494] If Volz is correct, then paragraph 2 of the resolution arguably legitimizes extraterritorial export and re-export prohibitions of WMDs as this provision also refers to the 'transport' and 'transfer' of WMDs. This conclusion is not imperative, however, as it could be argued that export and re-export controls are rather subject to paragraph 3 of the resolution as *lex specialis*. In contrast to paragraph 2 of the resolution, paragraph 3 explicitly obligates the establishment of 'domestic' controls (likely meaning 'not extraterritorial').

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491 See the Definitions in the Footnote to Security Council Resolution 1540 (2004).

492 Asada (n 481), 36.

493 The adoption of national lists concerned with WMD proliferation mirroring these produced by the various multilateral arrangements was only made mandatory in relation to North Korea with Security Council Resolution 1718 (2006), adopted on 14 October 2006, S/RES/1718 (2006); see further: ibid., 36 – 37.

494 Volz (n 24), at 331 – 332.

However, even if we accepted Volz's proposition that paragraph 2 of Resolution 1540 allows States to adopt extraterritorial export control legislation, this provision would still not justify extraterritoriality of most national export control regulations: On the one hand, paragraph 2 of the resolution only applies to the transport and transfer of the 'weapons' themselves, but not to dual-use goods. As mentioned above, dual-use goods are covered in Resolution 1540 through the definition of 'related materials' and while paragraph 3 of the resolution explicitly also controls such related materials, paragraph 2 does not. On the other hand, Resolution 1540 only concerns the proliferation of WMDs to non-State actors, while much of domestic export control measures are (also) concerned with recipients acting under the lawful authority of States. Thus, even a broad interpretation of Resolution 1540 would not serve as a basis for most extraterritorial export control regulations. Therefore, whether such measures comply with international law must be ascertained according to the customary jurisdictional principles.

3. Jurisdiction Based on the 'Nationality' of Goods

a) Practice in the United States

In the United States, rapid globalization including intensifying trade, technology transfer and investment networks has been historically perceived as a threat to the effectiveness of unilateral strategic export controls.[495] The growing capacity and possibility of foreign nations to divert controlled US goods and technology have been a thorn in the side of US regulators. It is no surprise, therefore, that the United States has pioneered the extensive use of extraterritorial export controls. Apart from extending US regulations to domestic controlled foreign subsidiaries,[496] one of the primary mechanisms employed to achieve this objective is the enforcement of re-export controls.

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495 Kenneth W Abbott, 'Defining the Extraterritorial Reach of American Export Controls: Congress as Catalyst' (1984) 17 Cornell International Law Journal 79, 92; Gregory Bowman, 'A Prescription for Curing U.S. Export Controls' (2014) 97(3) Marquette Law Review 599, 628 f.

496 See above at C.II.2. The Extension of Personality-based Jurisdiction to Foreign Subsidiaries.

US re-export controls have existed at least since the end of the Second World War.[497] Today, multiple statutes and regulations administered by different government agencies govern this complex area of law. The Export Administration Regulations (**EAR**)[498] covers a broad range of dual-use goods, the commercially most important category.[499] In addition to the EAR, other notable mechanisms concerned with export and re-export control include the International Traffic in Arms Regulation (**ITAR**),[500] which covers conventional defence articles and the Atomic Energy Act,[501] which establishes the Nuclear Regulatory Commission overseeing nuclear equipment and technologies. Finally, certain country-based economic and trade sanctions programs, which often include extensive export controls beyond the category of goods mentioned above, are administered by OFAC under various legal authorities.[502]

The EAR restricts trade in controlled goods based on an evaluation of five different criteria, namely the specific characteristics of the item or technology, the destination country of the prospective transfer, the ultimate end-user and the ultimate end-use as well as the conduct in question (for instance, the EAR contains specific rules for financing, freight forwarding etc.).[503] For exports not originating within the United States, the EAR defines four different situations in which it nevertheless claims authority: First, the EAR controls the re-export of all US origin items (wherever located) to other countries, i.e., the physical transfer of goods from one foreign country to another without them passing through US territory.[504] Second, the EAR also applies to certain transactions between third countries involving purely foreign-made products if the items in question 'incorporate', are 'bundled' or 'commingled' with controlled US

497 Mestral and Gruchalla-Wesierski (n 152), at 77 f.

498 Export Administration Regulations, 15 C.F.R.§§ 730–774 ('EAR'); The EAR was based on the authority of the EAA. The EAA was supposed to expire, but has been 'kept alive' through Executive Orders, see Wei Luo, 'Research Guide to Export Control and WMD Nonproliferation Law' (2007) 35 International Journal of Legal Information 447, 449 – 450; In 2018, the Export Controls Reform Act of 2018, Pub. L. 115–232 (HR 5040) repealed the EAA and now provides the new authority.

499 Bowman (n 495), 619.

500 International Traffic in Arms Regulation, 22 C.F.R. §§ 120–130 ('ITAR').

501 Atomic Energy Act of 1954, Pub. L. 83–703, 68 Stat. 919 (1954), 42 U.S.C. §§ 2011–2297.

502 See above at C.II.1c) Overview of US Economic Sanctions.

503 EAR, 15 C.F.R. § 736.2 (a).

504 EAR, 15 C.F.R. § 736.2 (b) (1).

origin commodities or technology exceeding a certain *de minimis* level. Generally, foreign-made items are 'contaminated' and thus subject to US export control regulations if they include US content that makes up more than 25 % of the total fair market value of the product. However, for re-exports to certain countries and categories of goods considered particularly problematic, this threshold value may drop to 10 % or there may be no threshold value at all.[505] Third, foreign goods are also subject to the EAR if they do not contain any US components but are produced directly using US origin technology or software.[506] And finally, the EAR claims authority with regard to foreign goods that are not themselves produced using US origin technology but where the facility used for manufacturing them is a direct product of US origin technology or software.[507] In each of these cases, the transactions may either be prohibited or subject to a licence issued by various US government agencies. Violation of these regulations may carry both administrative and criminal sanctions even in cases where the foreign re-exporter had no knowledge of the applicable export control regulations.[508] A particularly sensitive sanction for foreign multinational enterprises is the possibility for US agencies to deny export privileges to these companies including restricting their access in general to US goods and technologies.

While enforcement of extraterritorial export control regulations has received only sparse attention after the highly political Pipeline episode,[509] recent cases regarding Chinese telecommunications companies have risen to unexpected prominence. In one case, US authorities alleged that the Chinese manufacturer ZTE and its affiliates had purchased controlled US origin equipment and subsequently re-exported them to Iran without obtaining necessary licenses. Apart from violating the general comprehensive US economic sanctions against Iran, ZTE also specifically exported telecommunications equipment with certain surveillance components (which were listed pursuant to the Wassenaar Arrangement) and thus violated the EAR.[510] ZTE pleaded guilty and paid fines exceeding USD 1 billion in a massive settlement involving various US agencies. In addition,

505 EAR, 15 C.F.R. § 736.2 (b) (2) and § 734.4.
506 EAR, 15 C.F.R. § 736.2 (b) (3).
507 EAR, 15 C.F.R. § 734.3 (a), § 736.2 (b) (3).
508 *Iran Air v Kugelman*, 996 F 2d 1253, 1257–59 (DC Cir 1993).
509 See above at C.II.2b)bb) Diplomatic Protest against US Assertions of Control-based Jurisdiction.
510 See for instance, Factual Resume, *United States v ZTE Corporation*, 3–17-cr-120k (ND Texas 2017), paras. 22 and 43.

the company agreed to a denial of export privileges for up to seven years which, however, was initially suspended subject to certain probationary conditions.[511]

However, one year after the initial closure of the case, the Bureau of Industry Security (**BIS**) found that the company had made false statements with regard to disciplinary measures that ZTE was required to take against several employees engaged in the original export scheme.[512] It thus revoked the suspension of the denial order, barring the company from importing necessary US goods and technologies. Even though US President Trump later intervened and had the denial order removed as the ZTE measures increasingly evolved into one item of negotiation within the overall trade affair between the United States and China,[513] this case demonstrates that the United States is willing and able to enforce its re-export controls against foreign corporations.

b) Practice in China

China has continuously opposed US actions against its technology companies. The reactions have been relatively muted in the beginning but significantly escalated after the United States raised the stakes by enacting more intrusive regulations against ZTE and other national champions. The Chinese side argued that it opposed 'unilateral sanctions against Chinese entities by any country according to its domestic law'.[514] While the Chinese government does not explicitly refer to possible violations of international law as a basis for its opposition, the focus on 'unilateral' and 'domestic law' may hint that China views US export control measures as impermissibly extraterritorial. However, given the general preference of

511 Department of Commerce, *In the Matter of Zhongxing Telecommunications Equipment et al*, Order of 15 April 2018 Activating Suspended Denial Order relating to Zhongxing Telecommunications Equipment Corporation and ZTE Kangxun Telecommunications Ltd., at 2 f.

512 Ibid., at 4.

513 Department of Commerce, *In the Matter of Zhongxing Telecommunications Equipment et al*, Order of 23 July 2018 Terminating Denial Order Issued on April 15, 2018, Against Zhongxing Telecommunications Equipment Corporation and ZTE Kangxun Telecommunications Ltd., 83 Fed. Reg. 34825.

514 Regular Press Conference of the Ministry of Commerce (16 May 2019), available at http://english.mofcom.gov.cn/article/newsrelease/press/201905/20190502864790.shtml, last accessed on 13 April 2022.

China to resolve conflicts through informal compromise as well as the chaos of the overall tension between the United States and China, of which the recent actions are just one small component, it is hard to tell whether these statements reflect *opinio iuris*.

On the other side, China has most recently adopted its new Export Control Law, which came into force on 1 December 2020.[515] Among other things, the new Chinese Export Control Law includes a provision that allows for retaliatory measures against other nations if they apply their export control regulation in a manner threatening the national security or national interest of China.[516] It does not seem far-fetched to believe that this provision is a reaction to the perceived extraterritorial nature of US export control laws.

The Chinese Export Control Law also introduces re-export controls. In this regard, Article 45 of the new law prohibits the transit, transhipment, through transportation, and re-export of any controlled item.[517] According to this provision, therefore, the Chinese Export Control Law applies to re-exports of controlled Chinese origin goods occurring solely between third countries. Notably however, a percentage test similar to the *de minimis* rule under the EAR, which was included in one of the earlier draft versions of the law,[518] was removed from the final law. Under the percentage test of the draft Chinese Export Control Law, the law would have applied to the transfer of an item from a jurisdiction outside of China to a third country or region if it contained controlled Chinese items exceeding a certain value threshold. This provision of the draft Chinese Export Control Law had caused tremendous international uncertainty and during its public comment phase, no less than 14 US, European and Japanese industry associations submitted a joint statement urging for the reconsideration of this provisions.[519] While the percentage test was eventually not included in

515 Standing Committee of the National People's Congress, Export Control Law of the People's Republic of China (promulgated on 17 October 2020, entered into force 1 December 2020), available at http://www.npc.gov.cn/npc/c30834/202010/cf4e0455f6424a38b5aecf8001712c43.shtml, last accessed on 13 April 2022.

516 Export Control Law of the People's Republic of China, Art. 48.

517 Export Control Law of the People's Republic of China, Art. 45.

518 Draft Chinese Export Control Law, Art. 64, available at http://www.cistec.or.jp/english/export/china_law/02_fuken1.pdf, last accessed on 13 April 2022.

519 The Computing Technology Industry Association et al., 'Joint Comments by Industrial Associations of the United States, Europe and Japan on China's Export Control Law Draft', at 6: 'Reexports have extra-territorial effects, which should be eliminated or highly limited', available at http://www.cistec.or.jp/service/china_law/180309-01-e.pdf, last accessed on 13 April 2022.

the final Export Control Law, it may be possible for the test to be revived through administrative regulations.

c) Practice in Europe

European practice with regard to re-export controls has been inconsistent.[520] The most significant European action has actually been a series of *reactions* in 1982 against the scope of US regulations during the already mentioned *Pipeline* incident. In the same diplomatic note criticizing the US use of control-based jurisdiction,[521] the EC also protested the export prohibitions to the Soviet Union based on the origin of the goods or technologies involved.[522] After the 1982 *Pipeline* incident however, European States have started to either silently acknowledge the existence of US re-export controls without further protest or in exceptional cases even started to collaborate with US authorities in limited areas. The UK for instance has recently concluded a treaty with the United States (the British-US Defence Trade Cooperation Treaty) which allows for the licence-free export and import of certain ITAR listed goods to British firms. In return, however, the treaty stipulates that further re-transfers and re-exports are subject to control and that in particular, the UK government, before granting an authorization, shall require documentation including US approval of the proposed transaction.[523] Although the explicit inclusion of a provision on mutual re-export control may be a novel approach, it seems that British authorities have informally supported US re-export policies already before the conclusion of the Defence Trade Cooperation Treaty.[524]

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520 See further Quentin Genard, 'European Union Response to Extraterritorial Claims by the United States: Lessons from Trade Control Cases' [2014] Non-Proliferation Papers 1.

521 See above at C.II.2b)bb) Diplomatic Protest against US Assertions of Control-based Jurisdiction.

522 European Community: Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, Presented to the United States Department of State on 12 August 1982, 21 ILM (1982) 891.

523 Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Defense Trade Cooperation, Treaty Series No. 26 (2013), Art. 9 (1).

524 See the verbal exchange between Mr. Jenkin and Mr. Lincoln, House of Commons, Defence Committee, Third Report of Session 2007–08 on the UK/US Defence Trade Cooperation Treaty, at 18.

While European States have thus backed down from their hostile attitude regarding US re-export controls, their own efforts in preventing the diversion of exported goods are much less intrusive. In particular, European States have not assumed jurisdiction over transactions between third countries based on the origin of the involved goods (or the origin of the components of the goods or the origin of the underlying technology). Rather, the European system of re-export controls generally relies on the use of end-user certifications.[525]

d) Comparative Normative Analysis

States have a legitimate interest that sensitive items and technologies posing potential security threats are not used or disposed in any way contrary to the conditions under which the original export was licenced. This is well recognized and several international documents including Security Council Resolution 1540 refer to the establishment of re-export controls to this end.[526] However, while the State of origin undoubtedly has jurisdiction over the primary export of controlled goods in the moment that these goods are physically removed from its territory, that territorial jurisdiction of the exporting State generally ceases to exist once the goods have reached the dominion of another (the importing) State.[527] The question thus becomes whether re-export regulations are justified by some jurisdictional basis under international law other than territoriality. In this regard, the nationality principle, the protective and the effects principle as well as considerations of anti-evasion all potentially support domestic re-export controls. However, the following analysis confirms that for the majority of cases, none of these principles justify regulating exports between third State parties after the controlled goods have left the territorial jurisdiction of the original exporting State.[528]

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525 See below at C.III.4b) Practice in Europe.

526 See above at C.III.2c) Security Council Resolutions.

527 *American President Lines Ltd v China Mutual Trading Co Ltd.*, Supreme Court of Hong Kong, 1953 American Maritime Cases 1510. The facts of the case are summarized in Cynthia D Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* ([2. ed.], Martinus Nijhoff 2002), at 599.

528 Andrea Bianchi, 'Comment to Professor Maier' in Karl M Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law Internat 1996), 95; Achilleas (n 472), 13; Volz (n 24), at 85 – 86; Christian Forwick, *Extraterritori-*

The United States seems to view the origin of goods and technologies to be something similar to the nationality of natural or legal persons. Goods and technologies that contain at least a *de minimis* level of US origin content are considered as 'items subject to the EAR' which remain under the jurisdiction of the United States even after these goods have been exported abroad.[529] However, outside of the United States, this theory has not been accepted in practice: For instance, during the *Pipeline* incident, the EC argued that US re-export controls could not be based on the nationality principle because '[g]oods and technologies do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them.'[530] This view is also overwhelmingly shared in literature.[531] Nationality is considered to have its basis in the notion of attachment or allegiance to a State as well as in the existence of reciprocal rights and duties. However, unlike ordinary natural persons, goods and technologies can neither develop feelings of affiliation towards a nation nor enjoy the benefits of nationality nor be bearer of rights and obligations.[532] Thus, because goods do not possess any nationality, it is not possible under international law to use their origin as basis for extraterritorial re-export controls.

Because export controls relate to matters of national security and other threats to the domestic territory or economy, it does not seem too far-fetched to consider the protective or the effects principle to justify jurisdiction over persons controlling certain sensitive goods.[533]

The application of the protective principles requires a threat to the State's fundamental interests, such as its security, integrity, sovereignty or important governmental functions.[534] Because there is a tendency for States to quite easily assume a danger to the security and integrity of

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ale US-amerikanische Exportkontrollen: Folgen für die Vertragsgestaltung (Abhandlungen zum Recht der Internationalen Wirtschaft vol 25, Verlag Recht und Wirtschaft 1992), at 77.

529 EAR, 15 C.F.R. § 734.3.

530 European Community: Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, Presented to the United States Department of State on 12 August 1982, 21 ILM (1982) 891, 894.

531 See e.g., Bowman (n 495), 654 ff; certain exceptions are accepted, for instance with regard to marine vessels, aircrafts and spacecrafts as well as cultural property.

532 Forwick (n 528), at 77.

533 *United States v Evans*, 667 F Supp 974, 980 – 981 (SDNY 1987).

534 See above B.I.2e) The Protective Principle.

the State,[535] the literature is rightly restricting jurisdiction based on the protective principle to direct threats.[536] Thus, the protective principle is at most applicable for very exceptional cases of re-export, such as when precursors to WMDs or other weapons are diverted to terrorist organisations planning an imminent attack on the State.[537] However, certainly the vast majority of re-exports of controlled items do not meet this requirement. Rather, re-exports in general do not threaten the existence or essential functions of the original exporting State in such a way as to justify application of the protective principle.

Similarly, the effects doctrine cannot generally justify the extension of jurisdiction to re-exports. In this regard, this basis of jurisdiction requires the occurrence of actual effects; the mere potential or threat of negative implications is not a sufficient basis to assert effects-based jurisdiction.[538] Most re-exports certainly do not satisfy this requirement because the mere transfer of goods between two parties located abroad hardly ever creates any tangible effect within the original exporting State. However, if a re-export should, under exceptional circumstances, indeed result in direct and substantial effects to the State's national security, then the protective principle would also likely apply. In this case, considerations with regard to the effects principle would be superfluous. Accordingly, the role of the effects principle in justifying re-export controls is rather limited.

The most convincing argument to allow for (limited) jurisdiction over extraterritorial re-exports seems to stem from considerations of anti-evasion. In fact, even authors in support of origin-based re-export controls implicitly argue with their purpose to contain abuse and to enhance the efficiency of the entire control system.[539] For instance, if a transaction involves exporting controlled goods from the United States to Iran with a short storage transit in Germany, it would be reasonable to assume that US

535 See Ryngaert, *Jurisdiction in International Law* (n 2), 115.

536 See above B.I.2e) The Protective Principle.

537 More restrictive: Mestral and Gruchalla-Wesierski (n 152), at 30.

538 Ryngaert, *Jurisdiction in International Law* (n 2), 114; The court in *United States v Evans*, 667 F. Supp. 974, 980 – 981 (SDNY 1987) applied both the protective and the effects principle.

539 According to Karl M Meessen, 'Extraterritoriality of Export Control: A German Lawyer Analysis of the Pipeline Case' (1985) 27 German Yearbook of International Law 97, 100 f., 'there is a basis for jurisdiction for regulating foreign-state-to-foreign-state exports if the regulations relate to goods exported from the regulating state or are produced under its licence'; See also: Wallace (n 527), 611 f.

jurisdiction extended to the entire transfer. The transit through Germany does not materially change the overall direction of the export from the United States to Iran. Because the entire transfer from the United States to Iran must be regarded as a single export in this specific case, territorial jurisdiction of the State of origin sufficiently justifies regulation of the transit through Germany.[540]

The same should apply if a US company, because it is prohibited to directly export certain controlled items to Iran, arranged with a German company that it would instead export the goods to the German importer, however, under the mutual understanding that the goods should be eventually forwarded to Iran. The purpose of the German company is thus to act as an intermediary, disguising the intended transfer of the goods from the United States to Iran. In this case, it could be argued that the United States should not only be able to assert jurisdiction over the first export from US territory to Germany, but also over the re-export of the items from Germany to Iran. In this regard, both the German intermediary company and the US exporter engaged jointly in an evasive scheme, justifying the exercise of jurisdiction also over the re-export.

It would, however, go too far if one were to consider every re-export to fall under considerations of anti-evasion. Specifically, if an unsuspecting US company exported controlled items to a German importer, and the importer later decides on his own volition to divert the items to a sensitive destination, this re-export cannot be regarded as an act of evasion. The German importer is not bound by US export control regulations (assuming he did not voluntarily subject himself to such regulations[541]). Therefore, because he is not required to follow US export controls, his conduct cannot be considered an evasion of these controls. Unlike the above example, the German importer is also not acting jointly with the US counterpart, which would justify US jurisdiction over the entire evasive scheme. Thus, while anti-evasion may justify some US re-export controls, this principle certainly cannot support the vast majority of EAR controls based on the origin of the controlled goods.

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540 In this sense: Abbott (n 495), at 134 – 137 proposes a rule where US authority ceases when the goods have 'come to rest' in another jurisdiction.

541 See below at C.III.4. Jurisdiction Based on Voluntary Submission.

4. Jurisdiction Based on Voluntary Submission

a) Practice in the United States

As already indicated above, another regulatory technique to prevent the potentially adverse effects of re-exports involves the use of voluntary submissions, such as certificates, contracts and similar instruments in which the purchaser guarantees that he/she will not use or transfer the received goods contrary to the original license. Despite the fact that US law applies *eo ipso* to re-exports of all items and technologies of US origin to third States, US agencies sometimes require foreign importers to additionally submit an end user statement. For instance, 15 C.F.R. § 748.9 (b) and § 748.11 require an application for an export licence to include a 'Statement by Ultimate Consignee and Purchaser' for certain defence equipment as well as for exports to the PRC.[542] In this statement, the end user must declare that he/she will not re-export the items received unless specifically authorized by the EAR or by prior written approval of the BIS.[543]

Moreover, the United States sometimes requires importers of US origin goods to consent to physical on-site visits in the host country in order to inspect that the imported goods are only used according to the license and have not been re-transferred or re-exported. One such program is the Validated End-User (**VEU**) Program in which companies from certain foreign countries (most notably China) can apply for a privileged status resulting in a more streamlined export control licensing procedure to these approved end-users.[544] Among others, one of the considerations for foreign companies to receive VEU authorization is consenting to on-site reviews by US Government officials to verify the end-user's compliance

542 EAR, 15 C.F.R. § 748.9 (b) and § 748.11 (a); See also Mestral and Gruchalla-Wesierski (n 152), 82.

543 Form BIS-711 of the US Department of Commerce: '[E]xcept as specifically authorized by the U.S. Export Administration Regulations (15 C.F.R. parts 730–774), or by prior written approval of the Bureau of Industry and Security, we will not reexport, resell, or otherwise dispose of any items approved on a license supported by this statement (1) to any country not approved for export […], or (2) to any person if we know that it will result directly or indirectly, in disposition of the items contrary to the representations made in this statement or contrary to Export Administration Regulations.'.

544 EAR, 15 C.F.R. § 748.15.

with the conditions of the authorization.[545] However, even prior to the establishment of the VEU Program in 2007, the United States had assumed the possibility to conduct physical on-site verifications for military items[546] as well as for dual-use items.[547] With regard to dual-use items, the BIS is posting Export Control Officers at various locations around the world to conduct such verifications. If a verification is not possible for instance because of lack of cooperation by the foreign company or interference by the host government, the companies may be included on the Unverified List by the Department of Commerce which will inhibit their ability to receive further exports.[548]

b) Practice in Europe

During the *Pipeline* incident, the EC not only criticized US re-export controls based on the 'nationality' of goods, it also condemned the use of private submissions to justify US jurisdiction. In the 1982 regulations, the US government relied on prior private submissions to prohibit the export and re-export of direct products of US origin technology: Among others, such re-export was prohibited (1) if the foreign user of the technology had been required to give a written assurance, at the time of the original technology transfer, that it would not transfer the technology or any of its direct products to the Soviet Union; or (2) if the foreign user had agreed to abide by US export control regulations in a license agreement or similar contract with its American supplier.[549] The EC, in its diplomatic memorandum, rejected this assertion of jurisdiction, arguing that the United States attempted to misuse the freedom of contract in order to circumvent rules of international law: Private contractual submissions, the EC argued, could not serve as a valid basis for jurisdiction.[550]

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545 EAR, 15 C.F.R. § 748.15 (a) (2).

546 Andrea Edoardo Varisco, Kolja Brockmann and Lucile Robin, 'Post-shipment Control Measures: European Approaches to On-site Inspections of Exported Military Materiel' (2020) https://www.sipri.org/sites/default/files/2020-12/bp_2012_post-shipment_controls.pdf, p. 16.

547 Ibid.

548 EAR, 15 C.F.R. § 744.15 (c).

549 See Abbott (n 495), 87.

550 European Community: Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act, Presented to the United States Department of State on 12 August 1982, 21 ILM (1982) 891, 895 f.

However, despite these differences during the *Pipeline* incident, contemporary administrative practice of most EU member States frequently makes use of end user certificates including private submissions to the jurisdiction of the exporting State. According to Art. 12 (2) of the Council Regulation (EU) 2021/821, which regulates export controls with regard to dual-use goods, member State authorities must require an end-use statement as part of the application documents for any license.[551] While the exact certifications end-users have to give with regard to re-export differ from country to country, Germany, for instance, requires that end-users declare that no re-export will be undertaken without the prior approval of the German government (*Genehmigungsvorbehalt*).[552] In principle therefore, the end-user abroad must abide by German export control regulations, non-compliance with which may have consequences for future licensing decision.[553] This approach, levelling end-use certificates to strengthen re-export controls is also explicitly endorsed by the EU Council in its 'Best practice recommendations for elements of a Community End Use Certificate'.[554] Other member States apart from Germany have thus adopted similar regulations.[555]

Similar to the United States, European nations have recently started to conduct physical on-site verifications within the territory of the importing nation or to require the importing State to consent to such verifications. In Germany for instance, according to § 21 (5) of the Foreign Trade Ordinance, German authorities may condition export licence approval on the submission of a certification issued by the importing country that it agrees to on-site post-shipment verifications.[556] However, during the pilot phase since May 2017, this provision was only applied to exports to governmen-

551 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), [2021] OJ L206/1.

552 Federal Office for Economic Affairs and Export Control, 'Manual: Completion of German end-use certificates', p. 9 – 10, available at https://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_eve_ausfuellanleitung_eng_sonstige_gueter.pdf?__blob=publicationFile&v=2, last accessed on 13 April 2022.

553 Ibid.

554 Council of the European Union, Best practice recommendations for elements of a Community End Use Certificate, 17135/08, COMER 228, Annex, at 2.

555 For a discussion of other EU member State practice, see Odette Jankowitsch-Prevor and Quentin Michel (eds), *European Dual-Use Trade Controls: Beyond Materiality and Borders* (Peter Lang 2014).

556 § 21 (5) of the German Foreign Trade Ordinance.

tal recipients of small arms and light weapons and other specific types of firearms so that the full potential of the provision has not been tested in practice yet.[557]

c) Comparative Normative Analysis

The practice of end user certificates, in which the purchaser of controlled goods agrees to abide by the export control regulations of the exporting State, raises the question whether submissions by private parties may serve as a basis for the exercise of extraterritorial jurisdiction. Phrased differently, is the exporting State permitted under international law to exercise jurisdiction over a purchaser abroad simply because that purchaser has consented to such jurisdiction. The answer to this question is crucial as re-export controls are ordinarily not justified by any of the traditional jurisdictional principles.[558]

When the importer declares in an end-user certificate that he will not re-export the received items without prior administrative approval of the exporting State, he consents to the power of the exporting State to create rules with regard to his conduct, in particular to allow or to prohibit a further re-export. We can thus interpret this consent as a voluntary submission of the importer to the (extraterritorial) jurisdiction to prescribe of the original exporting State. While the EC argued strongly against the validity of such private consent to US jurisdiction during the *Pipeline* incident,[559] States, in contemporary practice, make widespread use of end-user certificates or contractual clauses to secure their export control strategy.

In light of this development, Ryngaert has argued that there are generally no reasons why a private company should not be able to voluntarily 'bond' to the regulatory standards of another country because the submission to the jurisdiction to prescribe of the exporting State would not diminish the regulatory competence of the home State of the importer.[560] If the home State of the importer indeed disapproved of the possibility of domestic importers to subject themselves to foreign jurisdiction, it

557 Edoardo Varisco, Brockmann and Robin (n 546), p. 15 – 16.

558 See above at C.III.3d) Comparative Normative Analysis on the question that there is ordinarily no basis under international law for re-export controls.

559 Supporting this view also, Volz (n 24), 216 – 217.

560 Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (n 345), 634 f. who notes that this happens very commonly in the field of international financial regulation.

would always retain the possibility to explicitly prohibit such conduct (for instance by using a blocking statute).[561] Support for Ryngaert's position may further be found in principles of private international law, where the possibility to contractually apply foreign law or to submit disputes to a certain jurisdiction has been long accepted.[562]

However, there are compelling arguments against accepting private submissions to foreign regulations as a valid jurisdictional basis. From a practical perspective, allowing importers to voluntarily subject themselves to the regulation of the exporting State would increase the possibility of conflict if the rules of both States contradicted each other, which may result in unwanted legal limbos.[563] However, the potential of conflict alone would not suffice to dismiss jurisdiction based on private submissions as conflicting prescriptive jurisdiction is a regular occurrence in international law, for instance if regulations prescribed by two States based on nationality and territoriality differ. More fundamentally however, the scope of prescriptive jurisdiction of a State is traditionally determined by the existence of a genuine link between the State and the situation at hand in a form such as territoriality, effects or nationality. It is doubtable whether such a genuine link may be replaced by voluntary private submissions. Rather, under traditional doctrine, private entities cannot alter the sovereign legal position of States, either through contract with or through submission to another government.

This conclusion would necessarily also apply to the submission of the importer to post-shipment verifications including on-site visits. In fact, unlike mere approval requirements for re-exports, such physical controls would amount to an assertion of enforcement jurisdiction by the original exporting State. If the importer cannot alter the scope of its home State's jurisdiction to prescribe, then it is still less able to dispose of its home State's jurisdiction to enforce, which is strictly territorial under international law. An exporting State may not exercise jurisdiction to enforce through on-site verifications based solely on the consent of the importer as doing so would severely encroach on the territorial sovereignty of the importing State. Rather, the consent of the home government, either for

561 Ibid., 635.

562 Mills (n 14), 230 – 233.

563 See for instance Simon Rice, 'Discriminating for World Peace' 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), at 367.

individual verifications or in general through an international agreement on the matter, must be additionally present.[564]

In practice, however, this constellation poses less problems than the submission of domestic importers to the exporting State's extraterritorial jurisdiction to prescribe. This is because in general, such on-site verifications are only conducted with the approval or in conjunction with the government of the importing State. With regard to the VEU for instance, the United States had already previously concluded a specific agreement with China on the issue of verification.[565] The recently introduced possibility of physical inspections in German export control regulations also requires the consent not of the individual importer, but its home country.[566]

5. Conclusion

The end of the Cold War and the rise of new transnational threats in conjunction with the process of globalization and advancements in communication technology have dramatically changed the international security landscape. The risk that conventional weapons and WMDs, as well as dual-use goods and technologies that have both civil and military application, may land into the wrong hands has grown into a pressing global concern. At the same time however, private companies and developing States have legitimate interests to profit from these goods and technologies economically. Export control has established itself as the standard mechanism to balance these two objectives – limit the possibly devastating effects of proliferation, while allowing trade with non-critical counterparts. However, export control regulation has traditionally suffered from territorial limitations, i.e. that jurisdiction over sensitive goods and technologies generally ends once they are outside domestic borders.

Various international instruments, treaties, non-binding multilateral export control regimes and in particular Security Council Resolution 1540 have thought to address the issue, however, none of them offers a firm basis for the assertion of extraterritorial jurisdiction. States have therefore

564 Ernst Hocke and others, *Außenwirtschaftsrecht* (Bärbel Sachs and Christian Pelz eds. Heidelberger Kommentar, C.F. Müller 2017), § 21 AWV Rn. 37.

565 The confidential 2004 End-Use Visit Understanding, see Hugo Meijer, *Trading with the Enemy: The Making of US Export Control Policy toward the People's Republic of China* (First edition, Oxford University Press 2016), at 309 f.

566 § 21 (5) of the German Foreign Trade Ordinance.

turned to domestic mechanisms and in particular to re-export controls. These are based either on the origin of the goods and technologies or on voluntary consent by the ultimate importer to not further transfer the goods without prior authorization. As we have seen, both of these regulatory approaches have already featured in the 1984 *Pipeline* incident and were then heavily criticized by the EC. Likewise, closer analysis reveals that both mechanisms lack normative support: The exercise of jurisdiction over persons controlling certain goods based on the origin of such goods cannot be sustained under current principles of international law. The nationality principle does not apply to sensitive products or technology and such regulations are also not legitimized by the protective or the effects principle. Only in rare exceptions might there be room for the application of the principle of anti-evasion. Similarly, traditional jurisdictional principles do not envisage the possibility of private companies submitting themselves to the jurisdiction to prescribe of another State as private consent is irrelevant in the face of sovereign rights.

In contrast to the legal position, however, stands the actual contemporary State practice. While States have not explicitly accepted origin-based technology controls, in particular by the United States, they have also not staged major protests and silently acknowledged the existence of such practice. With regard to re-export regulation based on private consent, almost all major exporting countries require end user certificates or similar documents in which the importing party is required to submit itself to the regulatory authority of the exporting State. This State practice indicates that there is an actual need for such regulations. At the current stage of international law however, the principles of jurisdiction do not allow such mechanisms.

While the role of private agreement within the area of security-based export control is only one example, it is indicative of a larger issue, in that the territoriality-based system of jurisdiction is unable to account for interests that are not connected to State sovereignty. However, it is arguable that contemporary forms of regulation are shifting away from a purely sovereignty-centred model to one where private parties are equally taking part in the formulation of rules and may also influence the scope of application of those rules. In this regard, it has already been mentioned that the possibility to confer jurisdiction through private autonomy has long been recognized in private international law.[567] These issues will be examined more closely in the final part of this study.

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567 See on this: Mills (n 14), 233 – 234.

With regard to export control, the prevention of irregular re-transfers, either through private agreement or other modes, will likely grow in importance in the future. While this development is certainly to be welcomed, it also risks creating conflicting burdens on exporting companies, which may have to comply with different sets of export control regulations for every transaction. In this respect, international harmonization of the lists of controlled goods within multilateral control regimes would go a long way to eliminate double regulation.

IV. Anti-Corruption

1. Introduction

Corruption has become a transnational phenomenon. This is illustrated by no better example than the infamous Ibiza affair when video footage was released showing two senior Austrian politicians together with the supposed niece of a Russian oligarch in a villa on the Spanish holiday island Ibiza, allegedly discussing the trade of public contracts for various political campaign support for the Austrian Freedom Party.[568] While most corrupt practices do not have the potential to cause the collapse of a government within 24 hours, there is a wide international consensus that transnational corruption is an issue that needs to be combatted. However, even though corruption is subject to an international framework of governance, the main thrust of regulation still happens on the domestic level, where more and more States are adopting legislation, often with far-reaching extraterritorial effects.

These laws and related practices form the centre of the following inquiry. Although corruption is an umbrella concept for a wide range of different activities,[569] the primary subject of national and international regulation is bribery, a specific, legally reasonably well-defined offense. Bribery refers to a transaction, in which the bribe-taker (who need not necessarily be a public official) provides the bribe-giver an undue advan-

568 Maik Baumgärtner et. al., 'The Strache Recordings – The Whole Story' *Spiegel International* (17 May 2019), https://www.spiegel.de/international/europe/strache-caught-on-camera-in-ibiza-secret-recordings-a-1267959.html, last accessed on 13 April 2022.

569 The most comprehensive international legal instrument on corruption, the 2003 UNCAC (n 15), prescribes the criminalization of offenses as diverse as bribery, embezzlement, trading in influence, and abuse of functions.

tage by abusing or misusing his or her power in return for a monetary or otherwise valuable benefit.[570] This type of *quid pro quo* bribery is often seen as the most obvious form of corruption and in fact, within common parlance, these two terms are often used interchangeably.

In the previous chapters, we have begun to deconstruct the traditional framework of jurisdiction in customary international law. We have seen that this framework, in contrast to popular assumption, fails to offer a clear doctrinal answer to the (il-)legality of extraterritorial economic sanctions, used in particular by the United States. This is further evidenced by the inconsistent practice of European States, whose reactions to US measures depended highly on political convenience, specifically the alignment between the two blocs on the fundamental policy issues addressed by the sanctions.[571] The following analysis builds upon these findings:

On the one hand, this chapter expands the argument that customary international law principles do not enable clear doctrinal assessments of extraterritorial jurisdiction. To this end, this chapter contrasts the practice in the area of anti-corruption with that in the area of economic sanctions. In fact, regulation in both areas partly rely on similar jurisdictional triggers, namely the control of foreign subsidiaries by domestic companies and, in the US context, the use of the US financial system. Despite these similarities and in contrast to the situation with secondary sanctions, there is no evidence of any State protest against transnational anti-bribery regulation. This finding adds further uncertainty to the normative status of these triggers under international law.

On the other hand, similar to what has been argued in relation to extraterritorial export controls,[572] I will again contend that the customary international law principles provide an only incomplete picture: Here, the traditional doctrine fails to account for the existence of internationally shared community interests, which in practice greatly affect the acceptance of extraterritorial jurisdiction. In fact, modern anti-bribery regulations at times include a jurisdictional mechanism which goes decidedly beyond those used in secondary sanctions. The lack of protest against these measures can hardly be grounded on doctrinal reasoning because they arguably violate traditional jurisdictional principles. However, an important difference between these two areas is that while economic sanctions

570 Simeon Obidairo, *Transnational Corruption and Corporations: Regulating Bribery through Corporate Liability* (Taylor and Francis 2016), 31 – 32.

571 See above at C.II.2c) Comparative Normative Analysis.

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

are frequently levied to 'enforce' particular domestic foreign policy preferences, corruption is almost universally perceived by the international community as a global challenge. Part C chapter II has demonstrated that political interests were a significant determinant of whether European States protested secondary US sanctions. The following analysis takes this finding one step further and argues that the existence of a shared international community interest is the dominant explanation for the lack of protest against extraterritorial bribery regulations.

This global recognition that corruption poses a problem for society has been the result of both the availability of contemporary research highlighting the negative effects of corruption as well as a particular historic development, which had its inception in the form of a single domestic law, the US Foreign Corrupt Practices Act (**FCPA**).[573] Section 2 of this chapter contextualizes extraterritorial corruption regulation within this background. Section 3 then goes on to analyse multiple international regulatory instruments, in particular the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**OECD Anti-Bribery Convention**)[574] and the United Nations Convention against Corruption (**UNCAC**).[575] Despite their comprehensive ambition, international treaties do not allow for the regulation of corruption beyond the established customary law principles. Sections 4 to 6, the core of this chapter, focus on three domestic anti-bribery legislations, from the United States, the UK and France respectively, as well as the (muted) international response thereto. These sections will explore how each act achieves extraterritorial effects in light of the traditional principles of jurisdiction in international law, in particular by leveraging parent-subsidiary relationships, the mechanism of correspondent account banking as well as jurisdiction based on 'business presence'. Section 7 concludes accordingly.

573 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494, 15 U.S.C. § 78dd-1 (1977).

574 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997, entered into force 15 February 1999) (1998) 37 ILM 1.

575 United Nations Convention against Corruption (adopted 11 December 2003, entered into force 14 December 2005) 2349 UNTS 41 ('UNCAC').

2. Foundations of Transnational Anti-Corruption Regulation

It is one of the distinct features of anti-corruption regulation – and important for the normative arguments made later in this chapter – that extraterritorial jurisdiction in this area is embedded within a global agenda. The international community is nowadays largely unanimous in that it views corruption as a global concern demanding urgent reaction. This is supported by a growing body of research providing proof of the negative economic, developmental and political consequences of corruption:[576] It distorts economic growth,[577] reduces the level of private investment as well as public spending[578] and erodes trust in public institutions.[579]

However, this international consensus has been long in the making. In fact, up until the 1970s, some research suggested that corruption may serve to overcome excessively burdensome bureaucratic machineries and thus 'grease the wheels' of economic development.[580] This, coupled with

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576 See more generally on this: Eugen Dimant and Schulte Thorben, 'The Nature of Corruption: An Interdisciplinary Perspective' (2016) 17(1) German Law Journal 53.

577 Nauro F Campos, Ralitza Dimova and Ahmad Saleh, 'Whither Corruption?: A Quantitative Survey of the Literature on Corruption and Growth' (Bonn 2010). IZA Discussion Paper 5334 http://ftp.iza.org/dp5334.pdf, last accessed on 13 April 2022.

578 According to the researched data, if Bangladesh for instance improved the integrity and efficiency of its bureaucracy to the level of that of Uruguay, private investment would rise by almost 5 %, and its yearly GDP growth rate would rise by over 0.5 %, Paolo Mauro, 'Corruption and Growth' (1995) 110(3) The Quarterly Journal of Economics 681, 700 – 704. See further, Susan Rose-Ackerman and Bonnie J Palifka, *Corruption and Government: Causes, Consequences, and Reform* (Second edition, Cambridge University Press 2016), 29 ff.

579 In the classic study on the effects of corruption by Wade, who for years observed the Irrigation Department of a state in Southern India, he documented how officials extracted bribes from farmers for allocation of water. In fact, corruption ran so deeply in the organisation that officials actively withheld information and created uncertainties among farmers in order to solicit larger bribes. As a result, the credibility of the department had deteriorated to a degree that farmers stopped believing government warnings about actually impeding water shortages, see Robert Wade, 'The System of Administrative and Political Corruption: Canal Irrigation in South India' (1982) 18(3) The Journal of Development Studies 287, 314 – 315.

580 Samuel P Huntington, *Political Order in Changing Societies* (11. printing, Yale Univ. Press 1976), 68 -69; see also Nathaniel H Leff, 'Economic Development Through Bureaucratic Corruption' (1964) 8(3) American Behavioral Scientist 8, who argued that corruption should be treated as an additional way for business

the Cold War, in which both blocs were eager to support allies without regard to potential corrupt practices, initially hindered the establishment of anti-corruption governance at an international level.[581]

Rather, as the now often repeated story goes, international and transnational anti-corruption regulation has its beginnings in the Watergate Scandal in the United States.[582] During the investigations into illegal political campaign contributions, the Watergate Special Prosecutor uncovered the widespread use of slush funds by corporations to pay for bribes to foreign officials in international business transactions.[583] By 1977, in a voluntary disclosure programme ran by the Securities Exchange Commission (**SEC**), over 400 US corporations had admitted to paying bribes to foreign public officials in the amounts exceeding USD 300 million.[584] As a response to the suspected damage to American reputation and to restore public confidence, the US Congress, in a pioneering move, passed the FCPA, the first domestic law dealing with transnational bribery. Specifically, the FCPA targeted the supply side of international corporate bribery, i.e., the active offering of bribes by multinational corporations.

From the initial adoption of the FCPA on, it was one of the main concerns of the American business community that the new law would put US companies under a competitive disadvantage against companies from other capital-exporting States that were not bound by similar anti-corruption regulation.[585] In light of this consideration, the lobbying effort concentrated on (1), persuading Congress to repeal or at least amend the FCPA and (2), encouraging the US government to pursue the adoption

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to influence government, which, assuming that business groups are more likely to promote growth, can in fact help development.

581 Jan Wouters, Cedric Ryngaert and Ann S Cloots, 'The International Legal Framework against Corruption: Achievements and Challenges' (2013) 14 MelbJIntLaw 1-76, 4.

582 Ibid., 3 – 12; William Magnuson, 'International Corporate Bribery and Unilateral Enforcement' (2013) 51(2) Columbia Journal of Transnational Law 360, 379 – 381.

583 Alejandro Posadas, 'Corruption under International Law' (2000) 10 Duke Journal of Comparative and International Law 345, 349 f.

584 H.R. Rep. No. 95–640, at 4 (1977); Sean Coleman, 'Foreign Corrupt Practices Act' (2017) 54 American Criminal Law Review 1381, 1382; Anita Ramasastry, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-corruption Movement' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013), 174.

585 Magnuson, 'International Corporate Bribery and Unilateral Enforcement' (n 582), 383 f.

of an anti-corruption treaty on the international level. While the first approach proved to be only moderately successful, the second approach, encouraging the conclusion of an international instrument, eventually succeeded.

After efforts at the UN level to negotiate an agreement on anti-corruption initially failed,[586] the United States shifted its focus to a more homogenous and receptive forum, the OECD. 1997 thus saw the adoption of the OECD Anti-Bribery Convention, chiefly due to the immense pressure applied by the United States.[587] The strong US influence is also reflected in the substance of the OECD Anti-Bribery Convention, which closely tracked its intellectual predecessor, the FCPA. Just like the US statute, the OECD Anti-Bribery Convention mainly requires State parties to criminalize one specific type of offense, the active bribery of foreign government officials by corporations. Eventually, the initial vision of a treaty at the UN level was realized with the UNCAC, which was adopted by the General Assembly in October 2003. As of November 2021, there are now 189 parties to the convention, signalling a near universal approval regarding the necessity of anti-corruption measures.[588]

However, the adoption of international instruments against corruption (of which there are now six[589]) mandating legislation did not correspond with immediate action on the domestic level. In fact, until recently, the United States with the FCPA remained by far the most active player in the

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586 Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015), 64.

587 See on the history of the OECD Anti-Bribery Convention, Mark Pieth, Lucinda A Low and Nicola Bonucci, *The OECD Convention on Bribery: A Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997* (2. ed. Cambridge University Press 2014), at 16 – 22.

588 Latest stats available at https://www.unodc.org/unodc/en/corruption/ratification-status.html, last accessed on 13 April 2022.

589 Apart from the two already mentioned, these are: The Inter-American Convention Against Corruption (adopted 29 March 1996, entered into force 6 March 1997) (1996) 35 ILM 724 ('OAS Convention'), The Criminal Law Convention on Corruption (adopted 27 January 1999, entered into force 1 July 2002) ETS No 173 (1999) (the 'COE Criminal Law Convention'), The Convention Drawn Up on the Basis of Article K.3(2)(c) of the Treaty on European Union on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union [1997] OJ C 195/2 and The African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006) 43 ILM 5 (2003) ('AU Convention').

enforcement of transnational anti-corruption regulation.[590] The number of FCPA investigations has skyrocketed from about three per year between 1978 and 2000 to around 100 per year today.[591]

Within the OECD framework, the OECD Working Group on Bribery in International Business Transactions (**OECD Working Group**) has developed an elaborate and effective peer review system to encourage action at the domestic level. In particular, the Working Group's growing frustration with the UK's inadequate and delayed implementation of the Convention may have been one of the drivers behind the eventual adoption of the UK Bribery Act.[592] Similarly, the Working Group's dissatisfaction with low enforcement levels of anti-corruption legislation in France[593] may have prompted the adoption of law n° 2016–1691 on transparency, the fight against corruption, and the modernization of the economy (referred to as **Sapin II**).[594] As we shall see, both the UK Bribery Act 2010 and the French Sapin II contain provisions with highly extraterritorial effects that may go well beyond what the OECD Anti-Bribery Convention requires. Thus, these two recent European pieces of legislation as well as the notorious American FCPA form the core of the normative inquiry into extraterritoriality related issues within the field of anti-corruption.

3. International Anti-Corruption Instruments

This chapter argues that the jurisdictional principles of customary international law fail to account for the status of anti-corruption as a widely

590 Daniel P Ashe, 'The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act' (2005) 73(6) FordhamLR 2897, 2915.

591 Annalisa Leibold, 'Extraterritorial Application of the FCPA under International Law' (2015) 51 Willemette Law Review 223, 233.

592 Bribery Act 2010 (UK) c 23 ('Bribery Act'); Working Group on Bribery, 'United Kingdom: Phase 2bis: Report of the Application of the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions' (16 October 2008), para 79; Peter Alldridge, 'The U.K. Bribery Act: "The Caffeinated Younger Sibling of the FCPA"' (2012) 73 Ohio State Law Journal 1181, 1197; Rose (n 586), 84 – 92.

593 Working Group on Bribery, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France' (October 2012), para 15.

594 Loi n° 2016–1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique ('Sapin II').

shared community interest, which in practice greatly affects the acceptance of extraterritorial regulation in this area. The previous section has briefly sketched how combatting corruption has developed into an international priority issue. This section serves to ascertain the normative framework of our inquiry, in particular, that despite this international consensus, extraterritorial regulation is still subject to the limitations of customary international law principles of jurisdiction. Specifically, the international treaties mentioned above do not allow for (among parties) a wider regulatory scope overriding the established permissive principles. Rather, although international treaties at times require an extensive interpretation of certain jurisdictional bases, they in fact closely reflect established customary international law doctrine.

a) The Jurisdictional Provisions of the OECD Anti-Bribery Convention

At its core, the OECD Anti-Bribery Convention requires the criminalization of active corporate bribery. In addition, State parties have to establish measures regarding the maintenance of books and records and prohibit, among others, the establishment of off-the-books accounts and the making of off-the-books or inadequately identified transactions for the purpose of bribery.[595] The Convention also includes a requirement that State parties have to make the bribery of foreign officials a predicate offense for the purpose of the application of their money laundering legislation.[596] In implementing these measures, States are not required to achieve uniformity or to change the fundamental principles of their domestic law, but rather, the Convention's goal is to assure 'functional equivalence' among its parties.[597] For instance, the Convention recognizes that not all State parties have legal systems that recognize the criminal liability of corporations. In these cases, the Convention allows for civil or administrative sanctions of legal persons, as long as they are effective, proportionate and dissuasive.[598]

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595 OECD Anti-Bribery Convention, Art. 8 (1).

596 Ibid., Art. 7.

597 Working Group on Bribery, 'Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (21 November 1997) in OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, OECD Doc DAFFE/IME/BR(97)20 (8 April 1998) 12, 12 [2] ('OECD Anti-Bribery Convention Commentaries').

598 OECD Anti-Bribery Convention, Art. 3 (2).

Apart from substantial rules, the Convention provides for rules on mutual legal assistance as well as extradition,[599] and, of particular interest for our purposes, rules regarding the establishment of jurisdiction. According to Arts. 4 (1) and 4 (2), State parties are required to exercise territorial jurisdiction and, if their domestic laws already provide for this basis, active personality jurisdiction. The exercise of territorial jurisdiction extends over the bribery of foreign officials 'when the offence is committed in whole or in part in its territory'. This accurately reflects the territoriality principle as established by the Harvard Draft. However, already signalling an extensive application of this principle in domestic law, the official commentaries to this rule provide that this 'basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required'.[600]

In contrast to the obligatory exercise of territorial jurisdiction, Art. 4 (2) of the Convention requires the assertion of active personality jurisdiction only for these States that already exercise it for other crimes.[601] This limitation in particular served to accommodate State parties with a common law tradition, which historically did not accept jurisdiction based on nationality. The Convention did not want to burden States with an obligation to exercise active personality jurisdiction beyond what they have already assumed according to domestic law. Similarly, it is acceptable that a State only exercises nationality-based jurisdiction contingent on the availability of dual criminality according to its domestic law.[602]

With the acceptance of both a wide territoriality-based and active personality-based jurisdiction, the drafters of the OECD Anti-Bribery Convention have explicitly advocated for a certain degree of extraterritoriality in the fight against corruption. As such, the OECD Anti-Bribery Convention also contains a brief provision on the issue of concurrent jurisdiction. Within the framework of the Convention, this may be the case if the national of one State party bribed a foreign official within the territory of another State party so that there is an overlap of nationality and territoriality-based jurisdiction. Concurrent jurisdiction may also occur when a complex bribery transaction passes the territory of multiple jurisdictions or includes nationals from multiple State parties. In these cases, State parties shall consult with each other so as to determine the 'most appro-

599 Ibid., Art. 9 and 10.
600 OECD Anti-Bribery Convention Commentaries, para. 25.
601 OECD Anti-Bribery Convention, Art. 4.
602 OECD Anti-Bribery Convention Commentaries, para. 26.

priate' jurisdiction for prosecution.[603] However, the OECD Anti-Bribery Convention does not provide guidance on how the 'most appropriate' jurisdiction should be determined nor which factors should flow into the deliberation.[604]

Finally, the commentary to the OECD Anti-Bribery Convention stipulates that an act should not be deemed bribery under Art. 1 of the Convention if the advantage granted to the foreign official was 'permitted or required by the written law or regulation of the foreign public official's country'.[605] This clarification has the potential to mitigate jurisdictional conflicts between the anti-corruption law of a company's home State and the laws of the host State where the corrupt practice took place: A payment that is considered legal in the host State should also not be extraterritorially criminalized by the company's home State. However, it is unlikely that the OECD included this exception based on jurisdictional concerns. Rather, this exception was probably more intended to mitigate concerns of commercial competitiveness in countries where bribery was accepted.[606]

b) The Jurisdictional Provisions of the UN Convention Against Corruption

Compared to the OECD Anti-Bribery Convention, the UNCAC pursued a diametrically different strategy. The objective of the Ad Hoc Committee negotiating the treaty was to create a broad and comprehensive convention: Thus, while the OECD Anti-Bribery Convention focused on the criminalization of one specific behaviour, the UNCAC addresses a wide range of different offenses considered corrupt including the bribery of domestic as well as foreign officials, embezzlement, trading of influence, abuse

603 OECD Anti-Bribery Convention, Art. 4 (3).
604 International Bar Association (n 12), 229.
605 OECD Anti-Bribery Convention Commentaries, para. 8.
606 This affirmative defence is also recognized by the FCPA in § 78dd-1 (c), § 78dd-2 (c) and § 78dd-3 (c); See further, Bartley A Brennan, 'The Foreign Corrupt Practices Act Amendments of 1998: Death of a Law' (1990) 15 North Carolina Journal of International Law and Commercial Regulation 229, 242 – 243; However, it should be noted that the local law exception has only played a marginal role in practice; in the United States, it was raised (but not accepted) in *United States v Kozeny* 582 F Supp 2d 535, 539 (SDNY 2008), see Mike Koehler, 'On The Eve Of Trial, Battle Over The FCPA's "Local Law" Affirmative Defense In U.S. V. Ng Lap Seng', http://fcpaprofessor.com/eve-trial-battle-fcpas-local-law-affirmative-defense-u-s-v-ng-lap-seng/, last accessed on 13 April 2022.

of functions and illicit enrichment.[607] The Convention also applies to corrupt dealings limited to private parties.[608] Apart from criminalization, the UNCAC also contains additional provisions on preventive measures, asset recovery and rules geared towards the effective enforcement of the Convention, such as freezing of proceeds of crime and the protection of whistle-blowers.

Despite the breadth of the UNCAC, particularly in light of the range of conduct it criminalizes in Part III of the Convention, the actual effects on domestic legislation may have been more limited. This is because the UNCAC distinguishes between mandatory and non-mandatory provisions: For instance, while the bribery of national public officials, the active bribery of foreign public officials, embezzlement, money laundering and obstruction of justice carry the language that State parties 'shall adopt' the necessary measures, other offenses come with a significantly weaker mandate for the State parties, in that they only 'shall consider' criminalization.

This distinction between mandatory and non-mandatory rules is further reflected in the Convention's approach towards the establishment of jurisdiction. According to Art. 42 UNCAC, State parties are required to establish jurisdiction when the offence is committed in their territory as well as when the offender is present in their territory and the State does not extradite the offender because he or she is one of its nationals.[609] The first instance concerns traditional territoriality-based jurisdiction. However, compared to the OECD Anti-Bribery Convention, it is notable that the UNCAC does not explicitly mention the case when the offense is only committed 'in part' within the territory of a State party. Whether this omission was intentional or whether it is simply a semantic error that does not carry any difference in interpretation is debated.[610] The second instance of mandatory jurisdiction concerns cases in which a national of a State party has committed an offense abroad and is later found within that State's territory. If the State party refuses extradition because of a prohibition to extradite its nationals, it has to prosecute based on the active personality principle.

The UNCAC also provides for the discretionary exercise of active personality jurisdiction in other cases as well as passive personality jurisdic-

607 UNCAC, Art. 15 -20.
608 UNCAC, Art. 21 -22.
609 UNCAC, Art. 42 (1) and 42 (3).
610 Wouters, Ryngaert and Cloots (n 581), 46; International Bar Association (n 12), 227 – 228.

tion and jurisdiction based on the protective principle.[611] Additionally, Art. 42 (4) of the UNCAC allows States to exercise jurisdiction based on the *aut dedere aut iudicare* principle, that is, if an offender is found within its territory and the State does not extradite him or her based on some other reason than nationality.[612] This basis extends beyond customary international law standards: As neither the offender nor the behaviour in question need to have any other connection to the prosecuting State party apart from the offender's presence, it is functionally a 'quasi-universal' jurisdiction.[613] With these additional bases to assert extraterritorial jurisdiction, the UNCAC, in principle, goes even further than the OECD Anti-Bribery Convention, which makes no mention of these possibilities. However, these principles do not play a major role in practice as only territorial and active personality jurisdiction is frequently asserted by domestic legislation.[614] Nonetheless, as will be discussed below, these two jurisdictional bases allow for near universal prosecution of corruption.

4. Regulation through Parent-Subsidiary Relationships

a) Practice in the United States

As indicated above, the United States has, for a long time, set the benchmark for anti-corruption legislation and enforcement with the FCPA.

611 UNCAC, Art. 42 (2).

612 Wouters, Ryngaert and Cloots (n 581), 47.

613 See already above at B.I.3. Treaty-based Extensions of Jurisdiction.

614 While no international instrument on corruption mentions the exercise of universal jurisdiction, some authors have considered that particularly heinous forms of corrupt practices may rise to crimes against humanity under Art. 7 (1) of the Rome Statute of the International Criminal Court, see Ilias Bantekas, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies' (2006) 4(3) JICJ 466, 474 and Ben Bloom, 'Criminalizing Kleptocracy?: The ICC as a Viable Tool in the Fight against Corruption' (2014) 29(3) American University International Law Review 627, 637 – 640. However, others scholars disagree, arguing that corruption, even if 'grand' on scale, is not on par with the other explicitly mentioned crimes of the Rome Statute, see Claudia Letzien, *Internationale Korruption und Jurisdiktionskonflikte: Die Sanktionierung von Unternehmen im Fall der Bestechung ausländischer Amtsträger* (Juridicum – Schriftenreihe zum Strafrecht, Springer Fachmedien Wiesbaden 2018), 272; Jessica A Lordi, 'The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violaters' (2012) 44 Case Western Reserve Journal of International Law 955.

Particularly, in recent times, US agencies have advanced multiple expansive jurisdictional theories to regulate or sanction foreign individuals and companies for bribery offenses.[615] When studying FCPA cases and enforcement actions, it is important to remember that, similar to economic sanctions, this area of law generally gets a pass on judicial scrutiny as most of the cases are settled through non-prosecution agreements, deferred prosecution agreements or pleas.[616] Therefore, it is often unclear, on what basis or principle the enforcement agencies are grounding their jurisdictional assertions as their documents often only provide sparse argumentation. That said, many of the enforcement actions targeting essentially extraterritorial conduct concern foreign subsidiaries of 'domestic' corporations. From a normative point of view, these instances are particularly interesting because they have a certain resemblance to the control doctrine, which, in the area of economic sanctions, has at times led to substantial disagreement between nations.[617]

aa) The Jurisdictional Scope of the FCPA

The FCPA contains two sets of rules, first, a prohibition of bribery of foreign public officials (*the anti-bribery provisions*) and second, the requirement that corporations 'make and keep books, records, and accounts, which, in reasonable detail, […] reflect the transactions and dispositions of the assets' as well as 'devise and maintain a system of internal accounting controls' (*the accounting provisions*). Both sets of rules have been utilized to target foreign behaviour. However, at first glance, none of the jurisdictional bases of the FCPA directly mention foreign subsidiaries:

The accounting provisions (15 U.S.C. § 78m(b)(2)(A)) apply to 'issuers', which flows from the fact that the FCPA forms part of the Securities Exchange Act of 1934. 'Issuers' include any company with a class of securities listed on a national exchange in the United States or any company with

615 Leibold (n 591), 233 – 235 shows that UK, German, Swiss and French company were among the most heavily targeted by FCPA enforcement actions and that 8 out of the 10 highest monetary penalties resulting from such actions were paid by non-US companies.

616 Mike Koehler, 'The Facade of FCPA Enforcement' (2010) 41 Georgetown Journal of International Law 907, 909.

617 See above at C.II.2. The Extension of Personality-based Jurisdiction to Foreign Subsidiaries.

a class of securities traded in the over-the-counter-market in the United States and required to file reports with the SEC.[618]

The personal scope of the anti-bribery provisions is complex. In principle, the anti-bribery provisions apply to three groups of persons: (1), issuers,[619] as defined above, (2) so-called 'domestic concerns', i.e. individuals who are citizens or residents of the United States as well as any corporation, partnership or other organization that is organized under the laws of the United States, or that has its principle place of business in the United States,[620] and (3), officers, directors, employees, or agents of issuers and domestic concerns, regardless of whether they are nationals or foreigners.[621] However, foreign officers, directors, employees, or agents as well as companies not incorporated in the United States only fall under the scope of the FCPA if they 'make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance' of bribery.[622] This additional requirement need not to be satisfied if the person concerned is an US issuer or otherwise a 'United States person'.[623]

Interestingly for our purposes, the original 1977 draft of the FCPA by the US House of Representatives asserted jurisdiction also over foreign subsidiaries owned or controlled by citizens or nationals of the United

618 Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition' (2020), at 9 and 43.

619 FCPA, § 78dd-1.

620 FCPA, § 78dd-2 (h) (1).

621 FCPA, § 78dd-1 (a); FCPA § 78dd-2 (a); Finally, the anti-bribery provisions also apply to any other person, provided that they conduct any act in furtherance of bribery 'while in the territory of the U.S.' (§ 78dd-3 FCPA) The scope of this territoriality-based jurisdiction is subject to discussion in C.IV.5. Correspondent Account Jurisdiction .

622 FCPA, § 78dd-1 (g) and § 78dd-2 (i). Note however that 'instrumentality of interstate commerce' is defined very broadly so that it rarely limits the application of the FCPA anti-bribery provisions in practice, see Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (n 618), at 10; see also below n 644.

623 Note that according to § 78dd-2 (h) of the FCPA, 'domestic concerns' and 'United States persons' are not synonymous. Legal persons are only qualified as 'United States persons' if they are organized under the laws of the United States while it suffices for the qualification as 'domestic concern' if they have their principal place of business in the United States. Thus, it is possible to be a 'domestic concern' but not a 'United States person'. In this case, the FCPA anti-bribery provisions only apply if an instrumentality of interstate commerce was used.

States as a subcategory of 'domestic concerns'. Surprisingly however, this explicit expansion of the active personality principle has been specifically dismissed by the US Senate because of the 'inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill'.[624] The Senate ultimately decided against such an extraterritorial assertion. This is surprising because the FCPA hails from about the same time as the infamous *Pipeline* incident, in which US regulators confidently resorted to the control doctrine.[625] In the decades following the passage of the statute however, the actual enforcement practice has more and more strayed away from the cautious stance of the Senate, and without regard to any jurisdictional or diplomatic issues, liberally sought to bring foreign subsidiaries under the purview of the FCPA. Technically, this has been possible through two regulatory innovations, by interpreting corrupt payments made by foreign subsidiaries as violations of the accounting provisions and by holding US domestic parents as well as foreign subsidiaries liable through the agency doctrine.

bb) Parent and Subsidiary Liability Based on the Accounting Provisions

Since the beginning of the new millennium, the SEC and the DoJ, who are jointly responsible for the enforcement of the FCPA, have started to use an expansive reading of the accounting provisions to pursue alleged briberies by foreign subsidiaries of domestic corporations. In general, violations of these provisions may carry both civil or criminal liability. While criminal liability may only be imposed if the person or corporation 'knowingly' or 'willfully' failed to implement internal control mechanisms or falsified books and records, no such mental requirement exists for civil liability.[626]

Although the accounting provisions only apply to issuers directly, an issuer's books and records also include those of its consolidated subsidiaries and affiliates.[627] Thus, issuers are not only required to follow the rules

624 H.R. Rep. No. 95–831, at 13–14 (1977); See also *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 414, Reporter's Notes 5; Magnuson, 'International Corporate Bribery and Unilateral Enforcement' (n 582), 398.

625 See for the control doctrine above at C.II.2. The Extension of Personality-based Jurisdiction to Foreign Subsidiaries.

626 FCPA, § 78m (b) (4) – (5).

627 Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (n 618), 44; However,

themselves, but also to ensure compliance with the accounting provisions throughout their controlled (domestic or foreign) subsidiaries. While the extension of the accounting provisions to controlled (foreign) subsidiaries through consolidated books and records may not be considered unusual in itself, FCPA enforcement agencies have used this mechanism to target extraterritorial conduct by interpreting bribery related offenses of foreign subsidiaries as violations of the accounting provisions.

An early example of this trend can be found in the 2004 case *SEC v Schering-Plough Corporation*.[628] In it, the SEC charged Schering-Plough Corporation with violation of the accounting provisions. Factually however, it alleged that Schering-Plough Poland, a subsidiary of the defendant, had made multiple corrupt payments to a charity, whose founder and president was at the same time the director of a government health authority in Poland. The SEC did not claim that the parent organization, Schering-Plough Corporation, approved these payments or that it even knew of them. However, as the payments were disguised as donations, they were thus falsely reflected in Schering-Plough Poland's books and records and – through consolidation – eventually inaccurately recorded in the books and records of the parent organization. Because of this, Schering-Plough Corporation itself had violated the accounting provisions of the FCPA. In effect, the parent organization was held liable for an FCPA violation because of the bribes paid by its foreign subsidiary.[629] Moreover, as civil liability under the accounting provisions does not require knowledge or wilfulness, this mechanism in fact establishes a parent organization's strict liability for all of its foreign subsidiaries' dealings.[630]

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the issuer's obligations are explicitly limited to majority-owned subsidiaries and affiliates. In this regard, § 78m(b)(6) of the FCPA stipulates that if an issuer only has minority control (less than 50 % of voting power) with respect to a domestic or foreign firm, it merely has to ensure that it uses its influence in good faith to cause these subsidiaries to maintain an accounting system as required by the FCPA.

628 Complaint, *SEC v Schering-Plough Corp.*, 1:04cv00945 (DDC 2004).

629 Ibid., at 1.

630 Ashe (n 590), 2926; Koehler, 'The Facade of FCPA Enforcement' (n 616), 979; further examples are described by Karen E Woody, 'No Smoke and no Fire: The Rise of internal Controls absent anti-bribery Violations in FCPA Enforcement' (2017) 38 Cardozo Law Review 1727, 1740 – 1743; see also Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 Washington and Lee Law Review 1769, 1858 who uses this point as an argument to enact a similar

However, FCPA enforcement agencies have used the accounting provisions not only to hold domestic corporate parents liable but also to press criminal charges directly against the foreign subsidiaries. These actions are based on a theory that, by engaging in bribery, the foreign subsidiaries violate the FCPA accounting provisions because they *cause* their corporate parent's books and records to become false. This is due to the fact that the corrupt payments of the foreign subsidiaries are disguised and then inaccurately consolidated into the books and records of the corporate parent.

For instance, using this theory, the DoJ entered into a plea agreement with the Brazilian subsidiary of Walmart Inc. in 2019. The Statement of Facts alleged that Walmart Brazil retained the services of a 'Brazil Intermediary', who used to be a former government official, to obtain licences and permits.[631] As to the violation of the accounting provision, Walmart Brazil 'falsely recorded $527,000 in payments to Brazil Intermediary as payments to certain Brazil construction companies […] These false records were then consolidated into Walmart's financial records and were used to support Walmart's own financial reporting'.[632] Thus, under this theory, Walmart Brazil caused corrupt payments to be falsely recorded in Walmart's books and records contrary to the accounting provisions. However, because corrupt payments by controlled companies are usually falsely reflected in the consolidated books and records of the corporate parent, this causation-theory effectively means that the accounting provisions directly prohibit briberies of foreign subsidiaries abroad. As demonstrated in the Walmart Brazil case, FCPA enforcement agencies also do not shy away from directly asserting jurisdiction against foreign subsidiaries.[633]

cc) Parent and Subsidiary Liability Based on the Agency Theory

The re-interpretation of the accounting provision is not the only mechanism with which US authorities regulate the conduct of foreign controlled

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statute in the field of egregious human rights violations or environmental torts by a parent organization.

631 *United States v WMT Brasilia S.a.r.l.*, Criminal No. 1:19cr192, Plea Agreement of 20 June 2019, at 32 – 33.

632 Ibid., at 31.

633 See for other examples: Criminal Information, *United States v Hewlett-Packard Polska, SP Z O.O.*, No 14-cr-202 EJD (ND Cal 2014) and Criminal Information, *United States v ZAO Hewlett-Packard A.O.*, 5:14-cr-201 DLJ (ND Cal 2014).

subsidiaries. A second strand of argumentation revolves around the expansive use of the agency doctrine. Similar to the first approach, this theory allows for charges against parent organizations based on quasi-strict liability for the conduct of their subsidiaries as well as directly against the foreign subsidiaries. However, resorting to agency law, enforcement agencies may prosecute violations not only of the accounting provisions, but also of the arguably more severe anti-bribery provisions of the FCPA.

Before moving on to the specifics of agency theory under the FCPA, it might be useful to understand some basic concepts: In general, US agency law establishes the vicarious liability of corporations for the acts of their agents.[634] Particularly interesting for our purposes is the fact that under certain circumstances, this theory may establish that a corporate subsidiary was acting as an agent of the parent.[635] In this case, agency law may serve to overcome the principle of limited liability and is in this sense related to the doctrine of piercing the corporate veil.[636] Whether a subsidiary can be deemed an agent of the parent organization is determined on a fact-specific basis with the decisive factor being the degree of control that the parent enjoyed over the subsidiary.[637] However, even though the Resource Guide to the FCPA stipulates that the evaluation of the agency relationship depends on the practical realities of actual parent-subsidiary interaction,[638] in reality, it seems that the simple existence of a parent-subsidiary relationship at all is almost sufficient to assume agency under the doctrine.

In the Matter of Aloca Inc, the leading case with regard to the SEC's and the DoJ's interpretation of agency, sheds some light into the logic used

634 Jennifer A Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (A Report for the Harvard Corporate Social Responsibility Initiative to Help Inform the Mandate of the Unsg's Special Representative on Business and Human Rights. Working paper/ Corporate Social Responsibility Initiative vol 59, Harvard University, John F. Kennedy School of Government 2010), 170 – 171.

635 Justin F Marceau, 'A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act' (2007) 12 Fordham Journal of Corporate & Finance Law 285, 298.

636 Marcela E Schaefer, 'Should a Parent Company Be Liable for the Misdeeds of Its Subsidiary?: Agency Theories Under the Foreign Corrupt Practices Act' (2019) 94 New York University Law Review 1654, 1661 – 1666.

637 Vivian Grosswald Curran, 'Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations' (2016) 17 Chicago Journal of Interanational Law 403, 426.

638 Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (n 618), 28.

by US authorities.[639] The case concerned two of Alcoa's subsidiaries and the use of an intermediary to bribe officials in Bahrain in relation to long-term supply agreements with the State-owned Aluminium Bahrain B.S.C. (**Alba**). According to the SEC's Order, no 'officer, director or employee of Alcoa knowingly engaged in the bribe scheme'.[640] Nevertheless, the SEC found Alcoa liable for violation of the FCPA's anti-bribery provision because the subsidiaries carrying out the scheme were deemed to be agents of the parent corporation. The factors that led to this determination include among others, that (1), Alcoa appointed the majority of seats on a Strategic Council to the subsidiaries, (2), the entities transferred personnel between them, (3), Alcoa set the business and financial goals for the subsidiaries, (4), the subsidiaries' employees reported functionally to Alcoa and (5), that Alba was a significant customer of Alcoa. Additionally, (6), members of the Alcoa management had met with Alba officials and the intermediary and (7), they had approved the terms of related contracts with Alba and the intermediary.[641] It is obvious that all of the above criteria, perhaps apart from the last two, are often fulfilled in any parent-subsidiary relationship unless the subsidiaries are acting completely independently. Thus, agency relationships between parent and subsidiary are easily constructed according to the SEC and the DoJ.

With agency relationships between parent and subsidiary corporations established, US authorities now have the tools to target foreign subsidiaries directly. This is because both § 78dd-1 FCPA regarding issuers and § 78dd-2 FCPA regarding domestic concerns also claim direct jurisdiction over any (foreign) agent acting on their behalf.[642] We can see this mechanism at work in the case against Diagnostic Products Corporation (**DPC**), where it seems that the presence of an (unsubstantiated) agency relationship between parent and subsidiary was considered not only as an appropriate basis for liability of the parent corporation but also for direct prosecution of the foreign subsidiary.

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639 Another important decision clarifying the agency doctrine in relation to the FCPA has been rendered most recently in *US v Hoskins*, Ruling on Defendant's Rule 29(C) and Rule 33 Motions, 3:12-cr-00238 (D Conn 2020); however, the ruling did not discuss the circumstances under which foreign subsidiaries may be considered agents of their domestic parents.

640 SEC, *In the Matter of Aloca Inc.*, Order of 9 January 2014, Administrative Proceeding File No. 3–15673, at 10.

641 Ibid.

642 Leibold (n 591), 229; Wilson (n 378), 1081.

Factually, DPC's subsidiary in China was found to have bribed physicians and laboratory personnel employed in government-owned hospitals in China in exchange for agreements that the hospitals would purchase the company's products. Similar to the Alcoa case, the SEC's order established DPC's violation of the FCPA anti-bribery provision without claiming that the parent organization had any knowledge of the subsidiary's conduct.[643] In addition, the DoJ criminally charged the Chinese subsidiary, DPC Tianjin. The criminal information does not provide any thorough analysis on what grounds the DoJ is asserting its jurisdiction over the Chinese entity, though it does mention that DPC Tianjin was acting as an agent to its parent organization.[644]

Concluding, we can observe that while the US legislator has originally rejected applying the FCPA to foreign subsidiaries of domestic concerns, enforcement agencies have allowed this practice to return through the backdoor. If any subsidiary may be considered an agent of the parent corporation and the FCPA is, without further qualification, applicable to any agent of a domestic concern, then *de facto*, the FCPA applies directly to foreign subsidiaries owned or controlled by domestic concerns.[645]

b) Practice in Europe

aa) The UK Bribery Act 2010

Before the Bribery Act 2010, the UK anti-corruption framework consisted of a medley of laws from the nineteenth and early twentieth century along

643 SEC, *In the Matter of Diagnostics Products Corporation*, Order of 20 May 2005, Administrative Proceeding File No 3–11933, at 2.

644 Criminal Information, *United States v DPC (Tianjin) Co. Ltd.*, 05-cr-482 (CD Cal 2005), at 2; As for the requirement that DPC Tianjin has to 'make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance' of bribery, the Information mentions that DPC Tianjin sent emails from Tianjin to Los Angeles containing monthly reports. These monthly reports reflected the corrupt payments as 'selling expenses', see p. 5 – 7; However, if regular monthly reports fulfil the requirement of making use of the mails or any means or instrumentality of interstate commerce, than foreign subsidiaries of US companies will almost always fulfil this requirement.

645 See for the same conclusion, Michael S Diamant, Christopher W Sullivan and Smith Jason H. 'FCPA Enforcement Against U.S. and Non-U.S. Companies' (2019) 8 Michigan Business & Entrepreneurial Law Review 353, 363 and Wilson (n 378), 1081.

with a bribery prohibition stemming from UK common law. Thus, the overhaul of UK bribery regulation with the adoption of the Bribery Act 2010 was followed with widespread attention even outside the UK. One of the particularly thorny issues concerned its extensive extraterritorial effects and the resulting potential to disrupt international business.[646] As such, one author has referred to the Act as the 'The Caffeinated Younger Sibling of the FCPA'.[647]

The Act criminalizes four offenses: Sec. 1 and 2 of the Act are concerned generally with the offering and receiving of bribes while Sec. 6 addresses the bribing of foreign public officials specifically. However, the focus of much discussion has been on Sec. 7 of the Bribery Act: This novel corporate offense establishes the liability of a 'relevant commercial organisation' if an 'associated person' bribes another person intending to obtain or retain business or an advantage related to the conduct of business. For the purposes of Sec. 7, it is not necessary that the associated person as such must have been prosecuted for violation of the Bribery Act as long as there is sufficient evidence concerning his or her acts as to satisfy the standard burden of proof in criminal proceedings.[648] If an associated person has been found guilty of bribery according to this standard, Sec. 7 establishes the liability of the commercial organisation even if there was no knowledge, intention or even recklessness on behalf of the commercial organisation.[649] Instead, a defence is given if the accused organisation can show that it had adequate procedures in place designed to prevent associated persons from undertaking bribery.[650]

The particularly wide scope of Sec. 7 of the Bribery Act stems from the extensive definition of the terms 'relevant commercial organisations' and 'associated person'. Broadly speaking, 'relevant commercial organisations' include any corporation or partnership that is incorporated or formed

646 See for German commentaries: Jan Kappel and Otto Lagodny, 'Der UK Bribery Act – Ein Strafgesetz erobert die Welt: Ein kritischer Diskussionsanstoß' [2012] StV 695, 696; Marc Engelhart, 'Der britische Bribery Act 2010' (2016) 128(3) Zeitschrift für die gesamte Strafrechtswissenschaft, 882; Robert Schalber, *Der UK Bribery Act und seine Bedeutung im Rahmen von Criminal Compliance* (Schriften zu Compliance v.13, 1st ed. Nomos Verlagsgesellschaft 2018).

647 Alldridge (n 592).

648 Ibid., 1202; Additionally, with regard to the associated person, the UK Bribery Act contains an affirmative defence in line with the OECD Convention, in that a payment, which is permitted or required under local law, does not trigger liability, UK Bribery Act, Sec. 6 (3) (b).

649 Ibid., 1202.

650 UK Bribery Act, Sec. 7 (2).

under the laws of the UK or that carries on a business, or part of a business in the UK.[651] Importantly for our purposes, examining the jurisdictional reach of Sec. 7 of the Bribery Act along corporate affiliations, the definition of 'relevant commercial organisations' excludes foreign subsidiaries. Therefore, unless the subsidiary of a UK company conducts business on the territory of the UK itself, Sec. 7 does not directly apply to them. This is consistent with the UK's longstanding rejection of the control doctrine, which has also been noted during the review by the OECD Working Group.[652]

However, while foreign subsidiaries may not be subject to Sec. 7 of the Bribery Act directly, their corrupt conduct may entail the liability of their parent corporation. This is because the definition of 'associated persons' includes any person who performs any kind of service on behalf of the commercial organization. The Bribery Act explicitly mentions employees, agents and subsidiaries. The exact scope is largely up to a fact specific determination on a case-by-case basis.[653] In practice, the Serious Fraud Office (**SFO**), the UK agency tasked with enforcing the Bribery Act, has brought a substantial number of proceedings based on the liability of domestic companies for the acts of their foreign subsidiaries. Recently for instance, Sweett Group plc, a construction and professional service company, was convicted and sentenced for failure to prevent one of its subsidiaries from making corrupt payments to secure a contract in the United Arab Emirates.[654] In certain circumstances, the government has indicated that the definition of 'associated persons' may also extend to other affiliates such as suppliers, contractors and (minority-controlled) joint ventures.[655]

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651 UK Bribery Act, Sec. 7 (5).

652 Working Group on Bribery, 'United Kingdom: Phase 2bis: Report of the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions' (16 October 2008), para 26.

653 UK Bribery Act, Sec. 8 (5).

654 News Release, 'Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction', https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/, last accessed on 13 April 2022; see also *Director of the Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) (8 May 2017) concerning alleged bribery by the Kazakh subsidiary of a UK company.

655 Ministry of Justice, 'The Bribery Act 2010: Guidance about Procedures which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with them from Bribing (Section 9 of the Bribery Act 2010)' (2011), paras. 37 – 43; In 2015, the SFO concluded proceedings against Standard Bank

bb) The French Law Regarding Transparency, the Fight against Corruption and the Modernization of Economic Life

The most recent addition to the current trend of tightening domestic anti-bribery regulation is the French Law Regarding Transparency, the Fight against Corruption and the Modernization of Economic Life (also referred to as Sapin II), which was adopted in December 2016. The law was born out of the continuous critique of the OECD Working Group on the insufficient enforcement of existing anti-bribery regulations in France as well as growing frustration with unilateral US actions, which resulted in the payment of massive fines from French companies to the US treasury.[656] In fact, Sapin II was preceded by a 2016 report prepared for the French National Assembly's Commission of Foreign Affairs and Commission of Finance studying the extraterritoriality of US legislation. In particular, although the report did not expressly condemn the FCPA as violating principles of international law,[657] it lamented in strong words the United States' use of the FCPA to advance its own economic and geopolitical objectives by specifically targeting French companies.[658] It recommended that France should strive to level the playing field with the SEC and the DoJ by strengthening the enforcement capacities of French authorities against domestic as well as foreign firms. This way, US authorities may be more readily persuaded into cooperation instead of resorting to unilateral action.[659] Finally, the new French legislation has also taken account of

plc for bribes paid by its sister company Stanbic Bank Tanzania Limited, both of which were then subsidiaries of the South African Standard Bank Group. The SFO based its enforcement on the fact that both companies had acted jointly on a contract by the Government of Tanzania, which made Stanbic Tanzania an associated person of Standard Bank plc, see *Serious Fraud Office v Standard Bank plc* [2014] Case No U20150854 paras 6 – 11.

656 Margot Sève, 'Sapin II: Is the Era of Compliance and Criminal Settlements upon France?' [2017] RTDF 2, 1.

657 Karine Berger 'Rapport d'information déposé en application de l'article 145 du règlement en conclusion des travaux de la mission d'information commune sur l'extraterritorialité de la législation américaine' n° 4082 (5 October 2016), pp. 77 – 78; it should be noted that the report took specific notice of the FCPA's application to conduct of foreign issuers without any territorial ties to the United States, see also below C.IV.4a)aa) The Jurisdictional Scope of the FCPA.

658 Ibid., 16 – 20.

659 Ibid., 84 – 87.

other developments across Europe, particularly the above discussed UK Bribery Act.[660]

Apart from the creation of a new anti-corruption agency[661] and the institutionalisation of a French-style Deferred Prosecution Agreement termed the '*convention judiciaire d'intérêt public*',[662] the most significant legislative changes for our purpose concern the extension of the jurisdictional scope of the French prohibition on bribery and the establishment of mandatory corporate compliance obligations.[663] Under Art. 17 of the law, the management of companies falling under the scope of the law[664] is required to establish comprehensive internal measures and procedures, including a code of conduct with regard to corruption, whistleblowing procedures, accounting controls, risk assessment and training programs.[665] The obligations are explicitly also applicable to foreign subsidiaries of French companies if the latter publishes consolidated financial statements. However, foreign subsidiaries are deemed to satisfy the requirements of Art. 17 if their French corporate parent has implemented the mandatory obligations throughout its corporate enterprise.[666] Failure to adopt the necessary measures may carry a penalty of up to EUR 200,000 for individuals and EUR 1 million for companies, pronounced by the new French anti-corruption agency.[667] Presumably, these fines may also apply to foreign subsidiaries of French companies directly (though this should be rather unlikely as the French parent itself is in any case subject to the law and is thus likely to be responsible for group-wide procedures).

660 Étude d'Impact – Projet de Loi relative à la transparence, à la lute contre la corruption, et à la modernisation de la vie économique, at 30.
661 Sapin II, Art. 1.
662 Ibid., Art. 22.
663 Ibid., Art. 21.
664 These are companies with revenues exceeding EUR 100 million that (a) have 500 or more employees or (b) are part of a group of companies with 500 or more employees, provided that the corporate parent is incorporated in France, ibid., Art. 17 I.
665 Ibid., Art. 17 II.
666 Ibid., Art. 17 I.
667 Ibid., Art. 17 V.

c) Comparative Normative Analysis

In the previous chapters, we have seen that the EU and European States have at times, though not consistently, protested US assertions of control-based jurisdiction. In this regard, we have argued that first, reactions to US sanctions are grounded in political expediency and remain in the realm of inter-subjectivity and second, there is no conclusive doctrinal position that jurisdiction over controlled foreign subsidiaries is contrary to customary international law principles. The following analysis deepens these arguments: In particular, FCPA enforcement practice by US authorities closely resemble the exercise of control-based jurisdiction. Nonetheless, there is no evidence of any State protest against the regulation of transnational bribery through parent-subsidiary relationships. This finding adds further uncertainty to the doctrinal status of control-based jurisdiction under international law. However, before turning to the more problematic control-based jurisdiction (below **bb**)), it should be noted that most of the mechanisms used in domestic anti-bribery legislation to influence foreign subsidiaries do not raise questions under customary international law principles of jurisdiction (below **aa**)).

aa) The Assertion of Jurisdiction in respect of Corporate Group Policies

First, public international law accepts the adoption of regulations that require the domestic parent organization to establish group-wide corporate policies intended to prevent and detect corruption. This is a mechanism employed by both the US FCPA and the French law Sapin II. With regard to the FCPA, these procedures include the obligation to make and keep accurate and reasonably detailed books and records as well as to maintain a system of internal accounting controls. With regard to Sapin II, more sophisticated compliance measures are also required, such as the establishment of a code of conduct with regard to corruption, whistleblowing procedures, risk assessment and training programs.

Even though these regulations indirectly affect controlled foreign subsidiaries, they have generally proved uncontroversial in international relations. That certain, in a wider sense 'fiscal' corporate policies, standards and obligations have to be applied uniformly across an entire corporate group is well-recognized in business practice as well as domestic legislation. Such policies may be necessary for an enterprise's parent organization to provide consistent and consolidated information, for instance to

investors and regulatory authorities.[668] This sentiment is also reflected by the principles set out in the Restatement (Third), one of the most sophisticated accounts on jurisdiction based on parent-subsidiary relationships.[669] Indeed, § 414 (2) (b) of the Restatement recognizes that the regulation of foreign affiliated entities in matters such as 'uniform accounting, disclosure to investors, or preparation of consolidated tax returns of multinational enterprises' should generally be presumed reasonable under customary international law.[670]

Both the accounting provisions of the FCPA as well as the more comprehensive compliance measures mandated by Art. 17 of the Sapin II fall into this category of corporate policies addressed by § 414 (2) (b) of the Restatement.[671] This is obvious in relation to the FCPA, which requires the enterprise-wide establishment of certain standards regarding books and records as well as internal controls. These are prime examples of the 'uniform accounting' measures envisioned by the Restatement.[672] However, the same logic also applies to the more extensive requirements of Sapin II. The rationale behind § 414 (2) (b) of the Restatement is that certain corporate matters are typically subject to group policies and that with regard to these matters, home State jurisdiction over corporate parents should also extend to foreign subsidiaries. While the drafters of the Restatement Third in the 1970s and 1980s explicitly only had accounting measures in mind, today, corporate compliance measures are also frequently regulated through single, group-wide frameworks. Thus, both the FCPA accounting provisions as well as Art. 17 of the Sapin II are well permitted under public international law.

Second, public international law also accepts the criminalization of the failure of a domestic parent organization to prevent its subsidiaries from engaging in bribery. This is the mechanism chiefly employed by

668 Stanley Marcuss, 'Jurisdiction with Respect to Foreign Branches and Subsidiaries: Judicial Power in the Foreign Affairs Context under Section 414 of the Foreign Relations Restatement' (1992) 26 The International Lawyer 1, 7.

669 Although there is quite some dispute regarding whether the Restatement (Third) actually represents customary international law, see David B Massey, 'How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law' (1997) 22 YaleJIntLaw 419.

670 *Restatement (Third) of the Foreign Relations Law of the United States* (n 5), § 414 (2) (b).

671 In relation to the FCPA, see Marcuss (n 668), 18.

672 Ibid., 18.

Sec. 7 of the UK Bribery Act. Sec. 7 establishes the liability of relevant commercial organisation for the conduct of their associated persons – including subsidiaries – if these engaged in bribery with the intention to 'obtain or retain business or an advantage in the conduct of business' for the commercial organisation.[673] Even though the liability of the parent organization is independent of whether it had knowledge of the actions of the subsidiary, a defence is given if it had in place adequate (compliance) procedures designed to prevent its subsidiaries from undertaking such conduct. Therefore, the focus of Sec. 7 of the UK Bribery Act in fact lies in the actions, or rather omissions of the corporate parent to establish compliance measures, while also *taking into account foreign subsidiary conduct*.[674] The UK Bribery Act (as applied to domestic companies) is therefore closely related to the French Sapin II. In fact, both acts essentially require, under the threat of penalties, domestic corporate parents to introduce compliance measures that also affect controlled foreign subsidiaries. Therefore, it seems logical to evaluate the UK Bribery Act under the same standards as Sapin II. Therefore, applying § 414 (2) (b) of the Restatement (Third) by analogy, such measures generally comport with established principles of jurisdiction under international law.[675]

bb) The Assertion of Control-based Jurisdiction under the FCPA

However, the application of the FCPA by US enforcement agencies in practice involves jurisdictional claims that are more dubious under public international law:

First, it was shown above that briberies by foreign subsidiaries automatically trigger the liability of the parent organization for violation of the FCPA.[676] US enforcement authorities rely on two grounds to justify this type of strict liability. For one, the corporate parent may be liable for the conduct of its foreign subsidiaries because of the consolidation of

673 Ministry of Justice (n 655), paras. 37 – 42.

674 See for a more thorough doctrinal discussion of Sec. 7 of the UK Bribery Act, Schalber (n 646), p. 80 – 90.

675 This argumentation only considers the case where the parent organization is a UK corporate national. As discussed below in C.IV.6.b)aa) The UK Bribery Act 2010, Sec. 7 of the UK Bribery Act may also apply to parent organizations that are not UK corporate nationals. In this case, the doctrinal evaluation will be different.

676 See also Skinner (n 630), 1858.

books and records within corporate groups. This consolidation means that corrupt payment of foreign subsidiaries, if they are falsely recorded, also distort the books and records of the domestic corporate parent. And because the books and records of the corporate parent are now false, the parent organisation itself violates the accounting provisions. For the other, general agency theory stipulates that a parent organization may be liable for the acts of its subsidiaries if they can be considered its agents. As we have seen above, however, agency relationships are assumed rather freely by the SEC and the DoJ, leading to broad liability of corporate parents for their foreign subsidiaries.

Second, the United States has also directly enforced the FCPA against foreign subsidiaries. For one, US authorities claim jurisdiction over foreign subsidiaries by way of a causation theory. They argue that if foreign subsidiaries falsely record corrupt payments in their books and records, through consolidation, they cause the books and records of the corporate parent to become false. This not only entails a violation of the accounting provisions by the corporate parents, it also brings the foreign subsidiaries themselves under US jurisdiction. For the other, according to 15 U.S.C. § 78dd-1 (a) and § 78dd-2 (a), the FCPA applies to (foreign) agents. Therefore, the establishment of an agency relationship between corporate parent and subsidiary also allows for the direct prosecution of the foreign subsidiary.

Notwithstanding the different doctrinal underpinnings, these practices involve the exercise of control-based jurisdiction similar to what we have seen in relation to the Cuban sanctions under the CACR and the Iran sanctions according to 31 C.F.R. § 560.215. This is because the above mechanisms in fact allow US authorities to directly exercise jurisdiction *vis-à-vis* any foreign company as long as it is owned or controlled by a US corporate parent. This is evidenced by the causation theory: Because majority-owned subsidiaries generally consolidate their books and records with those of the corporate parent, any bribery by any subsidiary constitutes a violation of the accounting provisions subject to the reach of US enforcement agencies. However, a similar effect is also achieved through the application of the agency doctrine: Because the SEC and the DoJ seemingly equate the agency relationship to the mere existence of a parent-subsidiary structure, any foreign subsidiary can be considered an agent and therefore, also falls under the scope of the FCPA.[677]

677 As noted above, technically, the FCPA's anti-bribery provisions cover foreign subsidiaries only if they 'make use of the mails or any means or instrumentality

The US practice under the FCPA lends further credence to the argument that the normative status of control-based assertions of jurisdiction remains unresolved under customary international law principles. First of all, despite the fact that the FCPA, under the interpretation of US authorities, engages jurisdiction structurally similar to the control theory as applied in the area of economic sanctions, no State has apparently protested the enforcement of the FCPA. Second, the application of the FCPA provides an example for a point that I have made earlier, namely that the direct assertion of jurisdiction over a foreign subsidiary can also be interpreted as a territorial regulation addressing the domestic parent corporation.[678] As the practice shows, US authorities have used territorial triggers – the consolidation of books and record and the agency doctrine – to hold parent organizations strictly liable for the conduct of subsidiaries abroad. However, they have also used the same triggers to directly prosecute the foreign subsidiaries. It is not entirely clear when enforcement agencies choose one option instead of the other. They have sometimes also used both options concurrently.[679] From the perspective of the regulator therefore, it seems that these different methods are largely interchangeable. However, if there is no difference, then the formal distinction under customary international law between jurisdictional claims directly addressing foreign subsidiaries and jurisdictional claims only addressing the territorial parents does not seem to be particularly useful.

5. Correspondent Account Jurisdiction under the FCPA

While enforcement practice has endowed the FCPA with an expansive reach based on personal affiliation with a US company,[680] its territorial scope may be no less problematic. As with the extension of FCPA jurisdiction to foreign subsidiaries, the plain text of the Act appears innocuous. According to § 78dd-3 of the FCPA, persons other than issuers or domestic

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of interstate commerce'. However, this requirement is interpreted so broadly that virtually every foreign subsidiary fulfils it, see above at n 644.

678 See above at C.II.2c) Comparative Normative Analysis.

679 See Complaint, *SEC v ENI S.p.A and Snamprogetti Netherlands B.V.*, 4:10-cv-2414 (SD Tex 2010): In this case, the SEC charged the issuer ENI with violating the accounting provisions and the Dutch subsidiary Snamprogetti with violating the anti-bribery provisions as agent of ENI as well as with violating the accounting provisions.

680 See C.IV.4a) Practice in the United States.

concerns are prohibited from corruptly using 'the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of' bribing a foreign official 'while in the territory of the United States'. This prohibition applies to agents and other affiliates of that person as well.[681]

Unsurprisingly, the DoJ and the SEC adhere to an expansive interpretation of territorial jurisdiction under the FCPA. Most notably, just as OFAC in the area of economic sanctions, these two agencies have at times relied on electronic monetary transfers clearing through US banks as a possible basis for jurisdiction. This is illustrated by the enforcement action against JGC Corporation, a Japanese engineering company, which was part of a joint venture with American, French and Dutch counterparts involved in the bribery of Nigerian officials. The criminal information in this case did not allege that JGC undertook any conduct within the United States. Still the DoJ found two grounds according to which it could exercise jurisdiction over the Japanese company. First, the DoJ argued that jurisdiction could be based on allegations that JGC Corporation conspired as well as aided and abetted issuers and domestic concerns. Second and more importantly, the DoJ also asserted territorial jurisdiction because the Japanese company caused a number of wire transfers that passed through US correspondent accounts.[682]

While US jurisprudence in relation to economic sanctions has explicitly endorsed correspondent account jurisdiction in the *Zarrab* case,[683] this basis remains untested in court in relation to the FCPA. It should be noted, however, that other aggressive theories of territorial jurisdiction advanced by FCPA enforcement agencies have had only mixed success under judicial intervention.[684] In relation to correspondent account jurisdiction specifi-

681 FCPA, § 78dd-3.

682 Criminal Information, *United States v JGC Corporation*, No. 11-cr-260 (SD Texas 2011), paras. 21 – 22; It is typical for the DoJ and the SEC to rely on multiple theories of jurisdiction. In fact, up to now, the DoJ and the SEC have yet not enforced the FCPA in a case based solely on correspondent account jurisdiction, see Wilson (n 378), 1072.

683 See above at C.II.3a) Practice in the United States.

684 See for instance *SEC v Sharef et al.*, No. 1:2011cv09073 at 15 (SDNY 2013): The prosecution alleged that the defendant, a senior executive at Siemens, had pressured another Siemens executive, Regendantz, into paying bribes to Argentine government officers. Regendantz later made falsified filings to the SEC in connection with the corrupt payments. The prosecution argued that these falsified financial statements, because they were made to the SEC, formed a viable jurisdictional basis for FCPA liability of the defendant. However, the court was

cally, a recent decision of the Second Circuit indicates that this theory may not be accepted by the US judiciary with regard to the FCPA.

The case concerns a UK citizen, Lawrence Hoskins, who was working for a French multinational enterprise and who was allegedly involved in a bribery scheme in Indonesia. For the relevant time, he had never set foot in the United States. The DoJ primarily grounded its jurisdiction over Hoskins on the theory that Hoskins conspired with US-based companies and employees. The court dismissed this argument based on conspiracy. Relying heavily on the legislative history of the FCPA as well as the presumption against extraterritoriality, the court concluded that the US legislator consciously and clearly defined the classes of persons subject to the jurisdictional scope of the law. Essentially, foreign nationals and foreign companies could only fall under the jurisdiction of the FCPA if they were either agents, employees, officers, directors, and shareholders of US citizens or US companies, or if they violated the FCPA while 'present' in the United States.[685] Mere conspiracy or complicity was not enough to trigger jurisdiction under the FCPA.

Applying this holding, *Hoskins* seems to put a bar to correspondent account jurisdiction in relation to the FCPA. Specifically, for persons that are not agents, employees, officers, directors, or shareholders of US citizens or US companies, *Hoskins* explicitly requires foreign companies to be present in the United States while violating the FCPA.[686] The mere

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not convinced that defendant's actions, even if they eventually 'touched' the United States because of the SEC filings, were sufficiently connected to the US territory to base jurisdiction on. It consequently dismissed the case. However, the US government prevailed on similar allegations in *SEC v Straub*, 921 F Supp 2d 244, 262 – 264 (SDNY 2013); *SEC v Straub*, No. 11 Civ. 9645 (RJS) at 16 (SDNY 2016).

685 See *United States v Hoskins*, 902 F 3d 69, 85 (2d Cir 2018).

686 See also *United States v Goncalves et al.*, No 1:09-cr-00335-RJL (DDC 2009): In this case, the court dismissed the US government's argument that it had jurisdiction over the defendant *Patel* based on the allegation that *Patel* had mailed a package from the UK to the United States containing an original copy of the agreement of a corrupt transaction. The judge's decision and reasoning were not reduced to writing. However, commentators note that the judge required that the relevant act, mailing of the package, must have been performed while the defendant was physically present in the United States, see Mike Koehler, 'The Foreign Corrupt Practices Act under the Microscope' (2012) 15 University of Pennsylvania Journal of Business Law 1, 50 and Leibold (n 591), 246 – 247.

causation of wire transfers that pass through US based bank accounts as alleged in *JGC* may not satisfy this threshold of presence.[687]

Despite *Hoskins*, it is too early to tell how correspondent account jurisdiction would fare under judicial intervention. Thus, until that time, this basis remains part of the US State practice. The technical mechanism and normative implications of jurisdiction based on correspondent accounts have been discussed *en detail* with regard to the enforcement of economic sanctions.[688] To sum up, as a consequence of the unique design of the US monetary system, virtually all wire transfers denominated in US dollars technically pass through US-based banking institutions, even if they are sent from one non-US account to another. Thus, for corrupt payment denominated in US dollars, a good argument can be made that a constituent element of the act (the corrupt payment) passed through US territory. Therefore, it is arguable that the United States may assume jurisdiction based on subjective territoriality. Thus, this kind of correspondent account jurisdiction does seem to comport with the doctrinal framework of jurisdiction under international law even though it would lead to almost unlimited jurisdiction of the United States in relation to corruption worldwide (similar to what we have seen in relation to extraterritorial economic sanctions).[689]

6. Jurisdiction based on 'business presence'

In contrast to correspondent account jurisdiction, which has remained a distinctly US American feature, all three pieces of legislation examined above achieve extraterritorial reach by including jurisdiction based on 'business presence'. I use this term to describe the assertion of jurisdiction

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687 Moreover, *Hoskins* also defeats the other jurisdictional theory of the DoJ in the JGC case. Applying *Hoskins*, JGC Corporation could not be held liable for conspiring or aiding and abetting issuers and domestic concerns. Rather, a foreign company that did not violate the FCPA while present in the United States could only be liable as an agent, employee, officer, director, or shareholders of US citizens or US companies. In *JGC* however, there was no indication that the Japanese company was an agent or shareholder of the involved issuers and domestic concerns.

688 See C. II.3 c) Comparative Normative Analysis.

689 See however also Wilson (n 378), 1080; Leibold (n 591), 254; de la Torre, Mateo J. 'The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets' (2016) 49 Cornell International Law Journal 469.

premised on the fact that a foreign natural person or company is economically active on domestic territory. Even though already the FCPA included a variation of this practice through its issuer-based regulation, 'business presence' as a jurisdictional trigger has been rediscovered by newer European legislation. Although rarely discussed in literature, this jurisdictional basis is significant as it seems to fall neither under the territoriality nor under the nationality principle.

a) Practice in the United States

As mentioned above, the FCPA employs jurisdiction based on 'business presence' through its application to issuers. Issuers, in a nutshell, include all companies whose stocks can be traded on a national exchange in the United States. Therefore, issuers need not to be US nationals in the sense of international law. Rather, foreign companies, i.e., companies that are neither incorporated nor have their seat of management in the United States, can list their stocks on US exchanges as well. Thus, the reach of the issuer-based jurisdiction of the FCPA is irrespective of corporate nationality, but only dependent on the 'presence' of the companies at domestic stock exchanges.

b) Practice in Europe

aa) The UK Bribery Act 2010

As mentioned above, the UK Bribery Act 2010 saw, in its Sec. 7, the introduction of a new corporate criminal offense for failure to prevent bribery on an organisation's behalf. Sec. 7 applies to 'relevant commercial organisations', defined as a body or partnership incorporated or formed in the UK, or any other incorporated body or partnership which carries on a business or *part of a business* anywhere in the UK.[690] While the first part of this definition encompasses UK corporate nationals according to the traditional active personality principle, the second part is based on 'business presence' as it covers all (foreign) companies if they only carry on 'part of a business' in any part of the UK irrespective of corporate nationality.

690 UK Bribery Act, Sec. 7 (5).

According to the official guidance to the UK Bribery Act, the interpretation of the term 'part of a business' will be done 'by applying a common sense approach':[691] Thus, companies would only fall under the scope of the Act if they have a 'demonstrable business presence' in the UK. For instance, the government notes that it would not expect a corporation to qualify as a relevant commercial organisation merely because its stocks are being traded on the London Stock Exchange. Moreover, the guidance states that having a UK subsidiary would not, in itself, fulfil the requirement of carrying on 'part of a business' in the UK as a subsidiary may act completely independently of its corporate parent.[692] Despite this 'common sense approach', the Ministry of Justice itself notes that 'the section 7 offence is endowed with extraordinary scope'.[693]

This extraordinary scope of Sec. 7 of the Bribery Act is demonstrated by the recent Deferred Prosecution Agreement entered between UK authorities and Airbus SE. Airbus SE is not a UK corporate national as the company is incorporated in the Netherlands and has its seat of management in France. The conduct alleged took place across Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana. Nonetheless, the judge approving the Deferred Prosecution Agreement found jurisdiction under Sec. 7 of the Bribery Act as Airbus SE carried on part of its business in the UK. As relevant businesses, the judge notes that Airbus SE operates in the UK through two of its subsidiaries, Airbus Operations Limited as well as Airbus Military UK Limited.[694] In effect therefore, any foreign company, as long as it entertains a 'demonstrable business presence' within the UK, may be subject to prosecution under Sec. 7 of the Bribery Act for failure to prevent bribery committed by any of its associated persons on its behalf in any other third country.[695]

691 Ministry of Justice (n 655), para. 36.
692 Ibid.
693 Ministry of Justice, 'Bribery Act 2010: Post Legislative Scrutiny Memorandum', para. 58.
694 *Director of the Serious Fraud Office v Airbus SE* [2020] Case No U20200108, paras. 14 – 21.
695 Lordi (n 614), 956.

bb) The French Law Regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life

The UK Bribery Act's venture into new jurisdictional territories (and presumably the lack of international protest against these assertions) has inspired other countries to follow the lead. In fact, the newest addition to the increasing number of domestic anti-bribery legislation with strong extraterritorial implications, the French Sapin II, has adopted very similar language.[696] According to its Art. 21, which amends the jurisdictional scope for bribery offenses, the law applies to French nationals, regular residents as well as persons that exercise all or part of their economic activity on French territory.[697] This jurisdictional provision applies equally to individuals and legal persons. According to a recent *Circulaire* published by the French Ministry of Justice, 'all or part of their economic activity' is supposed to be interpreted broadly and specifically to include at least foreign companies having a subsidiary, branches, commercial offices, or other establishments in France.[698]

c) Comparative Normative Analysis

Comparing the three different legislations, we have seen that all of them advance jurisdictional assertions based on a loosely defined 'business presence' of a company on the domestic territory. In the United States, the FCPA covers stock issuers generally, which includes non-US companies that list their stocks on domestic exchanges. The UK Bribery Act creates a corporate criminal offense for failure to prevent bribery that applies to organisations that only carry on part of a business within domestic territory. Similarly, Sapin II prohibits bribery by natural and legal persons as long as that person exercises part of its economic activity in France.

I will argue here that this kind of jurisdiction – based on the 'business presence' of the company within domestic territory – is not clearly

696 Sève (n 656), 5; Étude d'Impact – Projet de Loi relative à la transparence, à la lute contre la corruption, et à la modernisation de la vie économique, at 40.

697 Loi n° 20161691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Art. 21: 'personne résidant habituellement ou exerçant tout ou partie de son activité économique sur le territoire français'.

698 Ministry of Justice, Circulaire de politique pénale en matière de lutte contre la corruption international, p. 9.

supported by traditional doctrine of jurisdiction and may thus violate international law under certain circumstances. This finding is in stark contrast to actual State practice, which has not seen any significant protest against these legislations. The acceptance of extraterritorial jurisdiction in this area is likely explained by the wide international consensus on the need for combatting corruption as a globally shared community interest. Ultimately, this points to a larger deficiency of the customary international law principles of jurisdiction which relies on formal connections between the State and the object of the assertion of jurisdiction without regard to the substantial content of the regulation.

Jurisdiction based on 'business presence' has received only sparse attention in literature to date and it is sometimes seen as an expression of the territoriality principle. This argument seems straightforward: For instance, the FCPA applies to issuers which list on a domestic exchange. Thus, jurisdiction is derived from the territorial location of the stock exchange.[699] Sec. 7 of the UK Bribery Act applies to all commercial organisations as long as they carry on part of their business within the UK. Sapin II prohibits bribery by natural and legal persons as long as that person exercises part of its economic activity in France. Thus, jurisdiction in these two cases is premised on the existence of some sort of territorial business activity in a specific location.

However, despite this territorial connection, jurisdiction based on 'business presence' cannot be subsumed under the territoriality principle in customary international law. To simplify things, let us apply the jurisdictional basis of 'business presence' to a natural person. Assume that someone owns real estate in France which she rents out commercially, has a bank account in France and maybe even employs someone in France to take care of day-to-day matters. Undoubtedly, this person would exercise an 'economic activity' within France. However, as long as this person does not set foot within French borders, she would certainly not fall under French territorial jurisdiction. France would have no authority to prescribe whether she should rest on a Saturday or Sunday (outside of France), whether she is allowed to smoke marijuana (outside of France), or, for our purposes, whether she is allowed to bribe public officials in third countries.

The same applies to companies as well. Carrying on part of a business within domestic territory does not vest the territorial State with the power to regulate all other conduct without any territorial connection. In reality,

699 Wouters, Ryngaert and Cloots (n 581), 48.

provisions such as Sec. 7 of the UK Bribery Act are not so much an expression of the territoriality principle, but can be rather regarded as a disguised extension of active personality. Once a company conducts part of its business in the UK, it is subject to the Bribery Act for any act of bribery anywhere in the world. Therefore, under the Bribery Act, the actual act of bribery need not have a nexus to UK territory but rather to a specific company, namely any company that conducts part of a business in the UK.[700] Put differently, while active personality with regard to corporations requires that the corporation is either incorporated under domestic laws or has its seat of management in a certain country, the UK Bribery Act can be interpreted as to extend active personality jurisdiction to those companies that merely conduct part of a business in the country. There is no basis in international law for such an extension.

Thus, because jurisdiction based on 'business presence' – as it is asserted by Sec. 7 of the UK Bribery Act as well as Sapin II – is justifiable neither according to the territoriality nor according to the active personality principle, it is in fact not recognized under customary international law principles.[701]

This jurisdictional basis is also significant in practical terms: Since it is likely that most multinationals would have at least sporadic business dealings within the UK or France, jurisdiction based on 'business presence' may in effect have quasi-universal reach.[702] To cite the UK Ministry of Justice, Section 7 'would catch, for example, a bribe paid in Sweden, by a Philippine national on behalf of a Brazilian engineering company, that

700 Kappel and Lagodny (n 646), 699; Nathalie I Thorhauer, *Jurisdiktionskonflikte im Rahmen transnationaler Kriminalität* (Nomos Verlagsgesellschaft mbH & Co. KG 2019), 280.

701 To a somewhat limited extent, the same argument applies to issuer-based jurisdiction as well. It is arguable that subjecting issuers to certain domestic rules, regardless of where they are incorporated or acting, is in reality the inclusion of a new class of corporations into the active personality principle. However, it is arguable that the territorial jurisdiction over the listing of stocks also entails jurisdiction over ancillary conduct in preparation of or otherwise necessary for the listing itself. Thus, the State in which the stock exchange is located has territorial authority to prescribe rules regarding required reporting, accounting and disclosure obligation in relation to the listing itself. However, whether this includes FCPA accounting provisions or even the anti-bribery provisions is certainly debatable.

702 Lordi (n 614), 976; She then goes on to examine whether bribery may be considered a crime under international law for which universal jurisdiction is warranted, which she denies.

carries on a lift maintenance business in the UK, in respect of a contract relating to an infrastructure project in New Zealand'.[703] It is noteworthy, however, that not only have these legislations not received significant backlash from other States, but rather, they have prompted other OECD parties to draft legislation mirroring these provisions. Thus, State practice indicates approval for using this sort of jurisdictional hook at least in the area of anti-bribery.[704]

The acceptance of jurisdiction based on 'business presence' as practiced in more recent legislation such as the UK Bribery Act and Sapin II is significant. In the area of economic sanctions, States have at times reacted furiously over any purported infringement of their sovereignty through extraterritorial jurisdiction even if such assertions had a possible basis under international law. The complete lack of protest against at least highly dubious legislation in the area of anti-bribery suggests that there is fundamental difference in the assessment of jurisdiction in the area of secondary sanctions than in the area of anti-bribery. The most probable explanation of this diverging State practice is the underlying objective of the respective regulation. While economic sanctions are frequently levied to 'enforce' particular domestic foreign policy preferences, corruption is almost universally perceived by the international community as a global challenge. And even though this may seem obvious to us now, the doctrinal consequences of these findings are far from trivial: As has been discussed above at length, customary international law on jurisdiction is largely a formal regime looking for a nexus between the regulating State and the object of regulation. This analysis shows that this regime is inadequate because it fails to account for the growing importance of community interests possibly underlying exercises of extraterritorial jurisdiction.

7. Conclusion

The international anti-corruption regime has undoubtedly been a success story in the last few decades. Public perception of corruption has evolved

703 Ministry of Justice, 'Bribery Act 2010: Post Legislative Scrutiny Memorandum', para. 58.

704 Australia has, for instance, proposed legislation targeting corporate and financial crime. The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 introduces a new offense mirroring section 7 of the UK Bribery Act; the bill is available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1246, last accessed on 13 April 2022.

and while it was originally viewed as an issue that was best tacitly tolerated, it is now acknowledged as one of the most pressing problems of the globalized society. Within this bigger picture, extraterritorial regulation has primarily focused on one specific behaviour, that of transnational bribery: The analysis in this chapter has shown how the United States, acting in the aftermath of the domestic Watergate Scandal, has set an influential precedent in this respect with the FCPA and later successfully pressured other OECD partners to join its lead. Today, the international framework consists of six major international conventions on anti-corruption as well as numerous pieces of domestic legislation, many of which contain provisions with sweeping extraterritoriality.

Examining legislation in the United States, in the UK and in France, the analysis in this chapter has made two arguments with regard to the customary international law principles of jurisdiction. First, this chapter has expanded on the thesis that these principles do not allow for a clear distinction between permissibly territorial and impermissibly extraterritorial jurisdiction, which diminishes the functionality of these principles in regulating international relations. Second, this chapter has demonstrated that the customary international law principles of jurisdiction are also incomplete, in particular because – outside of universal jurisdiction – they generally do not allow for considerations in relation to the substance of the regulation. This stands in contrast to State practice, in which the regulatory object – anti-corruption – may greatly affect the acceptance of any assertion of jurisdiction.

In relation to the first argument, the analysis in this chapter further demonstrates that traditional jurisdictional principles offer no conclusive answer as to the (il-)legality of control-based assertions of jurisdiction. In the area of anti-corruption, the United States, the UK and France all regulate the behaviour of foreign subsidiaries (and other associates) of domestic corporations to ensure that such measures are not frustrated by shrewd corporate organization. Technically, this is accomplished (1), by mandating group-wide accounting and compliance measures to prevent and detect bribery, (2), by attaching liability to the parent organisation of the enterprise for the behaviour of its subsidiaries, and (3), by directly criminalizing the conduct of the foreign subsidiary. Specifically, US enforcement authorities employ all three modalities, including directly asserting jurisdiction over foreign subsidiaries.

We have previously seen that control-based economic sanctions have at times drawn strong negative responses from affected States. However, the examined practice of anti-corruption regulation supports the argument

that the doctrinal status of control-based jurisdiction is far from settled under traditional international law principles: First, despite the fact that FCPA enforcement against foreign subsidiaries essentially engages control-based jurisdiction, no State has apparently protested such actions in contrast to the widespread rejection of this jurisdictional basis in the area of economic sanctions. Second, we have argued that control-based jurisdiction essentially constitutes a disguised variation of territoriality. This is because the direct assertion of jurisdiction over a foreign subsidiary and the territorial regulation addressing the domestic parent corporation are identical in substance. This view is again confirmed by actual FCPA practice. The analysis in this chapter has shown that US enforcement authorities directly pursue foreign subsidiaries using the same jurisdictional theories they are using to target domestic corporate parents, lending credence to the argument that both methods are in fact interchangeable.

In relation to the second argument, this chapter has demonstrated that the status of anti-corruption as a universally shared objective greatly influences the acceptance of assertions of extraterritorial jurisdiction in practice. In particular, both the UK Bribery Act and the French Sapin II contain a novel jurisdictional trigger, which allows for the criminal prosecution of companies that merely conduct a limited portion of their economic activity within the respective domestic territory. Even though this type of jurisdiction based on 'business presence' may ostensibly rely on a territorial nexus, it is actually not covered by the territoriality principle. Rather, jurisdiction based on 'business presence' is to be seen as an extension of the active personality principle, for which there is no basis under prevailing international law.

Despite the possible doctrinal issues under international law, such extraterritorial anti-bribery regulation is not known to have caused discord between States in a way that similar measures in the area of economic sanctions have done.[705] In fact, inspired by the successes of the FCPA and the UK Bribery Act, even more States are currently pondering to strengthen their domestic anti-bribery regulation with extraterritorial effects.[706] It seems therefore arguable that in the regulatory area of anti-bribery, States

705 Zerk (n 634), 36 – 37.

706 Australia and Ireland have introduced or passed new legislations amending existing anti-bribery legislation; For Australia, see the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019; For Ireland, see Criminal Justice (Corruption Offences) Bill 2018, available at http://www.irishstatutebook.ie/eli/2018/act/9/enacted/en/html, last accessed on 13 April 2022.

are willing to accept a greater degree of extraterritoriality even though traditional jurisdictional principles may not support certain assertions. This is most likely the result of the fact that corruption is deemed harmful almost everywhere in the world and in particular, that the fight against transnational bribery is acknowledged not only as a domestic priority, but as a global objective.[707]

The development and acceptance of the transnational anti-bribery regime may be significant for similar regulatory challenges. The success of the FCPA to catalyse (near) universal change is seen as a prime example of how unilateral, extraterritorial regulation can affect the international community for the better.[708] It proves, so the argument goes, that the provision of global public goods need not, and maybe should not wait for cooperative action when multilateral consensus is elusive. Rather, unilateral measures by a powerful player may fill the regulatory void immediately, pressing other nations to join in.[709]

Still, caution is warranted: Despite the positive overall development of the global anti-bribery regime, the unilateral, extraterritorial enforcement of the FCPA by the United States has not been without its challenges. While it is without doubt, that precisely the aggressive extraterritorial action against foreign companies have prompted other States to reconsider their stance on transnational bribery, suspicion of an unfair bias of the SEC and the DoJ towards domestic corporations have been growing. This claim is bolstered by recent numbers, which find that fines against non-US companies amount for 67 % of total fines and that these companies pay, on average, five times the penalty of domestic companies.[710] Extraterritoriality of the FCPA may therefore not really be a tool to 'level the playing field' but rather to protect domestic economic interests. As shown above, this was one of the main points of criticism levied by the report studying US extraterritoriality presented to the French National Assembly. Whether there is merit to this claim or not, it shows that unilateral extraterritoriality, left unchecked, always contains the risk of abuse.[711]

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707 See, however, for a more critical account: Steven R Salbu, 'Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village' (1999) 24(1) YaleJIntLaw 223.

708 Magnuson, 'International Corporate Bribery and Unilateral Enforcement' (n 582), 404; Ryngaert, *Unilateral Jurisdiction and Global Values* (n 10), 68.

709 Magnuson, 'Unilateral Corporate Regulation' (n 10), 540 – 541.

710 Leibold (n 591), 236.

711 Magnuson, 'International Corporate Bribery and Unilateral Enforcement' (n 582), 411 – 413.

However, even if States enforce their own legislation in an impartial way, issues may arise. There is a risk of burdening companies with multiple and even conflicting regulatory standards with regard to compliance measures. Worse, without coordination among States, individuals and companies possibly face double prosecution, which may greatly diminish the legitimacy of the discussed regulations. That this is not a hypothetical is proven by existing case material.[712] Going into the future, these issues have to be dealt with seriously to not jeopardize an international achievement in the regulation of anti-bribery that was not easy to come by.[713]

V. Business and Human Rights

1. Introduction

It is no longer a secret that business enterprises have a profound impact on the enjoyment of human rights. Corporations have engaged in or facilitated human rights abuses such as child labour, forced expropriation, environmental harms, suppression of civil unrest, violation of rights of indigenous people and other forms of reprehensible behaviour.[714] Against this backdrop, the question of how to increase the accountability of business enterprises for their negative human rights impact has emerged as a pressing issue worldwide in both political and academic debate.

In the last two decades, the growing discipline of business and human rights has provided the most promising venue for the task to develop a response. To this end, States, international organizations, business enterprises and other non-governmental actors have devised a staggering amount of public and private initiatives to tame the behaviour of corporations

712 Letzien (n 614), 15 – 18; International Bar Association (n 12), 211 – 216.

713 One way to tackle this challenge would be to contemplate harmonization within a single international instrument that, among others, sets out the details with regard to compliance/due diligence measures and mandates cooperation between jurisdictions. See for some suggestions of how such legislations could look like: Lindsey Hills, 'Universal Anti-Bribery Legislation Can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt to Create Universal Legislation to Combat Bribery around the Globe' (2014) 13 Richmond Journal of Global Law and Business 469, 490 – 492.

714 See documentation at https://business-humanrights.org/en, last accessed on 13 April 2022 and the analysis by John G Ruggie, *Just business: Multinational corporations and human rights* (Amnesty international global ethics series, First edition, W.W. Norton & Company 2013), 19.

with respect to their human rights impact. The number of different measures reflects the complexity of the regulatory task at hand. A particular challenge is posed by transnational corporations, which operate worldwide and are therefore able to evade any particular State's jurisdiction.[715] Moreover, these global economic enterprises wield tremendous political power: For instance, comparing annual governmental revenue and corporate revenue, a study by NGO *Global Justice Now* finds that 69 of the 100 largest economies in the world are today multinational corporations (**MNC**s).[716] As such, developing host States, in which these companies operate, may not be willing or even able to regulate these powerful private entities.[717] In recent years therefore, seeking regulation and remedies for corporate human rights abuses in the home States (the State of incorporation or the State in which a corporation is headquartered) of those MNCs has become increasingly *en vogue*.[718] This particular mode to enhance corporate accountability inevitably raises new and old questions of extraterritorial jurisdiction.

This current shift has been long in the making and section 2 of this chapter seeks to, briefly, trace the different historic antecedents that laid the foundation for the current dominance of extraterritorial home State regulation. Despite progress at the UN level on a binding treaty establishing international legal obligations on businesses,[719] the arguably less ambitions 'Protect, Respect and Remedy' Framework (the **Framework**)

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715 Larry C Backer, 'Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37(2) Columbia Human Rights Law Review 287, 309.

716 Global Justice Now compared the annual revenue of corporations and the annual revenue of countries taken from the CIA World Factbook 2017 and the Fortune Global 500, https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/, last accessed on 13 April 2022.

717 Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley Journal of International Law 45, 82 - 83.

718 See for instance the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht Principles), available at http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23, last accessed on 13 April 2022.

719 In 2014, the UN Human Rights Council established the 'Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', see UN Human Rights Council, Resolution 26/9,'Elaboration of an international legally binding instrument on

and the UN Guiding Principles (the **Guiding Principles**) implementing this Framework[720] are still the primary reference in the business and human rights discourse. They serve as the starting point for a closer look at extraterritoriality in business and human rights, which follows in section 3.[721] Sections 4 and 5, the core of this chapter, turn to domestic measures in the United States and Europe that affect corporate behaviour in extraterritorial settings. Section 4 focuses on human rights legislation and administrative regulations that address business conduct abroad through parent-subsidiary or lead-supplier relationships. A strong argument can be made that these regulations have not caused protest by other States as on the one hand, these measures do not clearly violate established jurisdictional principles, and, on the other hand, the objectives of these regulations – respecting and protecting human rights – are universally endorsed. In contrast, section 5 turns to transnational litigations, which have drawn more international attention, as a means of remedy for victims of abuses. In fact – as will be shown – exercises of jurisdiction over third-State defendants are not permitted by traditional jurisdictional principles. However, this finding is lamentable given the interests of the victims of grave human rights abuses and points towards a larger need for reform. Section 6 concludes.

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transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9.

720 UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/17/31 (UN Guiding Principles); The UN Guiding Principles operationalize the 2008 'Protect, Respect and Remedy Framework for Business and Human Rights' also developed by the Special Representative: UN Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/8/5.

721 For a critique of the UN Guiding Principle's approach to extraterritoriality, see Daniel Augenstein and David Kinley, 'When Human Rights "Responsibilities" become "Duties": the Extra-Territorial Obligations of States that Bind Corporations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013).

2. Foundations of Business and Human Rights

The term 'Business and human rights' suggests that this area of regulation can be approached from two very distinct perspectives, namely 'business' and 'human rights'. Indeed, for quite some time, negative human rights impacts by corporations were primarily associated not with legal obligations, but with the corporate social responsibility (**CSR**) of businesses themselves. This has shifted markedly in the past decades and the modern concept of business and human rights has primarily turned towards the establishment of binding regulation (below **a**)). However, despite multiple serious efforts, the prospects of a legally binding instrument at the international level remain uncertain (below **b**)). In place of such an obligatory instrument, the international community adopted the UN Guiding Principles, which provide the primary reference also for business and human rights regulations at the domestic level (below **c**)).

a) Corporate Social Responsibility and Business and Human Rights

Business and human rights as an area of regulation is connected to the concept of CSR: Historically, few legal obligations existed for corporations in relation to their negative impact on the enjoyment of human rights. Rather, this issue has been addressed, if at all, by businesses themselves as part of their CSR policies.[722] Even today, business leaders sometimes regard business and human rights as a branch or the newest development within the area of CSR.[723] This view was also partly shared in academic commentary which at times described business and human rights as the 'latest lens through which to view the social responsibility of corpora-

722 Justine Nolan, 'From Principles to Practice: Implementing Corporate Responsibility for Human Rights' in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press 2015), 396 ff.

723 See for instance Worth Loomis, 'The Responsibility of Parent Corporations for the Human Rights Violations of their Subsidiaries' in Michael K Addo (ed), *Human rights standards and the responsibility of transnational corporations* (Kluwer 1999): 'I define human rights broadly to include environmental rights, anti-bribery rights, and the right of every individual to benefit from ethical behavior in general, both from corporations and from governments.' See further Robert McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 (2009) JOBE 385, 391.

tions',[724] a 'new layer of debate on corporate social responsibility',[725] or a new expectation for businesses as a condition for giving them a 'social license to operate'.[726]

Although a single universally accepted definition of CSR does not exist and its understanding depends heavily on one's own academic or professional background, the notion has overwhelmingly been associated with voluntary mechanisms.[727] For instance, in its CSR strategies of 2001 and 2011, the European Commission defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with other stakeholders on a voluntary basis'.[728] From a business point of view, the argument in favour of CSR policies is therefore often found in the 'business case' for CSR, which means that investing in social causes can in the end lead to greater profits.[729] It also means that CSR remains an essentially management-driven add-on, which companies will engage in if it is beneficial, that is profitable, for business operations.[730]

Because the focus of CSR is placed on the creation of value for corporations, it has always been a somewhat imperfect solution in relation to negative human rights impacts. The notion that human rights would be subject to considerations of profitability does not seat well with the peremptory nature of these rights. Therefore, when legal scholars, NGOs and international organizations, already having a certain set of identified human rights norms in mind, entered this area, their energy naturally

724 Michael K Addo and Jena Martin, 'The Evolving Business and Society Landscape: Can Human Rights Make a Difference?' in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press 2015), 349.

725 Backer (n 715), 311.

726 Patricia Illingworth, 'Global Need: Rethinking Business Norms' in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press 2015), 192.

727 Ibid., 180.

728 European Commission, 'Promoting a European framework for Corporate Social Responsibility' (COM(2001) 366), para. 8; European Commission, 'A renewed EU strategy 2011–14 for Corporate Social Responsibility' (COM(2011) 681), para. 1.

729 Archie B Carroll and Kareem M Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) 12(1) IJMR 85; for an application of the 'business case' to business and human rights, see Addo and Martin (n 724), 376.

730 McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (n 723), 391.

turned onto the creation of binding legal obligations, which they deemed more effective than mere social pressure.[731]

b) Historic Development of Business and Human Rights at the International Level

Arguably, efforts by international organizations to place business and human rights on their policy agenda started in the 1970s.[732] In 1976, the OECD created its OECD Guidelines on Multinational Enterprises, which provided non-binding principles and standards for responsible business conduct in a global context.[733] One year later, the International Labour Organization (**ILO**) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, urging companies to follow the ILO conventions and other labour practices as well as to respect the Universal Declaration of Human Rights and the corresponding international Covenants.[734] Since their creation, both documents have been revised multiple times and they still constitute some of the most important standards in business and human rights.

A first substantial attempt at establishing legally binding international corporate human rights obligations was undertaken by the United Nations Sub-Commission on the Promotion and Protection of Human Rights in 2003 when it adopted the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (the **Draft Norms**).[735] Although one of the authors of the Draft Norms praised the outcome as a 'restatement of the international legal

731 Ibid., 385.

732 Tagi Sagafi-nejad and John H Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (United Nations Intellectual History Project, Indiana University Press 2008), 41 ff.

733 OECD, 'Guidelines for Multinational Enterprises', 21 June 1976,15 ILM 969, the latest version can be found here: http://mneguidelines.oecd.org/guidelines/, last accessed on 13 April 2022.

734 General Policy 8 of the International Labour Organization, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy', 16 November 1977, 17 ILM 422, the latest version can be found here: http://www.ilo.org/empent/Publications/WCMS_094386/lang–en/index.htm, last accessed on 13 April 2022.

735 Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights', UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

principles applicable to businesses with regard to human rights',[736] and while they were strongly welcomed by NGOs and some academics, they were met with resistance by virtually anyone else.[737] Corporations, which still enjoyed the benefit of being allowed to largely self-regulate their human rights impacts through CSR policies, were particularly opposed to the Draft Norms. Because of the widespread resistance, the UN Commission on Human Rights ultimately adopted a decision stating that the Draft Norms had 'no legal standing'.[738]

The demise of the Draft Norms served as the catalysing point for the appointment of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (the **SRSG**), John Ruggie.[739] Over the course of six years, the SRSG conducted nearly fifty international consultations and drafted or commissioned various research reports. The process eventually culminated in the 'Protect, Respect and Remedy' Framework and the implementing Guiding Principles.[740] These documents, perhaps because they were much less ambitious than the Draft Norms, have received widespread support. They were unanimously endorsed by the Human Rights Council in 2011 and since then, have become the primary reference for the business and human rights debate.[741]

However, far from ending the decade-long debate, they have prompted various domestic, regional and international actions and responses. Specifically, the endorsement of the Guiding Principles has triggered renewed interest of the international community in a legally binding instrument on business and human rights. In 2014, the Human Rights Council established an intergovernmental working group to further explore such

736 David S Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 AJIL 901 - 922, 901.

737 D. Kinley and R. Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6(3) HRLRev 447, 458.

738 UN Commission on Human Rights, Decision 2004/116, 'Responsibilities of transnational corporations and related business enterprises with regard to human rights'.

739 Nadia Bernaz, *Business and human rights: History, Law and Policy – Bridging the Accountability Gap* (Human rights and international law, Routledge 2017), 188 f.

740 Ruggie (n 714), Introduction xx.

741 UN Human Rights Council, Resolution 17/4, 'Human rights and transnational corporations and other business enterprises', A/HRC/RES/17/4.

prospects.[742] The working group has recently released the second revised draft instrument focused on domestic due diligence obligations as well as access to remedy for victims of corporate abuses.[743] Despite progress, the mandate is facing considerable hurdles including the lack of participation of a number of key States.[744] Thus, the future of the still ongoing mandate remains uncertain.

c) The UN Guiding Principles

Until such time when a binding treaty comes into force, the Guiding Principles with their near universal endorsement offer the most established restatement of substantive and procedural standards within the area of business and human rights. Ruggie himself admitted that the Guiding Principle's normative contribution was not so much to elaborate new legal obligations, but rather to define and link existing standards and practices of States and business within a single and coherent template.[745] This template consists of three pillars: the State's duty to protect against human rights abuses by corporations; the corporate responsibility to respect human rights; and the need for effective access to remedy.[746]

Rather uncontroversial and consistent with existing international human rights law is the first pillar, the State duty to protect. It rests on the established doctrine that States not only have the obligation to refrain from violating human rights themselves, but also to protect against violations stemming from private third parties such as corporations. A landmark case in this regard is *López Ostra v Spain*, decided by the ECtHR in 1994, in which the court held that a State may violate the victim's right under

742 UN Human Rights Council, Resolution 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9.

743 See Second Revised Draft of legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf , last accessed on 13 April 2022.

744 Ryan Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's new Frontier' (2016) 17 MelbJIntLaw 1, 14 – 16; O'brien 151.

745 Ruggie (n 714), 83.

746 UN Guiding Principles, General Principles.

Art. 8 of the Convention if it allows a privately owned waste plant to emit harmful pollution.[747] Similarly, in the case concerning the Ogoni people in Nigeria, the African Commission on Human and People's Rights found that the State had failed to protect the local population's rights against the damaging acts of oil companies.[748] Comparable decisions have also been rendered by the Inter-American Commission on Human Rights[749] and the Human Rights Committee.[750] In line with this jurisprudence, the Guiding Principles restate that the State's duty regarding business and human rights includes the taking of 'appropriate steps to prevent, investigate, punish and redress private actors' abuse'.[751]

The second pillar – and maybe the cornerstone of Ruggie's work – contrasts the comprehensive legal obligations of the State with the social responsibility of corporations to respect. By distinguishing between the different nature of the two pillars, one being legal and the other social, Ruggie may have overcome one of the most vicious challenges against the Draft Norms. Respect in this sense may be translated into a simple 'do no harm', that is, do not violate, facilitate or otherwise get involved in human rights violations.[752] This includes actual or potential human rights violations arising not only from a company's own activities along the entire enterprise but also through its relationship with third parties. However, mere passivity would not be enough to discharge this responsibility; rather, companies would have to develop institutional capacities for human rights due diligence.[753] The concept of due diligence is further developed throughout the second pillar and Ruggie dedicates five entire principles to elaborate the practical steps necessary.[754]

Human rights due diligence is defined as 'an ongoing management process that a reasonable and prudent enterprise needs to undertake' to meet its responsibility to respect human rights and which may differ 'in

747 ECtHR, *López Ostra v Spain*, App No 16798/90, Judgment of 9 December 1994.
748 African Commission on Human and People's Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* [2001] No 155/96, para. 61.
749 Inter-Am. Commission on Human Rights, *Maya indigenous community of the Toledo District v Belize* [2004] Case 12.053, Report No 40/04, para. 152.
750 Human Rights Committee, *Länsmann v Finland* [1994] Communication No 511/1992, U.N. Doc. CCPR/C/52/D/511/1992.
751 Principle 1, UN Guiding Principles.
752 Ruggie (n 714), 95.
753 Principle 11 to 15, UN Guiding Principles.
754 Principle 17 to 21, UN Guiding Principles.

light of its circumstances (including sector, operating context, size and similar factors)'.[755] This notion of human rights due diligence has been particularly influential, with both States and international organizations referring to it in the design of regulations and policies. While Ruggie has not been the first to connect business and human rights with due diligence, he was arguably the one who saw the potential of the concept to bridge the intellectual gap between human rights practitioners and business leaders. In fact, the terminology of due diligence existed both in international human rights law as well as business practice and the SRSG indeed drew from both traditions when constructing his concept of human rights due diligence:[756]

On the one hand, due diligence is well established under international human rights law: For instance, in its seminal *Velasquez-Rodriguez* case, the Inter-American Court held that

> '[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'.[757]

On the other hand, however, companies have long engaged in their own kind of due diligence measures, which are understood as risk-mitigating internal control mechanisms, for instance to prevent criminal misconduct by employees or to comply with anti-bribery regulations.[758] Thus, framing human rights as another operational risk that companies needed to control appealed to businesses as well.

Finally, because the framework is lacking in a specific monitoring mandate itself, the SRSG made access to remedies his third and final pillar to provide the Guiding Principles with coercive teeth. According to Ruggie, remedies include a broad range of measures not limited to State-based

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755 Office of the United Nations High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', 4.

756 Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights' in Lara Blecher, Nancy K Stafford and Gretchen C Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association 2014), 68.

757 IACtHR, *Velásquez Rodríguez v Honduras* [1988] Series C No 4, para. 172.

758 Ruggie (n 714), 99; Nolan (n 722), 407.

judicial measures, but also non-judicial grievance mechanisms as well as corporate and other non-State based redress mechanisms.[759] Among State-based judicial measures, high-profile litigations against alleged corporate human rights abusers, such as those brought under the American ATS, are of particular practical relevance as well as symbolic value.

Despite the near universal acknowledgement of the Guiding Principles, Ruggie himself has described them as only the beginning of the journey towards corporate accountability for human rights abuses.[760] In particular, because the Guiding Principles explicitly eschewed the creation of binding obligations on businesses and the prospects of an international instrument are still uncertain, it is up to domestic law to fill the regulatory vacuum based on the concepts delivered by the SRSG. However, since host countries may not be willing or even able to exercise authority over powerful multinational corporations, the potential of extraterritorial home State regulation has garnered special interest.

3. Extraterritoriality in Business and Human Rights

a) Extraterritorial Jurisdiction as a Matter of Permission

During the drafting of the Guiding Principles, extraterritoriality has featured as a focal point at various stages of the project and multiple expert consultations and extended reports to study extraterritorial jurisdiction in the area of business and human rights were commissioned.[761] Despite that, the SRSG ultimately had to admit that the topic remained highly contentious.[762] While he conceded that '[t]here are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad', he remained indecisive on the legal aspects: Accordingly, the Guiding Principles concludes that

> 'States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in

759 Principle 25 to 31, UN Guiding Principles.
760 Ruggie (n 714), 170.
761 See Zerk (n 634); Olivier De Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' (2006).
762 Ruggie (n 714) 139 f.

> their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis'.[763]

This conclusion touches on the specific, dual nature of extraterritoriality in the context of business and human rights as it integrates both the concept of jurisdiction under *international human rights law* and jurisdiction proper under *general international law*. While the last sentence of the above-quoted paragraph refers to the permissive jurisdictional principles under general international law which are at the heart of this study, the first part of the conclusion addresses the concept of jurisdiction in international human rights law and the question whether an extraterritorial *obligation* of States exists to regulate foreign business conduct of 'their' home companies in relation to human rights.[764]

With regard to the question of permission, Ruggie's reference to the recognized jurisdictional basis to prescribe in international law means that he did not have to resolve the many contentious issues within this body of law. However, Ruggie offered some concretisation in the commentaries to the Guiding Principles where he endorsed a distinction between direct extraterritorial jurisdiction and domestic measures with extraterritorial implications. This distinction is also followed by Zerk in her more in-depth study on extraterritorial jurisdiction prepared to assist the SRSG: She reserves the concept of extraterritorial jurisdiction only for 'direct assertions of jurisdiction over the foreign conduct of individuals and companies', whereas other measures that 'try to influence conditions, standards and behaviour in other countries' are referred to as domestic measures with extraterritorial implications.[765] The idea is that while some measures may (purposefully) target foreign conduct, they may also be addressing a domestic situation or using a domestic trigger and that these measures form a category different from 'direct extraterritorial jurisdiction'. Therefore, an import restriction on goods produced abroad that do not adhere to certain human rights standards would constitute a 'domestic measure with extraterritorial implications'.[766] Another example would be a regulation

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763 Commentary to Principle 2, UN Guiding Principles.

764 Augenstein and Kinley (n 721); McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights' (n 756).

765 See Zerk (n 634), 15.

766 Ibid., 15: 'An import ban on products produced using environmental standards unacceptable to the regulating state is one example [of a domestic measure with extraterritorial implications].'; Scott (n 10), 109: 'in the vast majority of cases,

that requires parent companies to report on their overall human rights policy and impacts, including those of their overseas subsidiaries, because this measure would rely 'entirely on territory as the jurisdictional basis'.[767]

Even though this distinction has been rather influential with academic commentators,[768] Ruggie himself ultimately avoided associating clear normative consequences with it. While the context does suggest that in his opinion, the category of 'domestic measures with extraterritorial implications' would normally raise no issues under international law, the SRSG merely noted that the different ways to influence extraterritorially the human rights behaviour of companies are not 'equally likely to trigger objections under all circumstances'.[769] Ruggie's reluctance to offer a clear position reflects the complexity of the issue at hand. In fact, at least some of the 'domestic measures with extraterritorial implications' include trade and procurement regulations structurally similar to secondary trade boycotts, which have caused tremendous international uproar. The discussion below will return to this issue and attempt to connect the considerations from different areas of regulation.

b) Extraterritorial Jurisdiction as a Matter of Obligation

In the area of business and human rights, academic debate exists not only with regard to the scope of permitted extraterritorial jurisdiction; rather, progressive scholars have also created a vast body of writing on the issue of extraterritorial obligations. Their starting point is mostly rooted in the jurisprudence of human rights courts and treaty body decisions interpreting the scope of application of human rights treaties. For instance, while the European Convention on Human Rights (**ECHR**), the American Convention on Human Rights (**ACHR**) and the International Covenant on Civil and Political Rights (**ICCPR**) all contain clauses that generally

territorial extension is used to condition access to the EU market for imported goods or services'.

767 Human Rights Council, 'Business and Human Rights: Further Steps towards the Operationalization of the "Protect, Respect and Remedy" Framework', A/HRC/14/27 (9 April 2010), para. 49.

768 Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117(3) JOBE 493, 496 – 497; Augenstein and Kinley (n 721), 277 – 279; see already above at A.III.2. Extraterritoriality and Extraterritorial Jurisdiction.

769 Ibid., para. 49.

limit the human rights obligation of States to natural or legal persons within their jurisdictions, the competent treaty organs have extended the protection of the treaties to situations outside the State's territory.[770] Apart from a State's territory, jurisdiction has generally been interpreted to cover extraterritorial situations in which the State is exercising 'effective control', 'authority' or 'power' over certain persons or territory.[771] The conclusion drawn from this jurisprudence is that the triggering moment for the establishment of extraterritorial application of human rights treaties is the existence of a situation in which the affected foreigner is under the *de facto* power of the State. This line of decision is well accepted among modern human rights scholars.[772]

The actual innovation, however, is the argument that such situations of *de facto* power also arise when a foreigner is the victim of corporate human rights abuses and when the perpetrating business enterprise is subject to the factual power of the home State. Thus, because the home State is in a position to 'control' the enterprise, it is also able to indirectly exercise authority over the victim. This wide definition of 'control' is engaged for instance if the enterprise is a recipient of home State support such as export credits and more radically, if the corporate parent of the business enterprise is incorporated in the home State, which thus places the entire corporate group under the regulatory influence of the home State.[773]

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770 ECtHR, *Loizidou v Turkey*, Preliminary Objections, App No 15318/89, Judgment of 23 March 1995, para. 62; Inter-Am. Commission on Human Rights, *Victor Saldano v Argentina* [1999] Report No 38/99, para. 19.

771 See for instance: Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13, para. 10.

772 Milanovic (n 27), 417; See further the conclusions reached by Fons Coomans and Menno T Kamminga, 'Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004), 3 – 4.

773 McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (n 723), 399 – 389; Augenstein and Kinley (n 721) for instance write at 285 – 286: 'A state's de jure authority to exercise extra-territorial jurisdiction under public international law not only delimits the state's lawful competence to regulate and control business entities as perpetrators of extra-territorial human rights violations, but also constitutes a de facto relationship of power of the state over the individual that brings the individual under the state's human rights jurisdiction and triggers corresponding extra-territorial obligations.'

A regularly cited example in this regard is *Kovačič*, in which the ECtHR accepted jurisdiction in a case concerning a Slovenian law, which prohibited the Croatian applicants from withdrawing funds from their accounts in the Croatian branch of a Slovenian bank.[774] The Slovenian government had argued that the requirements of Art. 1 ECHR were not fulfilled as the State had no effective control over the applicants: Because the applicants' deposits were situated on Croatian territory, they were thus subject to Croatian and not to Slovenian jurisdiction. The court, however, was not swayed by this argument as the Slovenian law at issue explicitly related to the accounts opened with the Slovenian bank's branches situated outside Slovenian territory.

Several UN treaty bodies have also adopted decisions suggesting that a State's human rights obligations might extend to extraterritorial conduct and effects that are under domestic control.[775] Recently, the Committee on Economic, Social and Cultural Rights, in its Concluding Observations regarding the United Kingdom, held that the country should 'adopt appropriate legislative and administrative measures to ensure the legal liability of companies domiciled under the State party's jurisdiction for violations […] abroad committed directly by these companies or resulting from the activities of their subsidiaries'.[776] The Committee on the Rights of Child has taken a similar approach: While emphasizing that, in the case of transnational corporations, the primary regulatory responsibility lies within the host State, the '[h]ome States also have obligations […] to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations'.[777]

On a scholarly level, a notable development has been the establishment of the Maastricht Principles on Extraterritorial Obligations, which seek

774 ECtHR, *Kovačić and Others v Slovenia*, App No 44574/98, 45133/98 and 48316/99, Decision of 1 April 2004, the case was later struck out because full payments were made in the interim.

775 Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 14: The Right to the Highest Attainable Standard of Health', E/C.12/2000/4, para. 39; CESCR, 'General Comment No. 15: The Right to Water', E/C.12/2002/11, para. 31; CESCR, 'General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', E/C.12/GC/24, para. 33.

776 CECSR, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, para. 12.

777 Committee on the Rights of the Child, 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16', paras. 42 – 46.

to restate extraterritorial obligations of States with regard to economic, social and cultural rights on the basis of standing international law.[778] Despite this, the existence of such a hard 'duty to regulate' MNCs in an extraterritorial context remains contentious.[779] Accordingly, the following analysis shows that while States are engaging in a wide range of different regulations and policies to protect human rights extraterritorially, the design and scope of these measures are at times quite flexible and do not indicate an acceptance of an extraterritorial duty to regulate.

4. Regulation through Parent-Subsidiary or Lead-Supplier Relationships

a) Trade, Procurement and Investment Measures

Long before Ruggie identified the State duty to protect human rights as the first pillar of the Framework and the Guiding Principles, States were already engaging in policies that would squarely fall into the business and human rights context today. Many of these leverage trade, public procurement or investments/divestments to achieve extraterritorial human rights objectives.

aa) Practice in the United States

In the United States, market access restrictions in relation to human rights performance were introduced as early as 1930. Specifically, Sec. 307 of the Smoot-Hawley Tariff Act of 1930 prohibited the import of all goods 'mined, produced, or manufactured wholly or in part in any foreign country by convict labor or forced labor'.[780] However, for the most time since its enactment, the law had little impact because of a 'consumptive demand' clause, which exempted from Sec. 307 of the Smoot-Hawley Tariff Act of 1930 all products for which the domestic production did not satisfy the domestic consumptive need. However, this consumptive demand exception was repealed in a 2016 amendment and enforcement was significantly strengthened. Since the entry into force of the amendment,

778 See Maastricht Principles (n 769).
779 Claire M O'Brien, 'The Home State Duty to Regulate TNCs Abroad' (2016), 27 – 35.
780 Sec. 307 Smoot-Hawley Tariff Act of 1930, Pub. L. 71–361, 19 U.S.C. § 1307.

the US Customs & Border Protection (**CBP**) has already taken more than 30 enforcement actions as contrasted to only 39 actions in the previous 86 years, indicating a significant policy shift.[781]

CBP enforces the provision though the issuing of 'withhold release' orders if there are reasonable indications that imported goods have been mined, produced or manufactured in a foreign country by forced or indentured child labour. To gather the necessary information, CBP allows any person who believes that certain goods fall under the scope of the act to submit complaints to the agency. To release shipments subject to enforcement actions, the importer has to submit certifications of origin as well as detailed statements showing that the product was manufactured without forced labour. The Smoot-Hawley Tariff Act of 1930 may have strong extraterritorial implications because in practice, importers have to conduct extensive due diligence in relation to their foreign suppliers and may require them to adhere to strict forced labour standards themselves if they want to continue engaging in exports to the United States. If CBP continues this line of thorough enforcement, the Tariff Act of 1930 has the potential to become a potent tool to combat forced labour, in particular because NGOs may file formal complaints about labour practices around the world.[782]

Human rights considerations are also reflected, albeit in weaker form, in US public procurement regulations. The primary document governing procurement by US federal agencies is the Federal Acquisition Regulation (**FAR**), which consolidates legislation, executive orders and treaties.[783] Subpart 22.15 of the FAR prohibits the acquisition of goods produced by forced or indentured child labour. To implement this provision, the US Department of Labor maintains a 'List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor', which includes goods suspected of being produced by forced child labour. Entries on the list are framed broadly and for instance encompass bricks from

781 See Forced Labor section on the CBP website: https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings, last accessed on 13 April 2022.

782 See for instance: Press Release, 'ILRF Files Complaint to Halt Imports of Forced Labor-made Goods from Turkmenistan', http://www.laborrights.org/releases/ilrf-files-complaint-halt-imports-forced-labor-made-goods-turkmenistan, last accessed on 13 April 2022.

783 Federal Acquisition Regulation, 48 C.F.R. Chapter 1.

Afghanistan and toys from China.[784] To receive an offer from a procuring agency, a bidder must certify that either, (a) he will not sell a product on the list, or (b), he has made a good-faith effort to determine whether forced child labour was used.[785]

Furthermore, government contractors are prohibited from engaging in human trafficking related activities and are required to pass these prohibitions, including disclosure obligations, down their supply chains.[786] Additionally, if the procurement relates to services exceeding USD 500,000 and is to be performed outside the United States, the contractor has to prepare a compliance plan, which has to be posted on the company website, and annually certify that it has implemented this compliance plan. The compliance plan has to fulfil a number of minimum requirements, including an awareness programme, a whistleblowing scheme, a recruitment and wage plan as well as procedures to prevent any prohibited human trafficking down the supply chain and to monitor, detect, and terminate contracts with subcontractors or agents engaging in prohibited activities.[787]

bb) Practice in Europe

The EU is increasingly willing to use its strength in international trade to achieve social and ecological objectives. This is for instance evidenced in the field of public procurement. Under the European system, the award of public contracts exceeding certain monetary values is harmonized across the Single Market through EU directives. In 2014, these directives have received a major overhaul and may now provide State authorities additional opportunities to take human rights into account during the procurement process. As a general principle, under Art. 18 (2) of the Public

784 US Department of Labor, List of Products Produced by Forced or Indentured Child Labor, https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-products, last accessed on 13 April 2022.

785 48 C.F.R. § 22.1503.

786 48 C.F.R. § 52.222 – 50.

787 Ibid.; even though these procurement regulations exist on the books, their actual enforcement record is less stellar. An international study conducted by the International Learning Lab on Public Procurement and Human Rights concluded that the United States maintains only weak monitoring measures operationalizing those procurement policies, see Claire M O'Brien, Nicole Vander Meulen and Amol Mehra, 'Public Procurement and Human Rights: A Survey of Twenty Jurisdictions' (2016), 38 – 47.

Procurement Directive,[788] member States shall take appropriate measures to ensure that contractors comply with applicable obligations in the fields of environmental, social and labour law. Notably, these obligations refer to the ILO Core Conventions as well as several international environmental treaties. Bidders violating these obligations may be excluded from the procurement process.[789] Further, in cases of an 'abnormally low' tender, authorities are required to reject the offer if they can establish that the 'abnormally low' offer is the result of violations against said obligations.[790] Another rule having a human rights dimension is Art. 57 (1) (f) of the Directive, which requires the exclusion of contractors who (including a member of its administrative, managing or supervising body) have been convicted of child labour or other forms of human trafficking.[791] Furthermore, at the stage of awarding the contract, the new Directive allows for the incorporation of social and environmental criteria alongside more traditional economic considerations, subject to the conditions of proportionality, non-discrimination, and link to the subject matter of the contract.[792]

While these new procurement provisions are to be welcomed from a human rights perspective, they still seem to be 'weaker' than what comparable US regulations provide for. For instance, US regulations mandatorily prohibit the procurement of goods produced using forced or child labour as well as transactions with bidders engaged in human trafficking. Under the EU Public Procurement Directive, a mandatory exclusion only exists with regard to convicted offenders, even though a conviction may rarely happen if the violations occurred down the supply chain in an extraterritorial setting. In almost all other cases, exclusion will be in the discretion of State authorities based on a violation of Art. 18 (2) of the Directive.

b) Mandatory Supply Chain Regulation

As seen above, the UN Guiding Principles establish the corporate responsibility to protect not only with respect to a company's own activities but also with respect to its relationships with third parties, in particular

788 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.
789 Ibid., Art. 57 (4) (a).
790 Ibid., Art. 69 (4).
791 Ibid., Art. 57 (1) (f).
792 Ibid., Art. 67 (2).

its affiliates and suppliers.[793] Confronted with the technical difficulties of regulating the complex web of multinational and transnational corporations, States are increasingly establishing requirements with regard to the transparency of supply chains. This modus of regulation incentivizes or obliges corporations to identify, prevent, mitigate and account for human rights risks in their supply chains, which includes conducting sufficient human rights due diligence. In contrast to the above identified public procurement and trade measures, which at times require supply chain due diligence as well, these regulations are often rooted in national corporate or securities legislation. The specific mechanisms of regulation differ in coercing force. The arguably strongest rules impose mandatory requirements, which are sometimes backed by severe penalties, in contrast to mere disclosure requirements, which depend on conscious consumers and activist investors to act upon the information made available. The most severe forms of regulation often come with significant extraterritorial effects, as subjected companies may have to impose human rights standards along the supply chain or terminate contractual relationships with individual suppliers, many of which are located abroad.

aa) Practice in the United States

The most well-known example of a mandatory supply chain regulation in the United States is the heavily contested rule regarding conflict minerals in the Democratic Republic of Congo (the **DRC**) and neighbouring countries, introduced through Sec. 1502 of the Dodd-Frank Wall Street Reform and Consumer Exchange Act.[794] The provision requires stock issuing companies that manufacture or contract to manufacture certain conflict minerals, defined as tin, tantalum, tungsten and gold, to investigate and disclose certain information regarding the sources of those minerals. These conflict minerals form integral parts of many consumer electronics but are at the same time linked to the financing of armed groups in the DRC.[795]

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793 See above C.V.2c) The UN Guiding Principles.

794 Dodd-Frank Wall Street Reform and Consumer Exchange Act, Pub.L. 111–203, H.R. 4173.

795 Erika George, 'Influencing the Impact of Business on Human Rights: Corporate Social Responsibility through Transparency and Reporting' in Lara Blecher, Nancy K Stafford and Gretchen C Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association 2014), 258 – 260.

The Final Rule promulgated by the SEC to implement Sec. 1502 establishes a three-step process: First, the companies have to determine whether they are subject to the conflict minerals disclosure obligation. If affirmed, the affected business enterprises have to conduct a reasonable country of origin inquiry to determine whether the minerals were sourced from the DRC or one of its neighbouring countries. This requirement is satisfied if the company is able to obtain reliable representations from the facilities at which its conflict minerals were processed.[796] If the inquiry determines that minerals used did not originate from the DRC or neighbouring countries, the company has to take no further steps apart from disclosing this finding with the SEC. If, after the reasonable-country-of-origin inquiry, the company knows or at least cannot rule out the possibility that minerals originated from the DRC or neighbouring countries, it is obliged to perform due diligence on the source and the supply chain of the minerals. In this case, the company has to submit a Conflict Minerals Report (**CMR**) as an attachment to the filing for the SEC.[797] The CMR has to detail the due diligence measures taken to determine whether products of the company contain minerals that directly or indirectly finance or benefit armed groups. The due diligence process has to conform with a nationally or internationally recognized due diligence framework such as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (the **OECD Due Diligence Guidance**).[798] Additionally, the CMR has to undergo an independent private sector audit, which is to be conducted in accordance with standards established by the Comptroller General of the United States and the result of this audit has to be filed with the SEC as well.[799]

These provisions are strengthened through a number of transparency requirements and enforcement possibilities. Because the reasonable-country-of-origin inquiry and, if applicable, the CMR have to be filed with

796 Conflict Minerals Final Rule, 77 Fed. Reg. 56.311 -313.

797 Ibid., 56.320. There is no obligation to submit the CMR if the due diligence leads to the positive determination that its conflict minerals in fact did not originate in the DRC or a neighbouring country.

798 Ibid., 56.326; See OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011), available at http://www.oecd.org/corporate/mne/mining.htm, last accessed on 13 April 2022.

799 Ibid., 56.328.

the SEC,[800] failure to comply with these provisions, for instance through false or unreliable statements, are subject to injunctive, civil, or criminal sanctions. In particular, if such statements lead to injuries on the part of shareholders in a stock transaction, these shareholders can use a private right of action to hold the company liable.[801] Furthermore, companies have to disclose their reasonable-country-of-origin inquiry and their CMR not only to the SEC, but also make them public on their internet websites. Originally, companies were required to label their products as either 'DRC conflict free' or 'have not been found to be "DRC conflict free"'. However, this last requirement has been partially struck down as unconstitutional compelled speech.[802]

Sec. 1502 has extraterritorial implications in multiple ways. For one, just like the FCPA[803] it applies to companies that issue stocks on US exchanges and that are required to file reports with the SEC regardless of whether they are domestic or foreign.[804] For the other, the provision may have had significant effects on the conduct of the upstream supply chain of US companies, particularly smelters and refiners, which have to disclose the sources of their minerals and which in turn requires them to conduct thorough due diligence. An EU communication estimated the number of companies in Europe indirectly affected by the rule to be between 150.000 and 200.000.[805] On the intergovernmental level, the International Conference on the Great Lakes Region (the **ICGLR** or the **Conference**), an international organization comprising the DRC and its neighbouring countries, has introduced a Regional Certification Mechanism to help mineral producers in the region to comply with Sec. 1502.

Despite its strong extraterritorial implications, Sec. 1502 has not been the subject of vehement State protest. In fact, while the ICGLR lamented the *de facto* embargo on the mineral sector of the region and the ensuing

800 See Sections 13(p)(1)(A)(ii) and 13(p)(1)(D) of the Securities Exchange Act of 1934, 17 C.F.R. § 240.13p-1.

801 Karen E Woody, 'Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog' (2013) 81 FordhamLR 1315, 1336 – 1338.

802 *National Ass'n of Manufacturers v SEC*, 800 F 3d 518 (DC Cir 2015).

803 See above: C.IV.4a)aa) The Jurisdictional Scope of the FCPA.

804 See on this the letter by Taiwan Semiconductors Manufacturing Company Ltd. to the SEC, https://www.sec.gov/comments/s7-40-10/s74010-46.pdf, last accessed on 13 April 2022.

805 High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, Responsible sourcing of minerals originating in conflict-affected and high-risk areas: Towards an integrated EU approach, JOIN(2014) 8 final, at 7.

disruption of the local economy, the Conference opposed a US domestic proposal to repeal Sec. 1502, arguing that such action might lead to a resurgence of armed groups.[806] Moreover, the Conference as well as individual States did not suggest that the act at issue violated international law principles because of its extraterritorial implications.

bb) Practice in Europe

After years of discussion between the Commission, the Parliament and the Council, the EU, partly inspired by the US model, adopted its own version of conflict minerals regulations in 2017.[807] Aimed at the same minerals, tin, tantalum, tungsten and gold, the EU regulation imposes due diligence obligations directly onto the importers, in contrast to Sec. 1502, which addressed all stock issuing companies. The due diligence measures adopted have to be consistent with the OECD Due Diligence Guidance.[808] As with Sec. 1502, importers must have their activities and processes certified via independent third-party audits and disclose their supply-chain policies and related information to authorities and the public. To ease the burden on importers, they are exempted from the private audit requirement if they can provide evidence that they only sourced from smelters and refiners which themselves comply with the conflict minerals regulation and are included in a list of global responsible smelters and refiners.[809]

Comparable to Sec. 1502, the EU Conflict Minerals Regulation has extraterritorial implications. However, because the EU regulation targets the direct importers at the beginning of the downstream supply chain, it does not affect an end-purchaser's entire supplier base. Accordingly, the EU estimates that only about 500 smelters and refiners globally will be in-

806 See International Conference on the Great Lakes Region, Declaration on Section 1502 of the US Dodd Frank Act, http://www.icglr.org/index.php/en/homepage/135-laast-news/763-icglr-declaration-section-of-the-us-dodd-frank-act, last accessed on 13 April 2022.

807 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (hereinafter: EU Conflict Minerals Regulation).

808 See Art. 4 and 5 of the EU Conflict Minerals Regulation.

809 See Art. 6, 7 and 9 of the EU Conflict Minerals Regulation.

directly subjected to the regulation.[810] It seems plausible that, as importers move towards companies included in the list of global responsible smelters and refiners to avoid the obligation to conduct third-party audits, domestic as well as foreign companies will pursue compliance with the EU Conflict Minerals Regulation to not lose business.[811]

On the national level, after a similarly tedious legislative process, France in 2017 adopted its law regarding the *devoir de vigilance*, or duty of care of parent companies and subcontracting companies. Despite its limited scope of addressees – the law applies only to companies incorporated or registered in France that employ more than 5,000 employees themselves or through their French subsidiaries or more than 10,000 employees globally – it introduced, at that time, unprecedented obligations in business and human rights. Companies subject to the regulation are required to elaborate, disclose and implement an effective *plan de vigilance* of reasonable measures to identify and prevent any serious violations of human rights, fundamental freedoms, and the health and safety of persons and the environment. This duty of care includes among others risk-mapping, preventive and mitigating measures and more importantly, a mechanism

810 European Commission, The regulation explained, http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/, last accessed on 13 April 2022.

811 The legislative process shows that the final regulation has been a carefully crafted compromise, after discarding both 'softer' and 'harder' regulatory options. The Commission had initially pushed for a voluntary self-certification system, which meant that meeting the due diligence requirements would be voluntary for importers who wanted to be certified as a responsible importer. In contrast, the European Parliament opted for mandatory due diligence by importers in addition to a disclosure requirement for stock issuing companies mirroring that of Sec. 1502. The original impact assessment also considered an import ban on conflict minerals if importers could not demonstrate compliance with OECD due diligence guidelines. For more details, see Anita Thoms, 'Offenlegungspflichten für Konfliktmineralien in den USA und der EU' in Arnold Wallraff, Dirk Ehlers and Hans-Michael Wolffgang (eds), *Recht der Exportkontrolle: Bestandsaufnahme und Perspektiven: Handbuch zum Exportkontrollrecht.* zugleich Festgabe für Dr. Arnold Wallraff zum 65. Geburtstag (Schriften zum Aussenwirtschaftsrecht 2015), 135 – 138; European Parliament, Press Release of June 16 2016, http://www.europarl.europa.eu/pdfs/news/expert/infopress/20160615IPR32320/20160615IPR32320_en.pdf, last accessed on 13 April 2022; European Commission, Impact Assessment, SWD(2014) 53 final, at 39.

to regularly assess the situation of subsidiaries and suppliers with the objective to prevent serious violations.[812]

To enforce the regulation, the company may be subjected to injunctive measures in case of breach and may be held liable for civil damages resulting from a negligence in implementing the 'plan de vigilance'. A third sanctions mechanism, which provided for a fine of up to 10 million Euros, was struck down for violating the constitutional principle of criminal legality as the particular conditions under which the fine could be levied were defined too broadly in the opinion of the Conseil Constitutionnel.[813] Therefore, the mechanism that provides coercive teeth to the new regulation is the possibility of civil liability, which gives foreign nationals in third countries access to a tort-based remedy in France against the corporate parent. In effect, therefore, the parent/subcontracting company may have to account for violations by its subsidiaries or suppliers along its global supply chain. This last point has also been raised in the constitutional challenge as it supposedly violated the principle of personal responsibility, that is, the principle that one cannot be held liable for actions and omissions of third parties. However, the Conseil Constitutionnel rejected this argument, because the company incurs liability only if there is a direct causality between the failure to exercise its duty of care and the violation sustained by the victim, even if the damage occurred abroad.[814] However, the effectiveness of this tort regime is severely curtailed as the burden of proof to substantiate the relationship between negligence on behalf of the parent/lead company and the violation lies with the victims, for whom it may be difficult to obtain information about the internal control structures of a multinational enterprise.[815]

The French law on *devoir de vigilance* has sparked multiple legislative initiatives on mandatory corporate due diligence across Europe. Most notably, Germany adopted its Corporate Due Diligence in Supply Chains Act on 22 July 2021.[816] While the law imposes similar due diligence

812 Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, texte adopté n° 924.

813 Conseil constitutionnel, 23 March 2017, Decision no. 2017–750 DC, paras. 9 – 14.

814 Ibid., para. 27.

815 Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2(2) Business and Human Rights Journal 317, 321.

816 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, BGBl. 2021 Part I p. 2959.

obligations, it has a significantly larger scope of application compared to the French law on *devoir de vigilance*: Beginning from 1 January 2024, German and foreign companies with a registered branch in Germany that employ more than 1,000 employees in Germany are subject to the law.[817] However, unlike the French law, the Corporate Due Diligence in Supply Chains Act does not provide for direct civil liabilities of German companies for failure to comply with their obligations; rather, the law is exclusively to be enforced by the Federal Office for Economic Affairs and Export Control.[818]

c) Disclosure and Transparency Requirements

Moving away from mandatory human rights due diligence obligations, States may choose to require companies to disclose – to the government, shareholders, consumers or the public – the measures they have undertaken with regard to CSR or a specific business and human rights situation, including when they have not taken any action. Disclosure requirements have a long tradition in US securities legislation: They were first introduced in the aftermath of the 1929 stock market crash to prevent fraud and give shareholders the access to necessary information to make prudent investment decisions.[819] Social disclosure requirements follow a similar idea to empower consumers and other activist stakeholders to receive information and base decisions on the social performance of companies, thus eventually pressuring corporations to act in a more accountable way.[820]

aa) Practice in the United States

One of the most significant pieces of legislation on the state level is the California Transparency in Supply Chains Act of 2010 (the **CTSCA**), with which California has spearheaded the supply chain due diligence

817 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, § 1.
818 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, § 3 and 19.
819 Woody, 'Conflict Minerals Legislation' (n 801), 1320 – 1322; George (n 795), 256.
820 Julia Planitzer, 'Trafficking in Human Beings for the Purpose of Labour Exploitation: Can Obligatory Reporting by Corporations Prevent Trafficking?' (2016) 34(4) Netherlands Quarterly of Human Rights 318, 329 – 331.

movement with regard to forced labour.[821] The CTSCA requires retailers and manufacturers doing business in California with annual gross receipts exceeding 100 million to disclose their efforts in combatting corporate forced labour and human trafficking. The term 'doing business' is understood broadly and includes any company actively engaged in any transaction for the purpose of financial or pecuniary gain or profit.[822] As such, the regulation potentially targets foreign corporations that are neither organized nor domiciled in the State of California. The companies have to make the disclosure public on their internet presence and describe activities undertaken with regard to five different topics, including the verification and audit of supply chains by the company itself or by third parties, whether the company requires certification of suppliers, international accountability as well as training measures. The disclosure requirements apply even if the company has not taken any measures with regard to forced labour and human trafficking.[823]

The statute is enforceable through injunctions filed by the State Attorney General, though enforcement activity up to now seems to have been rather low.[824] To provide further teeth for the legislation, private citizens have started proceedings related to the CTSCA under various statutes, including the California Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. In the most prominent of these cases, *Sud v Costco Wholesale Corp.*, the plaintiffs alleged that Costco was misleading consumers by disclosing on its website that it engaged in supply chain monitoring to prevent modern slavery when in fact prawns from Southeast Asia that Costco sold to consumers were farmed using forced labour. The case was eventually dismissed for lack of standing as the plaintiffs failed to prove that they purchased prawns from Costco specifically because of Costco's disclosure.[825] However, if the case would have succeeded, it could have forced Costco to address these issues within their foreign supply chain, which in the end could have led to a change of behaviour of persons and companies abroad.

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821 California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (2010), Cal. Civ. Code § 1714.43.

822 Kamala D Harris, 'The California Transparency in Supply Chains Act: A Resource Guide' CTSCA Resource Guide, at 3.

823 Ibid., at 4.

824 Cal. Civ. Code, § 1714.43, subd. (d); See also Planitzer (n 820), 329.

825 *Sud v Costco Wholesale Corp. et al*, No. 15-cv-03783-JSW (ND Cal. 2017), at 8.

bb) Practice in Europe

The CTSCA has acted as a catalyser for similar legislation around the world and in particular, led to the adoption of the UK Modern Slavery Act of 2015.[826] Sec. 54 of the Act requires commercial organizations, i.e. corporations and partnerships that supply goods or services with a global enterprise turnover above a certain threshold, to disclose the steps they have taken to ensure that slavery and human trafficking are not taking place in their business as well as their supply chains.[827] Companies subject to the regulation are encouraged to disclose information about their organization and supply chains, their policies related to human trafficking and slavery, their due diligence, risk management and performance monitoring measures as well as employee training.[828] Importantly, just like the CTSCA and the UK Bribery Act, the regulation applies not only to companies incorporated or domiciled in the UK, but also to any commercial organization that carries out at least part of its business in the UK.[829] Therefore, the Act will equally apply to foreign companies active in the UK that meet the turnover threshold.

Some commentators have lamented that the Act does not cover foreign subsidiaries of UK based companies that are not integrated into the parent company's supply chain and do not conduct business in the territory of the UK: Because these subsidiaries are not themselves acting in the UK, the Modern Slavery Act does not directly apply to them, and because they are not part of the supply chain of the parent company, technically the parent company is exempt from disclosing information about them. Thus, a UK company may still employ forced labour abroad by utilizing subsidiary corporations that are separated from the parent company's sup-

826 In the United States, on the federal level, the proposed federal Business Transparency on Trafficking and Slavery Act was initially rejected; see on this proposal Sophia Eckert, 'The Business Transparency on Trafficking and Slavery Act: Fighting Forced Labor in Complex Global Supply Chains' (2013) 12(2) Journal of International Business and Law. The UK Modern Slavery Act in turn has been the main inspiration for Australia, which has most recently adopted the Modern Slavery Act 2018, https://www.legislation.gov.au/Details/C2018A00153, last accessed on 13 April 2022.

827 Sec. 54 UK Modern Slavery Act 2015.

828 Sec. 54 (5) UK Modern Slavery Act 2015.

829 Sec. 54 (12) UK Modern Slavery Act 2015.

plier base.[830] The government seems to have acknowledged the existence of this loophole, as the official guidance points out that 'seeking to cover non-UK subsidiaries in a parent company statement, or asking those non-UK subsidiaries to produce a statement themselves, would represent good practice and […] is highly recommended'.[831] However, as this part of the guidance is non-binding in nature, it need not be discussed whether directly subjecting foreign subsidiaries to the Modern Slavery Act would have amounted to exercising control-based jurisdiction, which has been heavily contested within the context of economic sanctions.

d) Comparative Normative Analysis

Partly prompted by the UN Guiding Principles, States have begun to adopt a number of domestic measures seeking to address the extraterritorial human rights impact of corporations. Apart from long-standing trade and procurement measures, new regulatory patterns such as mandating supply chain due diligence or requiring social disclosure have emerged. Several techniques are used to equip these measures with extraterritorial reach: On the one hand, trade restrictions, public procurement selection criteria and similar measures influence foreign corporations by granting or withdrawing economic benefits based on their behaviour abroad. On the other hand, mandatory supply chain due diligence and disclosure obligations require companies at the top of the supply chain, which are the direct subjects of regulation, to ensure the transparency and integrity of the individual links with regard to their human rights performance. To fulfil this duty, the regulated companies in turn have to impose obligations on their foreign subsidiaries and suppliers and require them to mitigate human rights related risks, using their corporate control (in case of subsidiaries) or business relationships (in case of subcontractors) as leverage.[832]

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830 International Trade Union Confederation, Closing the loopholes – How legislators can build on the UK Modern Slavery Act, at 11 – 12, https://www.ituc-csi.org/closing-the-loopholes-how, last accessed on 13 April 2022.

831 Transparency in Supply Chains etc. A practical guide, paras. 3.11 – 3.13, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf, last accessed on 13 April 2022.

832 See more about this new mode of regulation: Galit A Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56 HarvIntlLJ 419, 434.

These recent initiatives in the area of business and human rights have not drawn strong criticism from affected countries, let alone faced challenges that they are contrary to international law. Three reasons might be brought up for this: First, the actual extraterritorial effects of some these measures for commercial organisations abroad are often not excessively intrusive. Second, even where the extraterritorial effects of the regulations are more intense, such as in the case of Sec. 1502 of the Dodd-Frank Act, these measures do not clearly violate international law as it could be argued that they are justified by established jurisdictional principles. Third, I will argue that the general acceptance of extraterritorial business and human rights regulations is connected to the substantive content of these measures as respecting and protecting human rights are universally endorsed objectives.

First, certain business and human rights regulations may not cause strong reactions simply because their effects are rather weak. For instance, disclosure obligations such as those contained in the CTSCA or the UK Modern Slavery Act actually allow companies to not take any action with regard to forced labour and similar employment practice within their supply chain. While doing so may reflect badly on the company in the eyes of the consumer, there is no legal obligation to conduct due diligence or to terminate business relationships with suppliers engaged in egregious labour practices. Therefore, both acts should be viewed in line with provisions such as the EU Non-Financial Reporting Directive,[833] the French Grenelle II legislation[834] and amendments to the Danish Financial Statements Act.[835] Less than hard regulations, the primary purpose of these acts is to raise awareness about corporate social responsibility and the impact of corporate conduct within senior management and to induce a gradual change in corporate culture over time.[836]

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833 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ 330/1.

834 Art. 225 of the Loi n° 2010–788 du 12 juillet 2010 portant engagement national pour l'environnement (Grenelle II).

835 Act amending the Danish Financial Statement Act (Accounting for CSR in large businesses).

836 See also Rachel Chambers, 'An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional Dilemma Raised/Created by the Use of the Extraterritorial Techniques' (2018) 14(2) ULR 22, 24.

Second, in relation to measures with more intensive extraterritorial effects such as Sec. 1502 of the Dodd-Frank Act, the EU Conflict Minerals Regulation or certain trade and procurement policies, the rather muted response to these regulations may be explained by doctrinal considerations: Indeed, there are persuasive arguments that the measures examined above do not clearly violate principles of international law as it could be argued that they are justified by traditional jurisdictional principles.

Specifically, Sec. 1502 of the Dodd-Frank Act as well as similar due diligence legislations can be readily subsumed under the territoriality or active personality principle. To be sure, these measures have extraterritorial implications: For instance, the lead company may – compelled by due diligence and/or disclosure rules – only retain those suppliers which fulfil certain compliance requirements. Thus, suppliers abroad have to *de facto* subject themselves to these compliance requirements if they are to continue business with the lead company. Still, these measures are justified by the territoriality or active personality principle because only the lead company, which is domestically incorporated or has its seat of management within domestic territory, is responsible for performing the obligations under the due diligence regulations. The lead company may choose whether and how it enforces these obligations along its global supply chain. Finally, it is only the conduct of the lead company which gives rise to liability for failure to comply with these regulations.

The situation is slightly more complicated in relation to trade and procurement measures, which deny the access to domestic market or domestic economic benefits if certain human rights obligations are not fulfilled abroad. For instance, as discussed above, the Smoot-Hawley Tariff Act of 1930 prohibits the importation of goods if they were manufactured using forced labour. These measures are somewhat similar to secondary trade boycotts such as Sec. 5 (a) of the ISA: There as well, the access to domestic market is conditioned on conduct abroad, specifically, the requirement not to undertake certain business dealings with Iran. Secondary trade boycotts have historically caused international outrage and sometimes been regarded as illegal under international law because they purportedly prescribe obligations onto foreigners regarding their conduct abroad.[837] However, this opinion has come under attack in more recent literature: Some commentators argue that secondary trade boycotts do not involve extraterritorial jurisdiction because in fact, access to domestic market or the granting of domestic economic benefits is nothing more than a terri-

837 See above at C.II.4. Secondary Trade Boycotts.

torial matter. In the terminology of the SRSG Ruggie, these regulations fall into the category of measures described as having mere extraterritorial implications in contrast to 'direct extraterritoriality'.[838] As explained in detail above, it is at least contentious whether market access measures conditioned on human rights behaviour abroad violate jurisdictional principles of international law.[839]

Third, the reluctant reaction of foreign governments against business and human rights measures may be at least partly connected to the substantive content of the regulations.[840] Because they arguably address universally recognized human rights standards, voicing open opposition may reflect negatively on the critics. The dynamics at work here are thus similar to those in the case of the FCPA and other anti-corruption measures with strong extraterritorial reach, where, as we have seen, the (near) universal character of corruption as a pressing global issue strengthened the acceptance of unilateral extraterritorial regulation.[841] However, because of the wide and at times uncertain scope of the discussed human rights legislations, future case law and administrative interpretation might change that cautious attitude, especially considering that normative conflicts with local regulations are well possible. In this respect, the State practice regarding transnational human rights litigations might foreshadow the future development for extraterritoriality in domestic regulations.

5. Transnational Human Rights Litigation

As already mentioned, both the ongoing discussion in relation to the establishment of a binding international instrument for business and human rights as well as the third pillar of the UN Guiding Principles emphasise the importance of facilitating access to remedies for victims of abuses. However, there may be a lack of effective redress mechanisms for victims within the host State in which MNCs are operating, either because the local legal system lacks resources or because the locally incorporated sub-

838 Commentary to Principle 2, UN Guiding Principles; see also above at C.V.3. Extraterritoriality in Business and Human Rights.
839 See above at C.II.4c) Comparative Normative Analysis.
840 See also Commentary to Principle 2, UN Guiding Principles.
841 See for this comparison: Ramasastry (n 584); for more on the FCPA and other anti-bribery legislation, see above at C.IV. Anti-Corruption.

sidiary is underfunded or defunct.[842] In these cases, a need arises for the victims to state their claim for compensation in some other forum, often in the home State where the parent company of the MNC is incorporated. In the last decades, this has spurred the development of a whole range of transnational tort litigations with grave human rights abuses as the underlying cause. In US courts, litigation based on the ATS has become the 'lynchpin' of transnational human rights litigation and received enormous practical and academic attention.[843] In several more recent decisions however, the US Supreme Court has significantly curtailed its jurisdictional reach (below **a**)). Even though the rather expansive interpretation of the ATS has received mixed reaction in Europe, several doctrinal developments are making European courts increasingly attractive to human rights litigation (below **b**)). From a doctrinal perspective, the exercise of jurisdiction over third-State defendants is not permitted by traditional jurisdictional principles. However, given the interests of the victims of grave human rights abuses, this fact is lamentable and point towards a larger need for reform (below **c**)).

a) Practice in the United States

Neither the history nor the plain text of the ATS suggest that it would one day become the central mechanism for victims of human rights abuses worldwide to remedy their wrongs in US courts. Enacted by the first Congress in 1789, the statute provides federal district courts with jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[844] The 'law of nations' in this provision refers to customary international law. In effect therefore, the statute allowed foreigners to claim compensation for a tort in a US federal court, when that tort at the same time constituted a violation of customary international law or of an international treaty to which the United States is a party.[845]

842 Anil Yilmaz Vastardis and Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?' (2018) 67(02) ICLQ 389, 389.
843 Note, 'Developments in the Law – Extraterritoriality' (n 343), 1233.
844 28 U.S.C. § 1350 (2012).
845 See Bernaz, *Business and human rights* (n 739), 260.

After a relatively uneventful 200 years, the statute was rediscovered by the Second Circuit in 1980, when in *Filartiga v Pena-Irala*, the court held that the ATS could apply to a claim for damages in a case involving the torture of two Paraguayan citizens by a Paraguayan government officer. In the court's opinion, customary international law recognized the torturer as *hostis humani generis*, an enemy of all mankind, so that the requirements of the statute, a civil claim relating to a tort that violates the law of nations, were fulfilled.[846] In subsequent jurisprudence, courts gradually expanded the scope of the ATS to other violations of international human rights law. For the purposes of our discussion of extraterritoriality in the context of business and human rights, *Kadic v Karadžić* constituted the first milestone, in which the ATS was applied to non-State individual actors,[847] while in *Doe I v Unocal Corp*, the act was invoked for the first time against a corporate defendant for its alleged complicity in human rights abuses.[848] The partly successful claim in *Unocal* has sparked an increasing number of actions against both US and non-US companies for involvement in human rights abuses abroad.

The Supreme Court, in subsequent decisions, mostly reigned in this development. In *Sosa v Alvarez-Machain*, the court considered a case of unlawful abduction and detention, the relevant parts of which took part in Mexico. While the court did allow suits in the fashion of *Filartiga* to move forward, it held that jurisdiction under the ATS was only available for causes of action that were as specific and universally accepted as the international norms the first Congress had in mind in 1789. According to the Supreme Court, such torts included piracy, violations of safe conduct, such as injury to a wartime enemy who was granted a specific guarantee of safety, and offenses against ambassadors.[849] However, even after *Sosa*, ATS litigation flourished and according to research conducted by Jonathan Drimmer, until 2012 alone, about 180 ATS lawsuits in US courts against corporate defendants have been filed.[850] Unsurprisingly, this practice has

846 *Filartiga v Pena-Irala*, 630 F 2d 876, 887 (2d Cir 1980).
847 *Kadic v Karadžić* 70 F 3d 232, 239 (2d Cir 1995).
848 *Doe I v Unocal Corp* 963 F Supp 880, 891 – 892 (CD Cal 1997).
849 *Sosa v Alvarez-Machain* 542 US 692, 724 (2004).
850 Table of cases annexed in Michael D Goldhaber, 'Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard (Human Rights Litigation in State Courts and Under State Laws)' (2013) 3 University of California Irvine Law Review 127, 137 – 149, see also Note, 'Developments in the Law – Extraterritoriality' (n 343), 1237.

increasingly caught the attention and at times triggered hostile responses by affected businesses and States abroad.

The development culminated in the controversial Supreme Court decision in *Kiobel v Royal Dutch Petroleum*. In *Kiobel*, the plaintiffs, Ogoni people in Nigeria, claimed that Royal Dutch Shell and its Nigerian subsidiary aided and abetted government human rights violations by providing material assistance and payment to violent police forces that raided Ogoni villages and massacred and raped in the region.[851] Two distinct questions were controversial going into the Supreme Court decision. The first concerned whether the ATS applied to causes of action based on corporate liability, given that while international law recognized individual responsibility for certain egregious crimes, its status on corporations is ambiguous at best. The second question asked whether and to what extent the ATS is applicable to conduct occurring almost entirely abroad, that is, the question of extraterritoriality.

In effect, the court majority opinion decided the case only on the second issue and held that the plaintiffs' claims under the ATS were barred because of the presumption against extraterritoriality.[852] As mentioned above, this presumption restricts the application of laws to 'within the territorial jurisdiction of the United States', unless an express legislative intent to the contrary can be demonstrated.[853] This was not the case with the ATS however, where, according to the Supreme Court, nothing in the text nor the historical background served to rebut this presumption. As a result, the ATS was restricted to only cover claims that 'touch and concern the territory of the United States with "sufficient force"'.[854] Following the decision, a jurisprudential split emerged among different lower courts in relation to the issue of extraterritoriality. While some courts interpreted the 'touch and concern' criterion to require a flexible case-by-case analysis considering all circumstances, others read the Supreme Court opinion

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851 *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108, 113 (2013).

852 Ibid., at 1664.

853 *Morrison v National Australia Bank Ltd.*, 561 US 247, 255 (2010) (quoting *EEOC v Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)); see above at B.I.2.a)bb) The US Presumption against Extraterritoriality.

854 *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108, 125 (2013); For commentaries on this decision, see e.g. Vivian Grosswald Curran and David Sloss, 'Reviving Human Rights Litigation After Kiobel' (2013) 107 AJIL 858; Paul L Hoffman, 'Kiobel v. Royal Dutch Petroleum Co: First Impressions' [2013] Columbia Journal of Transnational Law 28, 44; Caroline Kaeb and David J Scheffer, 'The Paradox of "Kiobel" in Europe' (2013) 107 AJIL 852, 857.

more restrictively and required the violation of international law to have taken place on US territory.[855]

While *Jesner v Arab Bank, PLC*, the next significant case to reach Supreme Court, provided the court with a prime opportunity to clarify on the 'touch and concern' criterion, the court ultimately decided the case on other grounds. The allegation in *Jesner* concerned conduct similar to what we have already seen above when analysing OFAC's enforcement actions, namely, the financing of terrorists via the American banking system.[856] The claimants, victims of terrorist attacks abroad, sought redress from Arab Bank, PLC, which allegedly facilitated these attacks through monetary transactions passing through Arab Bank's branch in New York. Thus, one of the main issues of the case concerned the question whether this conduct alone did touch and concern US territory with sufficient force to displace the presumption against extraterritoriality.[857] The Supreme Court however, did not clarify on the issue of extraterritoriality, but rather affirmed the Second Circuit's dismissal of the case based on the question unresolved in *Kiobel*, namely, whether the ATS provides a cause of action against corporate defendants at all.[858] Contrary to the views of several *amici curiae*,[859] the Supreme Court held that at least foreign corporations, such as Arab Bank, PLC, could not be subjected to ATS suits.[860]

In its most recent decision in an ATS case, *Nestlé USA, Inc. v Doe*, the Supreme Court revisited the issue of extraterritoriality. In this case, claimants from Mali alleged that they were trafficked into Côte d'Ivoire as children and enslaved to produce cocoa. While the corporate defendants, including *Nestlé USA*, did not own or operate farms in Côte d'Ivoire, they did buy cocoa from farms there and provided the farms with resources including training, fertilizer, tools and cash, in exchange for the exclusive rights to purchase their cocoa. The Supreme Court barred the suit from

855 See Note, 'Clarifying Kiobel's "Touch and Concern" Test' (2017) 130 HarvLRev 1902, 1910.

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

857 *Jesner v Arab Bank, PLC*, 138 S Ct 1386 (2018), Brief for the United States as *amicus curiae* in support of neither party, 27 – 29.

858 *Jesner v Arab Bank, PLC*, 138 S Ct 1386, 1399 (2018); see also *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F 3d 144 (2d Cir 2015).

859 *Jesner v Arab Bank*, Brief for the United States as *amicus curiae* in support of neither party, 17 – 24; Brief of International Law Scholars in support of petitioners, 4 – 5.

860 *Jesner v Arab Bank, PLC*, 138 S Ct 1386, 1408 (2018).

going forward. It held that the alleged conduct amounted only to 'general corporate activity',[861] which, just like 'mere corporate presence', did not serve to displace the presumption against extraterritoriality. In essence, the only marginal US-based conduct of defendants was not sufficient for a US court to exercise ATS jurisdiction over the case.[862]

Although the series of decisions since *Kiobel* have significantly limited the categories of possible litigations under the ATS, the door may not have been completely closed. Since it is yet unclear whether the holding in *Jesner* is restricted to foreign corporations, ATS suits may still be brought successfully against domestic corporations. If that is the case, it is not inconceivable that future litigations may involve corporate actions with a connection to US territory firm enough to overcome the requirements set by the Supreme Court in both *Kiobel* and *Nestlé*.

b) Practice in Europe

Considering the potentially global scope of ATS litigation in the United States, it is unsurprising that the EU as well as European States have followed the series of cases with great interest. Particularly during the *Kiobel*-saga, they have voiced their opinions in *amicus curiae* briefs, which therefore provide a unique window into the interpretation of international law by these States (below **aa**)). However, even before *Kiobel*, human rights lawyers have already been looking for alternative venues to remedy gross human rights violations. Even though litigants in European courts cannot base their claims on an ATS-like mechanism, which specifically concerns the violation of a norm of public international law, human rights violations may be alleged as tort claims.[863] Compared to the ATS, filing suits essentially alleging personal injury, in which international human rights law *per se* might only play a marginal role, may seem much less empowering for the claimants.[864] However, with a number of recent legal and doctrinal innovations, the case for seeking remedies in Europe is getting increasingly stronger (below **bb**)).

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861 See on this already: *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108, 125 (2013).
862 *Nestlé United States, Inc. v. Doe.* 141 S Ct 1931 (2021).
863 Bernaz, *Business and human rights* (n 739), 275.
864 Ibid., 275; Richard Meeran, 'Access to Remedy: the United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013), 379.

aa) Amicus Curiae Briefs in the Kiobel Proceedings

The most positive position towards ATS litigation in the fashion of *Kiobel* was expressed in the *amicus curiae* brief of the European Commission on behalf of the European Union. In the opinion of the Commission, the scope of the ATS should be interpreted with reference to the jurisdictional framework of international law. Of the traditional jurisdictional bases, special focus is dedicated to universal jurisdiction, which the Commission argues may support civil litigation under the ATS in certain circumstances.[865] Restating that universal jurisdiction is a well-established concept in the criminal context, the Commission endorses the application of the same principles to the civil context. The need for an effective remedy for particularly heinous crimes also includes civil reparations. The brief specifically pointed out to the already existing practice of bringing *actions civiles* to seek monetary compensation within a criminal universal jurisdiction proceeding.[866] However, according to the Commission, universal civil jurisdiction has to be restricted by similar requirements as its criminal counterpart, meaning that it should only be exercised for the most heinous of crimes and only after exhaustion of local remedies.[867]

While the Commission has thus embraced a progressive stance, European States that filed briefs in the *Kiobel* case disagreed with the assessment. The UK and the Netherlands (the home States of the respondent Royal Dutch Shell) for instance, argued in their respective brief that universal civil jurisdiction was entirely unknown to international law.[868] The German brief, while not explicitly discussing the issue of universal civil jurisdiction, similarly set out that US courts should surrender jurisdiction to more appropriate forums with a greater connection to the case and that proceeding otherwise may interfere with a third country's sovereignty.[869]

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865 See generally, Donald F Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 AJIL 142.

866 *Kiobel v Royal Dutch Petroleum Co., 569* US 108 (2013), Brief of the European Commission on behalf of the European Union as *amicus curiae* in support of neither party, 13 – 18 and 25.

867 Ibid., 26 – 33.

868 *Kiobel v Royal Dutch Petroleum Co., 569* US 108 (2013), Brief of the governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *amici curiae* in support of neither party, 12 – 13.

869 *Kiobel v Royal Dutch Petroleum Co., 569* US 108 (2013), Brief of The Federal Republic of Germany as *amicus curiae* in support of respondents, 10.

bb) Transnational Human Rights Litigation in Europe

Even though governments across Europe have yet to take up the Commission's stance regarding universal civil jurisdiction, several legal developments have made courts in Europe, and specifically in the UK, increasingly more attractive as venues to redress human rights violations. These include, first, the restriction of the discretionary doctrine of *forum non conveniens*, second, the assumption of a duty of care of parent corporations in relation to subsidiary conduct, third, the possibility of suing foreign subsidiaries as necessary or proper parties in proceedings against European-based parent companies and fourth, the growing acceptance of *forum necessitatis* for defendants not subject to Art. 4(1) of the Brussels I Regulation.

First, the application of *forum non conveniens*, a common law doctrine which has presented a hurdle for litigation in jurisdictions such as Canada, Australia and the United States,[870] has been largely restricted in Europe. Essentially, *forum non conveniens* allows a domestic court to decline exercising jurisdiction when it determines that another forum is more suitable for the action.[871] Within the EU, however, human rights suits against corporate defendants are cast as tort based litigation, the allocation of jurisdiction for which is governed by the Brussels I Regulation.[872] According to Art. 4(1) of the Brussels I Regulation, courts are required to assert jurisdiction over all persons domiciled in their respective EU member State. Thus, member State courts have adjudicatory jurisdiction over European-based parent companies of MNCs even if the alleged conduct has primarily occurred abroad. Moreover, according to the CJEU, courts are not allowed to decline jurisdiction based on *forum non conveniens*.[873] This development has especially benefitted the UK as a forum for human rights litigation.[874] Following Brexit, the Brussels I Regulation no longer applies in the UK as of 31 December 2020. Thus, *forum non conveniens* currently poses a risk to

870 Richard Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective' (2021) 6(2) Business and Human Rights Journal 255, 259.

871 CJEU, C-281/02, *Owusu v Jackson* [2005] ECR I-01383, para. 8.

872 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter: Brussels I), OJ 2012 L 351/1.

873 CJEU, C-281/02, *Owusu v Jackson* [2005] ECR I-01383.

874 Meeran, 'Access to Remedy: the United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' (n 864), at 380 lists 9 cases in recent years.

UK-based actions again. However, the UK is in the process of joining the Lugano Convention,[875] which, once successful, would essentially restore the situation under Brussels I.[876]

Second, British and Dutch courts, among others, have imposed material liability on parent companies – when their (foreign) subsidiaries were the direct perpetrators of tort-based violations – based on the doctrine of duty of care. This doctrine has been applied in a series of asbestos related cases, including *Chandler v Cape Plc*, in which UK courts have held that a parent company, under certain circumstances, may owe a duty of care to employees of its subsidiaries.[877] Because the parent companies are held liable for their direct negligence in their own acts or omissions, the concept of duty of care does not run counter to the principle of legal separateness of corporate entities.[878] Subsequent decisions after *Chandler* have considerably widened the scope for assuming duty of care:[879] Even though the Court of Appeal in two cases in 2018 still required a rather high level of control of the domestic parent company over the foreign subsidiary to establish a duty of care in relation to the activities of the subsidiary,[880] the UK Supreme Court opted for a more flexible interpretation in *Vedanta*, arguing that it came down to a case-by-case analysis.[881] Specifically, the UK Supreme Court held in *Vedanta* and most recently in *Okpabi*[882] that defective group-wide policies may be sufficient to impose a duty of care on the parent company.

Third, another feature of human rights litigation in Europe is that domestic parent corporations and their foreign subsidiaries themselves are

875 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2007 L 339/3.

876 Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective' (n 870), 260.

877 *Chandler v Cape Plc*, [2012] EWCA Civ 525, at 80; see also *Lubbe v Cape Plc* [2000] UKHL 4.

878 Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective' (n 870), 260.

879 Though the process has been far from linear: for instance, duty of care was rejected in a factually similar case shortly after, *Thompson v The Renwick Group plc* [2014] EWCA Civ 635.

880 *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191; *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532.

881 *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Others* [2019] UKSC 20.

882 *Okpabi & Others v Royal Dutch Shell plc & Anor* [2021] UKSC 3.

often sued together. While no adjudicatory jurisdiction would ordinarily exist with regard to the foreign subsidiary as they are incorporated in third States and thus outside the scope of Art. 4 of the Brussels I regulation, it is possible to join the subsidiaries in the litigation against the parent corporation as co-defendants. Under English law for instance, this requires the foreign subsidiary to be a necessary or proper party in the case against the parent company.[883] This litigation strategy has also been used in the Netherlands version of the *Kiobel* litigation, *Akpan*, where plaintiffs sought damages for oil spills against Royal Dutch Shell Plc and its Nigerian subsidiary at the same time. The Dutch courts deciding this case assumed jurisdiction over the Nigerian subsidiary as a third State defendant because the claim was intertwined with that against Royal Dutch Shell and maintaining the cases in the same court would thus promote efficiency.[884]

Fourth, with regard to defendants not domiciled within the EU, which consequently are not regulated under Brussels I, the concept of *forum necessitatis* has been developed next to the above-mentioned strategy of joining defendants. *Forum necessitatis* refers to the establishment of adjudicative jurisdiction *vis-à-vis* situations for which no ordinary jurisdictional basis exists, but in which the right to a fair trial or the right to access to justice requires hearing the case, i.e., if doing otherwise would amount to a denial of justice because the plaintiffs cannot reasonably bring a claim in any other forum.[885]

Two forms of *forum necessitatis* are distinguished: a pure form, where the imminent denial of justice alone is sufficient to trigger jurisdiction and a mixed form, in which apart from an imminent denial of justice, at least some sort of connection with the State must exist.[886] Most prominently,

883 See on this option more generally: Daniel Augenstein and Nicola Jägers, 'Judicial Remedies: The Issue of Jurisdiction' in Juan J Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017), 17; Arnauld Nuyts, 'Study on Residual Jurisdiction: Review of the Member States' Rules concerning the "Residual Jurisdiction" of their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations' (2007).

884 *Akpan v Shell*, ECLI:NL:GHDHA:2015:3587; The decision is part of a series of cases against Royal Dutch Shell in the Netherlands, see also *Oguru-Efanga v Shell*, ECLI:NL:GHDHA:2015:3588.

885 See Art. 26 of the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Regulation and Enforcement of Judgments in Civil and Commercial Matters, COM (2010) 748 final.

886 Mills (n 14), 224 – 225.

the Netherlands contemplates a form of pure necessity jurisdiction.[887] For instance, in the Dutch case *El-Hojouj v Unnamed Libyan Officials*, The Hague District Court accepted jurisdiction over a Palestinian doctor who was allegedly imprisoned in Libya, which at the time of the litigation provided no adequate forum for dispute resolution.[888]

In contrast, French courts exercise a mixed form of *forum necessitatis*. Relying on this basis, the Paris Court of Appeal has accepted jurisdiction over a Gabonese company, COMILOG.[889] The case concerns the dismissal of almost 900 workers in Congo by COMILOG in 1991 without due notice or any compensation. The workers sued in Congo; however, their efforts were stymied as the Congolese courts failed to deliver an interim decision on a jurisdictional challenge raised by COMILOG in 1994. In this procedural delay for over 20 years without further prospects, the Paris Court of Appeal saw an objective denial of justice. Additionally, the workers could also present a sufficient connection of the case to France, as COMILOG was subsequently acquired by a French multinational corporation. Thus, in the view of the court, both requirements of the mixed form of *forum necessitatis* under French law were satisfied.[890]

c) Comparative Normative Analysis

Notwithstanding the variety of legal doctrines discussed, from a normative point of view, it seems only necessary to distinguish between two different categories, on the one hand cases against corporations domiciled in the forum State and on the other hand, cases against entities domiciled in third States. While the first scenario occurs in numerous countries, claims

887 Cedric Ryngaert and Lucas Roorda, 'Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction' (2016) 80(4) RabelsZ 783 2016, 783, 786.

888 *El-Hojouj v Unnamed Libyan Officials*, The Hague District Court (21 March 2012) LJN: BV9748; also mentioned in *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108 (2013), Brief of the governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in support of neither party, 23.

889 Cour d'appel de Paris (pole 6, ch 2), 20 June 2013, n° 12/08935; Cour de Cassation, civile, Chambre Sociale, 28 January 2015, 13–22.994, 13–22.995, 13–23.003, 13–23.004, 13–23.005, 13–23.006.

890 However, this decision was later overturned by the French Cour de cassation, Arrêt n°2024 du 14 septembre 2017 (15–26.737; 15–26.738), ECLI:FR:CCASS:2017:SO02024.

against entities from third States have almost exclusively been litigated under the ATS. While recent decisions in *Kiobel*, *Jesner* and *Nestlé* have tremendously curtailed the extensive jurisdiction of US courts, litigation against corporations not domiciled in the forum State may find another home in the nascent doctrine of *forum necessitatis*.

I will argue here that while the first category, claims against corporations domiciled in the forum State, raises no issues under jurisdictional principles of international law, the same cannot be said about the second category, claims against corporations domiciled in third States. In fact, both doctrines advanced to justify these human rights litigations, universal civil jurisdiction and *forum necessitatis* are not generally accepted under customary international law. This is lamentable in particular with regard to *forum necessitatis*, where the State exercising jurisdiction is arguably subject to two conflicting international norms, on the one hand the rules concerning prescriptive jurisdiction and on the other hand, international human rights norms regarding access to justice. Ultimately, this points to a larger deficiency of the customary international law principles of jurisdiction, which almost exclusively recognizes formal connections to States as bases for assertions of jurisdiction without regard to the interests of potentially affected individuals.

aa) Jurisdiction over Corporations Domiciled in the Forum State

In principle, commentators view the first situation, litigation against corporations domiciled in the forum State, more sympathetically from the perspective of international law. The exercise of jurisdiction is arguably justified either by the territoriality principle or by the active personality principle. Territoriality is engaged if at least part of the relevant conduct falls onto domestic territory, for instance if the corporate parent directed or facilitated human rights abuses by its subsidiaries from its headquarters, even though the actual violation is felt abroad.[891] It is arguably also a case of territoriality if the corporate parent, in its home State, failed to undertake adequate human rights due diligence, subsequently resulting in harm abroad. Additionally, jurisdiction over corporations domiciled in the forum State may also be based on the active personality principle. This is because these corporations will likely possess the nationality of the forum

891 See also *Al Shimari v CACI Premier Tech., Inc.*, 758 F 3d 516, 530 (4th Cir 2014); *Mujica v AirScan Inc.*, 771 F 3d 580, 594 (9th Cir 2014).

State, as they will be either incorporated in the forum State or at least have their principal place of business there.

It is true that asserting jurisdiction against a domestic parent corporation based on human rights violations of its affiliates/subsidiaries abroad raises certain questions of extraterritoriality. However, as the litigations frequently concern the conduct, facilitation or omission of the domestic parent, these cases are better compared to prescriptive regulation addressing group wide due diligence or disclosure requirements with regard to foreign subsidiaries and affiliates such as the UK Bribery Act. Thus, as long as the focus of the litigation is clearly on the domestic conduct of the parent corporation, assuming jurisdiction will most likely not run counter to international law despite the possible extraterritorial implications.[892]

State practice seems to support this conclusion: Even after *Kiobel*, *Jesner* and *Nestlé*, the United States still accepts jurisdiction under the ATS for claims against US corporations for sufficiently US-based conduct. A similar situation presents itself in the UK as well as the Netherlands where a transnational (human-rights) tort claim has a possibility of succeeding if the defendant corporation is domiciled in the EU and substantially, if the corporation has acted against or neglected a duty of care *vis-à-vis* a third State victim.[893] So far, there has also been no State protesting these kinds of jurisdictional assertions (quite unlike in ATS cases against foreign defendants). In sum therefore, asserting adjudicatory jurisdiction over corporations domiciled in the forum State arguably raises few issues of international law.[894]

bb) Jurisdiction over Corporations Domiciled in Third States

The second situation concerns litigations against corporations not domiciled in the forum, such as in the case of *Kiobel*. As these cases cannot rely on the active personality principle and rarely satisfy territoriality, traditional jurisdictional principles as set out in part B of this study would suppose a violation of international law. However, progressive scholars

892 For the same conclusion see Sofia Massoud, *Menschenrechtsverletzungen im Zusammenhang mit wirtschaftlichen Aktivitäten von transnationalen Unternehmen* (Interdisziplinäre Studien zu Menschenrechten vol 2, 1. Auflage 2018, Springer Berlin; Springer 2018), 117 – 119.

893 Augenstein and Jägers (n 883), 27.

894 See for this conclusion also Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations' (n 768), 496.

have called this result into question. They argue that in relation to business and human rights claims, rules of prescriptive jurisdiction are modified or superseded by the nature of these cases, because jurisdiction is exercised to remedy grave human rights violations, i.e., to vindicate the community interest of upholding human rights.[895]

This argument is in particular embodied in the notion of universal civil jurisdiction. Conceptions of universal civil jurisdiction seem to be the logical extension of the more established principle of universality in criminal matters: If a certain conduct may give rise to procedures under international criminal law, it should likewise be remedied using tort-based civil litigation.[896] Moreover, the possibility for victims to bring *actions civiles* to claim monetary compensation within criminal prosecution based on universality may be seen as support for this doctrine.[897] In 2015 therefore, the *Institut de Droit International* formulated a resolution that not only allowed the exercise of universal civil jurisdiction, but also *de lege ferenda*, rendered it obligatory with regard to reparation for international crimes.[898]

However, State practice does not offer much support for this progressive concept. After the US Supreme Court's decisions following *Kiobel*, no State exists that exercises freestanding universal civil jurisdiction. Within the *Kiobel* proceedings, numerous States protested this doctrine in *amicus curiae* briefs while Argentina was the only nation accepting an unrestricted

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895 August Reinisch, 'Human Rights Extraterritoriality: Controlling Companies Abroad' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (First edition. Oxford University Press 2018), 408 – 409; another argument is advanced by Kohl who asserts that business and human rights claims are not even subject to rules of prescriptive jurisdiction, because such claims are civil and not regulatory or criminal in nature, see Uta Kohl, 'Corporate Human Rights Accountability: The Objections Of Western Governments To The Alien Tort Statute' (2014) 63(03) ICLQ 665, 677. This argument does not persuade: human rights litigation not only concerns the compensation for personal injuries suffered between ordinary citizens, but it also sets standards of (human rights) conduct, violations of which may give rise to sanctions; see in general above at A.III.5. Regulation, Public Law and Jurisdiction.

896 See on this comparison between criminal law and tort law with regard to universality: Donovan and Roberts (n 865), 154.

897 *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108 (2013), Brief of the European Commission on behalf of the European Union as *amicus curiae* in support of neither party, 13 – 18.

898 Institut de Droit International, Universal Civil Jurisdiction with Regard to Reparation for International Crimes, Resolution of 30 August 2015.

version of universal civil jurisdiction.[899] Given this record, it is hard to argue that this doctrine has found acceptance in customary international law *de lege lata*.[900] Besides, even if we accept universal civil jurisdiction in general, the usefulness of this doctrine to hold corporations accountable for human rights abuses is still doubtable: Because universal civil jurisdiction would be grounded in its criminal counterpart, any legal deficiency of universal criminal jurisdiction would arguably also be reflected in civil litigation. For instance, it is highly unclear what standards have to be fulfilled for secondary liability – aiding and abetting – or whether corporate liability is at all possible.[901]

Because of the unsettled status of universal civil jurisdiction and ultimately because of its lack of practical relevance, scholarly attention has turned to *forum necessitatis* as another variant of the argument that rules regarding prescriptive jurisdiction are modified when it comes to violations of human rights. In principle, the doctrine of *forum necessitatis* provides for jurisdiction in cases in which failure to do so would amount to a denial of justice because it is impossible, unacceptable or unreasonable for claimants to bring proceedings in any other forum with a closer factual connection to the case.[902] Unlike universal civil jurisdiction, *forum necessitatis* has enjoyed modest endorsement and a number of European as well as non-European States recognize or exercise this kind of jurisdiction.[903]

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899 *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108 (2013), Brief for the Government of Argentine Republic as *amicus curiae* in Support of Petitioners.

900 See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 69), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; See also Cedric Ryngaert, 'From Universal Civil Jurisdiction To Forum Of Necessity: Reflections On The Judgment Of The European Court Of Human Rights In Nait-Liman' [2017] Rivista di Diritto Internazionale 782, 795 – 796; Paul D Mora, 'The Alien Tort Statute After Kiobel: The Possibility For Unlawful Assertions Of Universal Civil Jurisdiction Still Remains' (2014) 63(03) ICLQ 699, 709 – 719.

901 For instance regarding secondary liability, the subjective (that is mental) standard required to establish aiding and abetting is unclear in international criminal law, see Bernaz, *Business and human rights* (n 739), 272 – 273 referring to, among others, the *Akayesu Case* (Judgement), No ICTR-96–4-T, Trial Chamber (2 September 1998), para. 545 and the *Furundzija Case* (Judgment), No IT-95–15/1-T, Trial Chamber (10 December 1998), para. 249.

902 Augenstein and Jägers (n 883), 28.

903 See Nuyts (n 883), 66; Chilenye Nwapi, 'A Necessary Look at Necessity Jurisdiction' (2014) 47 UBC Law Review 211, 225 – 226; *Nait-Liman v Switzerland* App No 51357/07, Judgment of 15 March 2018, paras. 84 – 86.

Despite this, the ECtHR, which recently examined the issue in the non-business-related case *Nait-Liman v Switzerland*, concluded that necessity jurisdiction is not accepted in customary international law *de lege lata*. The applicant in this case, before coming to Switzerland, has allegedly suffered torture at the hands of Tunisian government agents in his home country. Because a claim in Tunisia would have been unreasonable, he filed for civil damages in Switzerland based on *forum necessitates.* On appeal, the Swiss Federal Court dismissed the claims for lack of jurisdiction. Swiss law provided for a mixed form of *forum necessitatis*, which, in addition to the imminent denial of justice, required 'sufficient connections' to Switzerland in order to establish a case of *forum necessitatis*. The Swiss court opined that this requirement was not satisfied, as, *at the time of tortious conduct*, no relationship between the alleged tortious acts to Switzerland existed and the subsequent residence of the victim in Switzerland was immaterial.[904]

The ECtHR examined whether denying jurisdiction in the present case because of insufficient factual connections to Switzerland violated the applicant's rights of access to court under Art. 6 of the Convention. Essentially, the court asked whether under human rights law, there was a duty to establish a pure form of necessity jurisdiction. However, it held that the dismissal by the Swiss Federal Court both pursued a legitimate aim and was proportionate to achieve these aims.[905] To arrive at this conclusion, the court examined both universal civil jurisdiction and pure *forum necessitatis* to determine that customary international law enshrined neither of the two. Thus, by applying a mixed form of *forum necessitatis* and declining jurisdiction on the basis of an insufficient connection between the case and Switzerland, the Swiss Federal Court had acted within its wide margin of appreciation under Art. 6 of the Convention.[906]

However, not only is pure *forum necessitatis* not supported under customary international law, the same is also true in relation to mixed forms of *forum necessitates* in certain instances*.* As the imminent denial of justice is not recognized in traditional jurisdictional doctrine as a valid basis for the exercise of jurisdiction, the legality of mixed forms of *forum necessitatis* depends on the other connections between the case in question and the forum State. Jurisdiction is permitted only if the factual connections between the claimant or conduct in question and the forum State are such

904 *Nait-Liman v Switzerland* App No 51357/07, Judgment of 15 March 2018, para. 30.
905 Ibid., para. 217.
906 Ibid., paras. 176 – 216.

that these connections amount to one of the recognized jurisdictional principles. In the COMILOG case for instance, notwithstanding the fact that the Congolese workers had no access to reasonable judicial recourse in Congo, traditional doctrine would ask whether the factual circumstances satisfy one of the permissive principles. This may prove problematic here: The only connection relied upon by the Court of Appeal was that COMILOG later became a foreign subsidiary of a French corporation. Thus, this exercise could be tantamount to asserting regulatory jurisdiction based on the control doctrine, which as discussed above, is at least disputed in international law doctrine.[907]

Of course, if necessity jurisdiction may only be exercised when one of the traditional principles is fulfilled, then the doctrine of *forum necessitatis* would clearly be obsolete, as in these cases, jurisdiction would be permitted even if no imminent denial of justice on part of the victims was in question. In this regard, a more flexible approach to *forum necessitatis* would seem desirable as the State deciding on whether to act is arguably subject to two conflicting international norms, on the one hand the customary rules concerning prescriptive jurisdiction and on the other hand, international human rights norms regarding access to justice. Thus, the graver the alleged human rights violation, the more legitimate it would seem to permit States to exercise jurisdiction based on even less substantial factual connections. In extreme cases, the mere presence of the claimant or some of the defendant's assets within the forum State should possibly suffice.

Therefore, while we have concluded for the area of economic sanctions that the formalistic nature of the traditional bases of jurisdiction paved the way for abuses by powerful States, the opposite occurs here, where the recognized principles limit the possibility to expand jurisdiction in cases even though doing so may be considered legitimate in order to provide private individuals with access to justice.

6. Conclusion

The UN Guiding Principles as a high-level policy document are but the starting point of the discussion which seeks to create mechanisms to prevent, mitigate and account for the negative human rights impacts of

907 See above C.II.2c) Comparative Normative Analysis.

businesses.[908] As a binding international treaty on business and human rights still has little prospect, home States of MNCs are increasingly resorting to domestic mechanisms to mitigate extraterritorial threats to human rights. So far, States have employed two mostly independent regulatory techniques to control corporate behaviour with regard to human rights, through the adoption of regulation establishing human rights obligations for companies along parent-subsidiary or lead-supplier relationships and by creating redress mechanisms for affected individuals. In both strands, the normative issue of extraterritoriality adds further complexity to an already delicate political process.

In the first strand, States are increasingly employing trade measures such as import restrictions or due diligence regulations to combat forced and child labour. Most commentators view these measures as unproblematic from the perspective of extraterritorial jurisdiction and there have been no sustained State protests against these measures. Of the reasons we have discussed above, two shall be highlighted in these concluding remarks. First, such measures are often permitted by international law principles as they can frequently rely on a domestic nexus, be it access to a territorially circumscribed market or the domicile of the parent/lead company.[909] Second, the lack of opposition may also be indicative of more substantial considerations, namely that these measures are justified through their objective of upholding internationally agreed human rights.[910] For the doctrine of jurisdiction under international law, this seemingly means that the determination of the legality of a particular exercise of extraterritorial jurisdiction may not be able to rely on formal criteria only, but may well have to look into the substantive content of each regulation.

With respect to transnational human rights litigation, the redress mechanisms may be divided into two categories for the purpose of analysing jurisdictional issues, litigation against home State companies in connection with violations by subsidiaries/suppliers abroad and stand-alone litigation against third State companies. In the first scenario, it may be argued that a territorial link exists between the forum State and the alleged tortious conduct of the subsidiaries/suppliers. In this case, while there are extrater-

908 Ruggie (n 714), 170 – 172.

909 Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), discussing the ISA at 292 – 293; Cleveland (n 272), on human rights motivated selective purchasing laws at 61 – 62; Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations' (n 768), 498.

910 Vázquez (n 431), 816; Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction' (n 427), 374.

ritorial effects, the parent/subcontracting company in the home State is generally asked to remedy a foreign harm caused by its own actions or inactions so that issues of jurisdiction should not arise.

Finally, proceedings may be brought against third State defendants. While the ATS has traditionally provided the most promising venue, recent jurisprudence in *Kiobel*, *Jesner* and *Nestlé* may shift attention to another doctrine, *forum necessitatis*. These concepts raise difficult normative issues. Even though the European Commission has expressed sympathy towards such concepts,[911] it is submitted that both ATS-style litigation under universal civil jurisdiction as well as necessity jurisdiction have not found general acceptance yet. This is lamentable in particular with regard to *forum necessitatis*, which essentially deals with balancing two competing values of international law and where an exercise of jurisdiction may be legitimate even without a 'sufficient connection'. Currently, however, there is no evidence that the territoriality-based system of jurisdiction may reflect this particular situation.

The future of business and human rights, in particular with regard to the issue of extraterritoriality, is highly uncertain. Developments at the domestic level will remain essential. In this regard, the anti-corruption movement has shown that the definition of narrow and specific conducts may raise the international acceptability of extraterritorial jurisdiction.[912] For the business and human rights agenda, this means there is a need for the creation of international consensus about specific obligations of corporations to respect human rights, even in their foreign operations. In this respect, further elaboration on and harmonization of the notion of human rights due diligence may play a vital role. In France, the law regarding 'devoirs de vigilance' already sketches possible contours of such duties. Finally, apart from due diligence obligations, which are more of a procedural nature, the identification of substantive prohibitions on certain conduct within the area of business and human rights would possibly allow for further extraterritorial action. As we have seen both with regard to certain egregious labour practices and with regard to the suppression of conflict minerals, exercises of jurisdiction with extraterritorial implications

911 *Kiobel v Royal Dutch Petroleum Co.*, *569* US 108 (2013), Brief of the European Commission on behalf of the European Union as *amicus curiae* in support of neither party, 13 – 18.

912 See more generally on the possible learnings from the anti-corruption movement for the development of business and human rights: Ramasastry (n 584), 174.

have met little resistance, presumably because there is widespread consensus on an international level to outlaw the specific conducts in question.

VI. Synthesis: The Deficient Territoriality-based System

In a process, which may be described as the globalization of regulation, powerful States are increasingly trying to project their own policy and governance preferences extraterritorially. This occurs in relation to requirements on the ethical conduct of business, for instance through the regulation of both foreign bribery and corporate human rights standards. However, States may also seek to extend their domestic foreign policy considerations, such as through economic sanctions and export control regulations, where the objective is often less to mitigate immediate national security threats but rather to prompt longer-term change in the target's behaviour. All of these issue areas pose salient questions, as extraterritoriality is not employed in these regulations to protect the domestic populace or market from immediate adverse effects. To achieve these regulatory goals, States have resorted to a host of complex regulatory mechanisms. Some of these have recurred among different subject areas and will thus be analysed in a cross-sectorial manner, including

1) conditioning market access and other territorial economic benefits on conduct or circumstances abroad,
2) using parent-subsidiary relationships to extend jurisdiction to foreign subsidiaries of domestic multinational corporations,
3) leveraging territoriality to regulate conduct based on only fleeting territorial connections or to regulate companies based on territorial 'presence' and
4) securing regulatory authority through consent of the affected individual/company.

For instance, we have seen that States are willing to condition access to their market or economic benefits on a corporation's human rights records abroad, thus incentivizing foreign companies to uphold these standards.[913] However, even before this mechanism has found its way into human rights regulations, similar (and more severe) measures have been used by the United States to ensure compliance with its economic sanctions.[914] Moreover, crosscutting different regulatory fields, the United States and

913 C.V.4a) Trade, Procurement and Investment Measures.
914 C.II.4a) Practice in the United States.

European States are leveraging the fact that they often serve as home States to multinational corporations to induce change abroad by resorting to so-called parent-based regulation. This mode of regulation typically either attributes liability to the parent company of a multinational corporation if its subsidiaries violate domestic regulations abroad or directs the parent company to implement domestic regulatory measures throughout the corporate group. We have seen this mechanism most prominently in recent anti-corruption legislation[915] and the administration of economic sanctions,[916] but it has also served as a basis for transnational human rights litigation.[917]

The following synthesis demonstrates how these regulatory mechanisms have challenged the traditional, territoriality-based system of jurisdiction in international law. These challenges are twofold: On the one hand, the functionality of the system is severely curtailed because several of these regulatory mechanisms cannot be clearly categorized within the formal territoriality *versus* extraterritoriality dichotomy (below **1.**). On the other hand, the system restricts extraterritorial jurisdiction to a fixed set of sovereignty-based principles, even though other considerations should also influence the legitimacy of jurisdictional assertions (below **2.**).

1. The Normative Inconsistency of Territoriality

a) Market Access Regulation Conditioned on Extraterritorial Circumstances

Using access to a State's territory, its (ultimately territorial) domestic market or other economic benefits as leverage is one of the most widely used but also most controversial regulatory techniques to affect behaviour abroad. We have examined this type of regulation more closely referring to Sec. 5 (a) of the ISA and subsequent legislation. Sec. 5 (a) of the ISA and similar regulation stipulated a number of sanctions, such as a prohibition on US banks to grant loans or a domestic procurement prohibition, which were levied against companies worldwide that were heavily invested or investing in the Iranian petroleum sector. Comparable measures are also found in the area of business and human rights. The United States for

915 C.IV.4. Regulation through Parent-Subsidiary Relationships.
916 C.II.2. The Extension of Personality-based Jurisdiction to Foreign Subsidiaries.
917 C.V.5. Transnational Human Rights Litigation.

instance conditions market entry of certain products and the eligibility for public procurement on the human rights performance of the foreign economic operator, for instance on the absence of human trafficking and other degrading labour practices within its supply chain.

The reactions of affected States to these measures have been inconsistent and guided by political factors: While the EC has strongly criticized the original ISA, the EU has later accepted strong expansions of the same sanctions in 2012 and similar measures against Russia in 2014. More recently, however, Germany and Austria have again voiced strong opposition to renewed Russia sanctions that indirectly affected domestic industrial interests.[918] Within the area of business and human rights, using domestic market access and other economic benefits to condition foreign conduct has generally fared better and drawn less international criticism. The inconsistent response to formally very similar measures suggests that the reactions of States are less driven by doctrinal considerations of territoriality and extraterritoriality rather than by political motivations.

It has already been discussed that one reason for the inconsistent practice is that such measures are situated in a legal grey area under international law.[919] It suffices here to point out to some concluding observations regarding the debate. Measures based on market access are characterized by their dual nature: On the one hand, they seek to influence foreign behaviour; On the other hand, domestic privileges, such as the eligibility for public procurement or the ability to receive loans from domestic banks, are being affected. Even though academic commentary has advanced numerous proposals to analyse market access conditions under international law, the result of the legal analysis particularly depends on whether one focuses on the domestic condition or on the foreign implications thus triggered. This is the reason why Bartels and Scott, for instance, while they both rely on essentially the same factual understanding, come to normatively opposite results:

According to Bartels, the essence of measures based on market access is that their application is defined by something located or occurring abroad. Therefore, such measures should be considered extraterritorial and consequently need to satisfy principles of extraterritorial jurisdiction under international law.[920] Scott, on the contrary, analyses such measures from

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918 C.II.4b) Practice in Europe.

919 See above at C.II.2c) Comparative Normative Analysis.

920 Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction' (n 427), 381: even according to Bartels however, not all exercises of jurisdiction

the opposite angle: While it may be true that regulators in these cases are required to take into account conduct or circumstances abroad, the essential part of the regulation is that its actual application is triggered by the territorial connection. This kind of 'territorial extension' is to be distinguished from actual 'extraterritoriality', where the regulatory measure is precisely not dependent on any territorial trigger.[921] Therefore, Bartels would consider Sec. 5 (a) of the ISA, where application of sanctions is determined by a foreign company's investment into Iran, to be extraterritorial. Scott, consequently, would regard such measures as mere 'territorial extensions'.[922]

Other attempts to conceptualize market access conditions within the international law framework have been undertaken by Meng and Vazquéz. For Meng, the pertinent question in determining the extraterritoriality of a regulation is whether such regulation carries with it (intended) coercive effects or mere factual effects.[923] For instance, the prohibition of the importation of goods produced abroad under subpar environmental standards would not be considered extraterritorial – even though the effects on foreign exporters may be significant – because these effects are merely the result of growing economic interconnectedness and not intended.[924] However, it may be difficult in practice to distinguish between intended coercive effects and mere factual effects and Meng himself seems not to have been always consistent in his approach.[925] Vazquéz, on the other hand, asks whether the market access condition seeks to compel conduct regulated by internationally recognized norms, in which case its extraterri-

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that affect foreign interests are 'extraterritorial'; generic tariffs and subsidies, for instance, would not be defined by something located or occurring abroad.

921 Scott (n 10), 90; Other authors have developed similar categorizations with slightly different terminology. For instance, the above-mentioned report conducted by Zerk during the elaboration of the UN Guiding Principles on Business and Human Rights follows a comparable approach by distinguishes between 'direct assertions of extraterritorial jurisdiction' and 'domestic measures with extraterritorial implications', see above C.V.3a) Extraterritorial Jurisdiction as a Matter of Permission; see also Cooreman (n 38), at 84, who distinguishes between extraterritoriality '*strictu sensu*' and 'measures with an extraterritorial effect'.

922 Scott (n 10), 96 – 98.

923 Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (n 43), 86.

924 Ibid., 76 – 77.

925 For instance, he views Sec. 5 (a) of the ISA as unproblematic under principles of jurisdiction, even though he acknowledges the strong and intended coercive effects of the legislation, see also above at C.II.4c) Comparative Normative Analysis.

toriality would be justified.[926] The wide spectrum of academic opinion is testament to the controversial nature of market access conditions under international law.

On a final note, as measures based on market access are very versatile, it should be noted that this discussion is by no means limited to the subject areas examined in this study. For instance, Directive 2008/101/EC, which subjects also foreign airlines to the EU Emissions Trading System (**ETS**),[927] has led to very similar controversies and intensive State protest. The directive provides that for all flights departing or arriving within EU territory, all airlines must monitor, report and verify their emissions, and to surrender allowances against those emissions including for *emissions generated throughout the part of the flight taking place outside the EU airspace*.

This provision led to intense State protest including a joint statement by 23 EU partners, calling on to the EU to cease the application of Directive 2008/101/EC to third State airline operators.[928] The United States went even one step further and prohibited compliance with the ETS for US companies.[929]

The CJEU, however, seized to provide clarity on this provision, considered the approach of Directive 2008/101/EC to be compatible with international law. It argued that the territorial connection, i.e., flights arriving or departing within the EU, was a sufficient basis for application of the ETS also to the emissions generated throughout the part of the flight taking place outside EU airspace. In this regard, the court argued that foreign airlines voluntarily accessed the European market as they had a choice to structure their commercial flights in a way to not touch EU airports if they did not want to be subjected to the ETS.[930] However, despite the CJEU judgment, the EU has limited the application of Directive 2008/101/EC to

926 Vázquez (n 431), 817.

927 Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8/3 (2009).

928 Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU ETS of 22 February 2012.

929 European Union Emissions Trading Scheme Prohibition Act of 2011, Pub. L. No. 112–200.

930 CJEU, C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate* Change [2011] ECR I-13755, paras. 127 ff.

flights *within* the EU to soothe the critics and to support the development of measures at the international level.[931]

This example confirms that market access conditions remain a thorny issue in the subject areas examined in this study and beyond. In relation to such measures, the traditional international law framework offers no bright-line rules to distinguish territoriality from extraterritoriality.

b) Parent-based Regulation of Multinational Corporations

For the nation State, the seemingly unstoppable rise of multinational corporations has been generally regarded as a curse to effective regulations.[932] This is related to naked power politics as many of the world's largest multinational corporations dwarf the economic strength of States,[933] but also to the legal structure of these enterprises, which utilise a complex web of direct investments to avoid regulation.[934] In theory, establishing foreign incorporated subsidiaries all over the world allows multinational corporations to act anywhere through ownership and control while at the same time, the legal doctrine of corporate separateness – in principle – shields the foreign subsidiaries from regulatory measures enacted by the home State of the parent company.[935] However, we have seen that in multiple regulatory areas, States have advanced different regulatory techniques to bind foreign subsidiaries to domestic standards of conduct.

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931 European Commission, 'Reducing emissions from aviation', https://ec.europa.eu/clima/eu-action/transport-emissions/reducing-emissions-aviation_en, last accessed 18 March 2022.

932 The number of multinational corporations has risen from barely 7,000 in 1970 to 82,000 in 2009 and it is safe to assume that by now, it has already exceeded the 100,000, see UN Conference on Trade and Development, World Investment Report 2009: Transnational Corporations, Agricultural Development and Production xxi, UNCTAD/WIR/2009.

933 Comparing annual governmental revenue and corporate revenue, a study by NGO *Global Justice Now* has shown that already in September 2016, 63 of the 100 largest economies in the world were multinational corporations, Global Justice Now, http://www.globaljustice.org.uk/controlling-corporations, last accessed on 13 April 2022.

934 Liesbeth F H Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Zugl.: Utrecht, Univ. Diss. 2012, Eleven Internat. Publ 2012), 14.

935 Grosswald Curran (n 637), 406.

In very rare instances, domestic regulators have tried to address the foreign incorporated subsidiary directly. This has been most clearly articulated in the United States' use of economic sanctions, which has generally drawn strong opposition. An exception hereto are the 2012 amendments to the Iran sanctions, which were equally addressing foreign incorporated subsidiaries, but which have been tacitly tolerated by the EU.[936] Similarly however, the United States has employed an extensive agency doctrine in conjunction with the anti-bribery provisions of the FCPA to directly prosecute foreign subsidiaries for criminal violations.[937] Here as well, no State protests have apparently ensued.

More often, measures of home States of multinational corporations target the domestic parent company of the corporate group to indirectly control the conduct of foreign subsidiaries. This is achieved either by regulating the parent companies in relation to their foreign subsidiaries or by attaching liability to the parent companies for the conduct of their subsidiaries. In the *Fruehauf* case for instance, the US treasury instructed the domestic parent company to direct its French subsidiary to refrain from the fulfilment of a transaction contrary to US economic sanctions.[938] In relation to the FCPA, US enforcement agencies have held parent companies strictly liable for regulatory violations of their overseas subsidiaries.[939] In the area of business and human rights, parent-based regulation is mostly discussed in the form of a *duty of care*, or *devoir de vigilance*, on the part of the parent company for the conduct of the foreign subsidiary, but not in the form of strict liability.[940] Such measures have generally not been met with protest in the area of business and human rights as well as anti-corruption. However, with regard to the *Fruehauf* case, a French court denied giving effect to the direction of the parent company *vis-à-vis* its French subsidiary.[941]

Academic commentators have generally judged this sort of jurisdictional assertions unfavourably in cases, in which the home State regulator has directly addressed the foreign controlled subsidiary (such as in the

936 C.II.2b)bb) Diplomatic Protest against US Assertions of Control-based Jurisdiction.
937 C.IV.4a)cc) Parent and Subsidiary Liability Based on the Agency Theory.
938 C.II.2b)cc) Jurisprudence with regard to US Assertions of Control-based Jurisdiction.
939 C.IV.4a) Practice in the United States.
940 C.V.5b) Practice in Europe.
941 See above at C.II.2b)cc) Jurisprudence with regard to US Assertions of Control-based Jurisdiction.

Pipeline incident). They argue that such measures can be based neither on territoriality, as the foreign subsidiary is located outside domestic territory, nor on the nationality principle, as the foreign subsidiary is not a corporate national of the home State. In this regard, it is settled opinion in international law that corporate nationality is determined by either the place of incorporation or the seat of management, but not by the nationality of the shareholder/s.[942] In contrast, regulations aimed at the domestic parent company, either requiring it to direct the conduct of its foreign subsidiaries or holding it (strictly) liable for the conduct of these subsidiaries, have been regarded more favourably under the territoriality principle.

However, as argued above, this purely formal distinction between regulations addressing the domestic corporate parent and regulations addressing the foreign subsidiary is not entirely convincing. This is because every direct assertion of jurisdiction over a foreign subsidiary could be rephrased as a territorial regulation addressing the domestic parent company and holding it strictly liable for the conduct of its foreign subsidiaries abroad. Both regulations would achieve the same substantial result; in both cases, it is solely the conduct of the subsidiary that forms the subject of the regulation. Under such circumstances, it seems inconsistent to deem one instance a prohibited exercise of extraterritorial jurisdiction and the other one a permitted assertion of territorial jurisdiction.

In this regard, we are faced with a debate which is very similar to what we have just seen with regard to market access measures, which condition the import of certain goods on production processes or other circumstances abroad. There as well, it was questionable whether these measures should properly be characterised as territorial or extraterritorial. Just as in the case of market access conditionality, the traditional approach to jurisdiction provides no clear answers to the issue of jurisdiction over foreign controlled subsidiaries.

Therefore, as mentioned above, the Restatement Third convincingly takes a different approach and argues that this kind of jurisdictional assertion cannot solely be assessed based on whether the regulation formally addresses the domestic parent company or the foreign subsidiary. Rather, the Restatement suggests that the legality of such assertions of jurisdiction can only be judged by considering several circumstances, with the formal addressee being only one relevant factor. Accordingly, not all assertions of jurisdiction targeting foreign subsidiaries should be regarded as illegal, and

942 *Barcelona Traction Light and Power Co, Ltd. (Belgium v Spain)* (n 126), 36.

not all assertions of jurisdiction targeting domestic parent companies as legal, under customary international law.

c) Regulation of Conduct Based on Only Fleeting Territorial Connections or Based on Territorial 'Presence'

As mentioned, States overwhelmingly still nominally rely on territorial connections as the dominating basis for the exercise of jurisdiction addressing foreign individuals and companies. However, because of the growing territorial scope of economic operators and their business conduct, establishing territorial connections is not necessarily difficult for domestic regulators. This study has more closely examined two regulatory mechanisms which leverage territorial connections to significantly expand the jurisdictional reach of the regulating State.

First, States are exercising jurisdiction over conduct with only very limited territorial 'touchpoints'. This has been most clearly shown with regard to US prosecutions of foreign individuals and companies for violations of US economic sanctions or the FCPA based on the controversial theory related to monetary transfers through correspondent bank accounts.[943] Put simply, wire transfers denominated in US dollars are regularly settled through electronic systems linked to the US Federal Reserve Banks so that technically, such transactions all pass through US territory. According to this theory, monetary transfers between two parties with no relation to the United States whatsoever would fall under US jurisdiction as long as the transfer was made in US dollars. Despite the potentially unlimited scope of US jurisdiction based on this theory, these prosecutions have led to protest by the defendant's home State only in two instances and even then, the issue of extraterritorial jurisdiction was never explicitly mentioned.[944]

Second, the UK Bribery Act 2010 introduced a new mechanism for the regulation of foreign conduct based on the 'presence' of a company on domestic territory. According to Sec. 7 of the Act, any commercial organisation 'which carries on a business, or part of a business, in any part of the United Kingdom' may be held liable if a person associated to the organisation commits bribery and if the organisation cannot show adequate procedures designed to prevent such associated persons from bribery. As

943 See for instance the prosecution of Reza Zarrab at C.II.3a) Practice in the United States.

944 C.II.3b) Practice in Europe.

already mentioned, this provision is problematic because the actual act of bribery as well as the implementation of adequate procedures may well take place outside the UK, so that there is no territorial connection to the conduct to be regulated, but only a connection to the subject of regulation itself.

The UK Bribery Act can be seen as the latest development in a trend to subject companies that are not incorporated nor have their seat of management within domestic territory, but that are merely commercially present, to a growing number of regulations. Other examples include US security regulations, which also apply to non-US companies that issue stocks in the United States or that otherwise register their securities for sale. We have examined this type of issuer-based jurisdiction more closely referring to Sec. 1502 of the Dodd-Frank Act[945] as well as the FCPA. This mechanism was also used in the Sarbanes-Oxley Act of 2002, which sought to improve the corporate governance of US companies. However, with the exception of the Sarbanes-Oxley Act, this mode of regulation, which subjects foreign companies to a host of organisational rules based merely on their presence within domestic territory, has generally not led to international reactions.

In the literature, these regulations have yet to be considered jointly in a comprehensive manner. While the above-mentioned laws and regulations have at times been criticized as too far reaching, academic commentators have not yet undertaken a systematic assessment as to whether or when mere commercial presence – as opposed to being domestically incorporated or having a domestic principal place of business – suffices to prescribe rules abroad for foreign companies. It seems arguable that these regulations may rely on this presence as an evident territorial connection. However, this conclusion is by no means imperative. Analysing the UK Bribery Act, it has been argued that, in fact, the assertion of jurisdiction in relation to commercial organisations that merely carry on part of a business in the UK for failure to prevent bribery abroad amounts to an illegal extension of the corporate nationality principle as the relevant conduct occurs entirely outside the UK.[946] Again, the jurisdictional analysis seems largely to depend on whether such analysis focuses on the existing territorial connection such as the commercial presence of the addressee or on the foreign conduct being regulated. There is thus a parallel issue to regulation based on market-access conditionality, where it was equally

945 See above at C.V.4b)aa) Practice in the United States.

946 Kappel and Lagodny (n 646), 699; see also C.IV6c) Comparative Normative Analysis.

unclear under traditional jurisdictional principles whether the relevant part of the measure was the domestic restriction or the command to a foreign addressee.

2. The Restriction to Considerations of State Sovereignty

Finally, individual consent has emerged as a recurring issue in this research. In its most obvious form, US administration of export control relies (in part) on the consent of the foreign purchaser to be bound by certain regulatory standards. To be eligible to receive sensitive US goods and technology, the purchaser frequently has to guarantee the observance of US rules in relation to re-export and end-use even outside of US territory. However, consent has also emerged as an argument to justify the assertion of jurisdiction over foreign economic operators in a number of other cases. For instance, claims of jurisdiction over non-US issuers in securities matters, such as the above-mentioned Sarbanes-Oxley Act or Sec. 1502 of the Dodd-Frank Act, are sometimes justified based on the notion that, with the registration of securities with the SEC, the non-US issuer has voluntarily subjected itself to all related US regulation.[947] A variation of this argument has also found its way into the CJEU judgement on the extraterritoriality of the EU ETS, where the court stated that it was possible for airline operators, who did not want to be subject to the regulation, to avoid flying into or out of the Union.[948]

Especially in relation to export control cases, the clearest example of using consent to establish prescriptive authority, actual practice has proven to be inconsistent. While the EC has strongly protested this mechanism in the controversial *Pipeline* incident, where previous written submission to US regulations was utilised as one of the bases for jurisdiction over foreign companies,[949] modern export controls seem to largely rely on such consent. Academic commentary has equally been divided: The majority, in line with the EC's arguments in the *Pipeline* incident, seems to support the view that private parties could not dispose of what is essentially State sovereignty, the deciding aspect when it comes to the allocation

947 Detlev F Vagts, 'Extraterritoriality and the Corporate Governance Law' (2003) 97(2) AJIL 289, 293 raises this argument in relation to the Sarbanes-Oxley-Act.

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

949 See above at C.III.4b) Practice in Europe.

of regulatory competences.[950] In this regard, it is argued that the scope of prescriptive jurisdiction of a State is exclusively determined by the existence of a genuine link between the State and the object of regulation such as territoriality, effects, nationality or universality. Thus, unless one of these principles of jurisdiction under the traditional approach is given, assertions based on the individual consent of the affected are contrary to international law.

This is lamentable though as this approach to jurisdictional principles does not reflect actual contemporary practice. The State practice in the area of export control, where almost all major exporting countries use end-user certifications or similar documents requiring the importing party to submit themselves to the approval of the exporting State, indicates that there is an actual need for this regulatory mechanism. In this case therefore, the issue with the territoriality-based system of jurisdiction is not its *flexibility*, that its principles are too malleable to provide normative consistency, but rather its *rigidity*, in that it is unable to account for interests that are not connected to State sovereignty.

This rigidity of the traditional approach to jurisdiction leads to particularly acute issues in relation to the interests of individual natural or juridical persons.[951] Apart from the above-mentioned limitations placed on consent-based jurisdiction, it also restricts the concept of *forum necessitates* in the area of business and human rights. As elaborated, *forum necessitatis* refers to the establishment of adjudicative jurisdiction in situations in which the individual rights of the plaintiff require the assertion of jurisdiction as otherwise, the plaintiff would face a denial of justice. Despite this imminent denial of justice, establishing such necessity jurisdiction without cumulatively satisfying one of the traditional jurisdictional bases is not accepted in customary international law *de lege lata*. Here as well, a more flexible approach would seem desirable, as the State deciding on whether to act may legitimately have to consider the individual right of fair trial and access to justice.[952]

950 Volz (n 24), 216 – 217; Forwick (n 528), 82.
951 Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (n 345), 634 f.; Mills (n 14), 230 – 233.
952 C.V.5c) Comparative Normative Analysis.

3. Conclusion

The above synthesis has demonstrated that modern regulatory mechanisms have challenged the traditional, territoriality-based system of jurisdiction in international law in two ways. First, this system is not capable of providing order in international relations because there are no normatively consistent boundaries of territoriality: Under traditional doctrine, the answer to the question whether certain forms of regulation should be regarded as territorial or extraterritorial would demand identifying the territorial part of the conduct or situation and assess, whether this part is 'relevant' in a normative sense so that it triggers the legitimate exercise of jurisdiction. However, the answers to these determinations mostly depend on who you ask. In practice therefore, States are able to exploit these legal uncertainties and may nominally rely on territorial connections while setting regulations with a global reach. Contrary to its objective, the territoriality-based system of jurisdiction is thus not able to limit the regulatory competences of States.

Second, the system does not allow for considerations not rooted in State sovereignty, even when these should influence the legitimacy of jurisdictional assertions. On the one hand, we have observed that the acceptance or rejection of exercises of jurisdiction by other States also depend on the material political or legal interests involved. Thus, States are less inclined to protest certain forms of extraterritorial regulations if these regulations are intended to serve the interests of the international community. On the other hand, with regard to exercises of jurisdiction on the basis of private submissions and the principle of *forum necessitatis*, there is a real need for States to be able to account for the rights and the autonomy of individual natural and juridical persons.