THE IMPACT OF EXTRATERRITORIAL APPLICATION OF NATIONAL LEGAL NORMS ON INTERNATIONAL BUSINESS TRANSACTIONS: A TRANSATLANTIC VIEW

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Abstract

The following report was prepared in connection with a research project jointly led by Columbia Law School and the Sorbonne Law School in 2018 on the impact of extraterritorial legislation on international business transactions. It seeks to contribute to the current debate on extraterritoriality in the North-Atlantic region in a specifically Franco-American context and outlines some possible approaches to mitigating difficulties associated with the practice in two selected areas: anti-corruption law and economic sanctions. To do so, the report initially examines the very notion of extraterritoriality. It then provides some background to U.S. enforcement of anti-corruption measures and imposition of economic sanctions and summarizes several examples, seeking to identify the aspects that have with some regularity elicited objections in European circles. Where possible, the report identifies means of defusing the resulting controversies.

Résumé

Le présent rapport a été élaboré dans le cadre d'un projet de recherche mené par l'École de droit de Columbia et l'École de droit de la Sorbonne en 2018 sur l'impact des législations extraterritoriales sur le commerce international. Il entend contribuer au débat qui intéresse actuellement la région nord-atlantique autour de l'extraterritorialité, en particulier sous un prisme franco-américain, et met en lumière les approches possibles pour limiter les difficultés qui sont associées à cette pratique dans deux domaines prédéfinis : le droit anti-corruption et les sanctions économiques. Pour ce faire, ce rapport examine tout d'abord la notion même d'extraterritorialité. Il apporte ensuite des éléments de contexte s'agissant de l'application faite par les États-Unis de leurs mesures anti-corruption et de leurs sanctions économiques, avant de résumer quelques exemples dans ces domaines, en cherchant à identifier les aspects qui ont le plus suscité des objections en Europe. Quand cela est possible, le rapport propose des moyens d'enrayer les controverses.

THE IMPACT OF EXTRATERRITORIAL APPLICATION OF NATIONAL LEGAL NORMS ON INTERNATIONAL BUSINESS TRANSACTIONS: A TRANSATLANTIC VIEW

INTRODUCTION

The following report was prepared in connection with a research project jointly led by Columbia Law School and the Sorbonne Law School in 2018 on the impact of extraterritorial legislation on international business transactions (the "Report"). Research for the Report was mainly conducted through in-person discussions with academics, private practice lawyers, representatives of the business community, and public officials. The research project sought to contribute to the current debate on extraterritoriality in the North-Atlantic region in a specifically Franco-American context and outline some possible approaches to mitigating difficulties associated with the practice. After a first working seminar held in Paris, France, on 9 July 2018, the authors drew up a draft report. The latter has been updated after a follow-up seminar in New York, USA, on 19 November 2018. The Report summarizes the results of both working seminars.

Objectives of the Report

European concerns over the notion of extraterritoriality tend to concentrate on two areas of the law: anti-corruption and economic sanctions. These issues received renewed attention in France following a number of high-profile investigations by U.S. authorities involving French companies (e.g. *Alstom*) and financial institutions (e.g. *BNP Paribas*). The unilateral withdrawal of the United States from the Joint Comprehensive Plan of Action ("JCPOA") and the reinstatement of sanctions for engaging in business relationships with the Islamic Republic of Iran ("Iran") have once again shone a spotlight on the question of extraterritoriality and its consequences for international trade.

Taking a trans-Atlantic perspective, the research project sought to explore a number of questions relating to anti-corruption and economic sanctions, including

- Is current U.S. practice in relation to foreign anti-corruption enforcement and economic sanctions valid as a matter of international law and comity?
- Is extraterritorial regulation legitimate in other respects and, if so, under what circumstances?
- Assuming the U.S. approach is in principle legitimate, has its implementation been objectionable (e.g. disproportionate or otherwise excessive)?
- What have been the reactions in Europe to perceived overreach in the exercise of extraterritoriality, and have those reactions themselves been appropriate?

- Are the concerns among Europeans justified?

These questions stand at the crossroads of law and politics and call for a holistic and balanced approach.

Scope & Assumptions

This Report does not aim to provide a comprehensive assessment of the justifications or (lack thereof) and effects of all extraterritorial application of U.S. laws and regulations across sectors. There certainly exist areas of U.S. law other than anti-corruption and economic sanctions that have received international attention due to their extraterritorial consequences[1]. The choice was made, however, to initiate the research project in the two sectors that have received the most attention in France in recent years.

Moreover, this Report does not assume that the U.S. is the sole practitioner of extraterritorial regulation in the international system. The Report acknowledges that other legal systems have embraced extraterritoriality albeit in different contexts. While the Report focuses on reviewing the U.S. approach to the extraterritorial application of its laws and regulations in the realm of anti-corruption and economic sanctions, it notes the existence of extraterritorial provisions in European Union ("EU") law, such as in the General Data Protection Regulation ("GDPR"), that may conversely give rise to concern in the U.S. That latter scenario lies beyond the scope of the Report.

Although defining a precise and consensual definition of extraterritoriality reflective of global practices is beyond the scope of this Report, for present purposes of this Report, we assume three things:

- (i) a State is exercising extraterritorial jurisdiction when it seeks to regulate conduct, in whole or in part, taking place beyond its territory;
- (ii) that regulation supposes some kind of connection between the oversees conduct and the territory of the regulating State; and
- (iii) the extraterritorial application of domestic law can manifest itself in different ways.

Not all exercises of extraterritorial jurisdiction create international friction. When U.S. law seeks to regulate foreign conduct through standard conflicts-of-law mechanisms,

[1] E.g., *inter alia*, the Sherman and Clayton Acts, the Racketeer Influenced and Corrupt Organizations Act (RICO); or more recently, the Foreign Account Tax Compliance Act (FATCA) and the Clarifying Lawful Overseas Use of Data Act (CLOUD Act).

controversy seldom follows. Regulating part of a business activity taking place beyond the regulator's territory does not necessarily generate objections. For example, U.S. and Canadian legal challenges to the extraterritorial application of the EU emissions trading scheme, though unsuccessful in EU courts, did not stir any apparent political tensions between the U.S. and the EU[2]. In some circumstances, however, giving extraterritorial effect to domestic norms may produce consternation and even diplomatic crisis (e.g. *the "Siberian Pipeline"* case)[3]. Other instances of extraterritorial jurisdiction, without inducing that level of criticism, nevertheless create real practical difficulties for businesses.

This Report initially examines the notion of extraterritoriality. It then provides some background to U.S. enforcement of anti-corruption measures and imposition of economic sanctions and summarizes several examples, seeking to identify the aspects of them that have with some regularity elicited objections in European circles. Where possible, the Report identifies means of defusing the resulting controversies.

1. THE NOTION OF EXTRATERRITORIALITY

First and foremost, it should be noted that extraterritoriality is intrinsically tied to globalization. The internationalization of trade and the elimination of non-tariff barriers have undermined the very concept of territoriality. The development of multinational groups, with subsidiaries all over the world, has challenged the notion of nationality. In this context, any legislation might have an extraterritorial effect, i.e., an impact outside the enacting State's borders, without necessarily constituting an actual exercise of extraterritorial jurisdiction.

Before examining in the two selected areas, it is helpful to consider the bases on which, and means by which, a State can claim to regulate conduct beyond its territorial limits. The first question, in other terms, is how and with what justification can extraterritorial jurisdiction be exercised? The Report attempts to line a common baseline for commentators from both sides of the Atlantic.

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[2] *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Court of Justice of the European Union Case C-366/10 (21 December 2011).

[3] On 12 August 1982, the EU (then EC) claimed that U.S. export regulations designed to stop the construction of a pipeline by the Soviet Union were unacceptable under international law because of their extraterritorial reach. *See EC Calls For Withdrawal Of U.S. Pipeline Sanctions*, European community news n° 23/1982, Delegation of the European commission in Washington D.C. Available on : http://aei.pitt.edu/1768/1/US_dispute_comments_1982.pdf (last retrieved, 30 November 2020).

1.1. Traditional Categories of Jurisdiction

So far as the means by which authorities exercise regulatory power extraterritorially are concerned, one may conceptualize, and distinguish among, the following species of jurisdiction: (i) prescriptive jurisdiction (ii) adjudicatory or judicial jurisdiction, and (iii) investigative or enforcement jurisdiction[4].

Traditionally, a State exercises its prescriptive jurisdiction when it regulates conduct through laws and regulations. It exercises adjudicatory jurisdiction when it subjects natural or legal persons to its judicial system. It exercises its investigatory and enforcement jurisdiction when it takes steps to "induce or compel compliance or to punish noncompliance" with its laws and regulations[5].

Exercising its prescriptive jurisdiction, a State may extend the geographic scope of its laws and regulations to govern foreign conduct. Exercising its adjudicatory jurisdiction, a State may subject foreign persons to its judicial power or entertain causes of action arising out of conduct beyond its borders. Exercising its investigatory and enforcement jurisdiction, it conducts inquiries in another country and compels compliance with its laws through prosecution of companies and individuals for conduct that occurred, in whole or in part, overseas.

Conventionally, extraterritoriality consists of exercising jurisdiction without any, or any significant, territorial nexus. However, nowadays, the reference to "extraterritoriality" often carries a pejorative connotation, the State in question – usually the U.S. – being viewed as having exercised its jurisdiction abusively.

Turning to the bases of extraterritorial assertions, it is useful to identify the specific nexus (*critère de rattachement*) commonly invoked to justify regulation of overseas conduct. Without reviewing all of the possible nexuses enabling a country to exert extraterritorial jurisdiction, such as the effects of an act in one state on the territory of another, we note the existence of a spectrum, running from approaches that receive general acceptance to ones widely regarded as excessive. Territory and nationality are examples of nexuses traditionally

[4] Adopted, for instance, by the Restatement (Third) of the Foreign Relations Law of the U.S. There is no clear consensus internally on that categorization. *See e.g.* B. Stern, "Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit", *Annuaire français de droit international*, Vol. 32, pp. 7-52; B. Stern, "L'extra-territorialité « revisitée » : où il est question des affaires Alvarez-Machain, Pâte de Bois et de quelques autres…", *Annuaire français de droit international*, 1993, Vol. 38, pp. 239-313.
[5] *Id*. sec. 401(c).

and widely accepted. Other nexuses, such as use of currency or parent ownership of a subsidiary, are more contested.

1.2. Traditional Bases of Jurisdiction under International Law

While territoriality is the primary basis of prescriptive jurisdiction, international law also recognizes certain other, arguably extraterritorial, bases of jurisdiction.

According to the 1927 *Lotus* decision of the Permanent Court of International Justice, international law posits that states may exercise any form of jurisdiction that is not prohibited by the law of nations[6]. International law guidance since that decision has been scant, however, and no treaty governs the matter.

1.2.1. The Territoriality Principle

Widely accepted, the territoriality principle is the most prevailing basis of jurisdiction to prescribe. Pursuant to this principle, a State may regulate persons and situations within its borders. The vexing question is what degree of presence on the territory is required for the assertion of jurisdiction abroad to be justified on the basis of territoriality.

Deriving from the territoriality principle is the effects doctrine, according to which a State may have jurisdiction over conduct occurring outside its borders as long as it has substantial effects in its territory. Controversial at first, this basis of jurisdiction is now commonly recognized on both sides of the Atlantic in the area of antitrust and competition law particularly, although its application in certain circumstances may be hotly contested.

1.2.2. Extraterritorial Bases of Jurisdiction

Three bases of jurisdiction other than territoriality are usually recognized by international law: personality, protection and universality. Although each has an element of extraterritoriality, none is viewed as extraterritorial as such.

1.2.2.1. The Personality Principle

According to the personality principle, a State may exercise its jurisdiction over its nationals, whether they are the perpetrator (active personality) or the victim (passive

[6] *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para. 44-47. In the 1921 *Nationality Decrees in Tunis and Morocco* case the same court had noted that "jurisdiction which, in principle, belongs solely to the state is limited by rules of international law". *See* Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7), para. 41.

personality) of the offense or other conduct. Whereas the active personality principle is almost as broadly accepted as the territoriality principle, the passive personality principle is more disputed.

1.2.2.2. The Protection Principle

The protection principle allows a State to prosecute certain kinds of offenses, which pose a threat to its "security, integrity, sovereignty, or important governmental functions"[7] and are committed by foreign persons or committed outside its territory. It comprises offenses such as espionage or counterfeiting of a State's currency or official documents. The protective principle is a widely-accepted basis of jurisdiction.

1.2.2.3. The Universality Principle

The universality principle authorizes States to prosecute persons who are not their nationals for certain serious offenses which concern the entire international community (e.g. piracy, crimes against humanity, genocide) even if they are committed abroad. The universality principle does not require any form of connection to the regulating States, as it is based exclusively on the nature of the offense[8]. Jurisdiction on this basis is rarely exercised.

1.2.3. The Limits to Extraterritorial Jurisdiction Under International Law

While international customary law offers States a "wide measure of discretion"[9] in exercising their jurisdiction, many scholars consider it not to be limitless.

According to prevailing U.S. doctrine, even when a State could rightfully exercise its jurisdiction, it should not do so if "the exercise of such jurisdiction is unreasonable"[10]. Behind this so-called rule of reason lies the idea that States should demonstrate some self-restraint in situations that do not present a genuine connection to their territory, even when international law does not require them to do so. Several principles of international law, such as comity or proportionality, support this idea. A State may regard its regulatory intervention as unreasonable not only because of a lack of connection between it and the conduct, but also because it finds that another State has a substantially greater interest in regulating the conduct.

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[7] A. Chehtman, "Jurisdiction", in M.D.Dubber, T. Hörnle (ed.), *The Oxford Handbook of Criminal Law*, 2014, p. 410.
[8] C. Ryngaert, *Jurisdiction in International Law*, Oxford University Press, 2015, p. 101.
[9] *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p. 19.
[10] Restatement (Third) of the Foreign Relations Law of the U.S., § 403, p. 244.

In sum, some extraterritorial bases of jurisdiction are perfectly common and well accepted under international law: they do not trigger concerns over their legality. However, issues might arise when a State exercises its jurisdiction based on a nexus that does not fit in any of the categories or based on a too large interpretation of these principles.

This Report now applies these concepts in two areas: anti-corruption law and economic sanctions.

2. EXTRATERRITORIAL ANTI-CORRUPTION ENFORCEMENT

2.1. Background

2.1.1. Overview of U.S. Approach

To appreciate the problems raised in France with the extraterritorial application of U.S. anti-corruption law, it is helpful first to clarify against whom and to what ends the Foreign Corrupt Practices Act ("FCPA") applies and the basis on which its application is justified. The FCPA contains two basic sets of provisions: (i) anti-bribery rules and (ii) internal control requirements. It was adopted following the *Watergate Scandal* in the aftermath of which the Securities and Exchange Commission ("SEC") sought to understand how companies recorded payments they were making to foreign public officials. The FCPA was enacted as a new section of the Securities and Exchange Act of 1934.

Broadly speaking, the FCPA applies to four categories of subjects: (i) issuers of certain publicly-traded securities (covered issuers), (ii) domestic businesses, (iii) officers, directors, employees, and agents of covered issuers or domestic businesses, or stockholders acting on behalf of covered issuers or domestic businesses; or (iv) other persons who committed an act in furtherance of a bribe payment while in the territory of the U.S[11].

Notably, the FCPA does not address extraterritorial situations specifically. This feature of the statute is particularly important given that, traditionally, U.S. courts have assumed "that Congress legislates against the backdrop of the presumption against extraterritoriality"[12]. However, in practice, and as evidenced by the very term "foreign", the provisions of the FCPA can easily have extraterritorial implications. A foreign issuer of publicly-traded securities may

[11] 15 U.S.C. §§ 78 dd-1, 78 dd-2, 78 dd-3.
[12] EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991).

be a covered issuer under the FCPA and the foreign parent of a U.S. affiliate may be subject to the FCPA[13]. In all instances, the FCPA requires some connection to the U.S.

2.1.1.1. U.S. Presumption Against Extraterritoriality.

Despite the generalizations often made in Europe about the international reach of U.S. law, U.S. courts have, at least in principle, defined the geographic scope of statutes rather prudently, applying a "presumption against extraterritoriality". Although courts have at times engaged in nuances in applying the presumption, and although whether a measure is extraterritorial depends on the criteria used, the principle stands that Congress does not generally intend its laws to apply extraterritorially. Thus a specific expression of intent to legislate extraterritorially is in principle required in order for legislation to have that effect. Courts in the U.S. have long been cognizant of the fact that applying its laws extraterritorially could sow "discord with foreign nations"[14]. That presumption has thus served to lessen interference in foreign matters.

A fundamental question is whether the presumption against extraterritoriality has actually been followed in the FCPA context? Why is it the perception in Europe that, despite the professed presumption against extraterritoriality in U.S. law, the default rule under the FCPA appears to be extraterritorial reach?

In fact, except in cases involving the prosecution of individuals – in which a narrower reading of the statute seems to have emerged, at least in some courts (e.g. in the *Hoskins* case)[15] – U.S. courts have rarely been asked to identify the statutory bases for U.S. international enforcement under the FCPA. Unlike in the antitrust or capital markets contexts, private plaintiffs have had a very limited role in FCPA matters since the FCPA does not provide for a private right of action.

A distinctive feature of the U.S. system is that establishing the reach of its anti-corruption law has in practice mainly been the province of the Executive Branch. Questions concerning jurisdiction over foreign companies under the FCPA have rarely been litigated. One

[13]See eg SEC-DoJ FCPA Ressource Guide, p.10. Available at https://www.justice.gov/criminal-fraud/file/1292051/download. (Retrieved on 30 Novembre 2020).
[14] See, *supra* note 12 (explaining the canon).
[15] *United States v. Hoskins*, – F.3d – , 2018 WL 4038192, at *1-2 (2d Cir. Aug. 24, 2018).

reason for this state of affairs derives from a policy that the Department of Justice ("DoJ") adopted following the demise of Arthur Andersen[16].

In the aftermath of the scandal, taking a new approach to corporate governance and rehabilitation, the DoJ decided to energetically pursue out-of-court settlements with companies. Further to that policy shift, the DoJ has since the late 2000s significantly relied on Non-Prosecution Agreement ("NPAs")[17], Deferred Prosecution Agreements ("DPAs")[18], and/or plea agreements[19] to resolve FCPA investigations involving both domestic and foreign corporate defendants. In a memo from August 2008, then Deputy Attorney General Mark Filip noted, in relevant parts:

> *[W] here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims. Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law*[20].

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[16] In June 2002, Andersen was convicted of obstruction of justice for shredding documents related to its audit of Enron, resulting in the Enron scandal. Although the Supreme Court reversed the conviction in 2005, the impact of the scandal combined with the findings of criminal complicity ultimately destroyed the firm.

[17] A NPA is a privately-negotiated settlement between the DoJ and a corporation. NPAs are not filed in court and take the form of letter agreements.

[18] A DPA is also a privately-negotiated settlement between the DoJ and a corporate but, unlike the NPA, is filed with the court. In exchange for the DoJ to defer the prosecution, the corporation agrees to take responsibility and to take a number of undertakings.

[19] Three types of plea agreements are encompassed by the language of USAM 9-27.400: (i) agreements whereby in return for the defendant's plea to a charged offense or to a lesser or related offense, other charges are not sought or are dismissed ("charge agreements"); (ii) Agreements pursuant to which the government takes a certain position regarding the sentence to be imposed ("sentence agreements"); (iii) Agreements that combine a plea with a dismissal of charges and an undertaking by the prosecutor concerning the government's position at sentencing ("mixed agreements").

[20] M. Filip, *Principles of Federal Prosecution of Business Organizations, Memorandum to Heads of Department Components United States Attorneys*, 28 August 2008, U.S. Department of Justice. Available at https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf (retrieved on 30 November 2020).

Deciding what instrument is most appropriate in a given case lies in the discretion of federal prosecutors, and DoJ decisions in this respect have not been challenged in courts. NPAs result from completely private negotiations between the concerned company and the DoJ. DPAs are also the product of closed-door negotiations though formally filed with a court under the Speedy Trial Act. Cases suggest that courts in the U.S. exercise no oversight of DPAs[21].

For instance, the *Fokker Aircraft* decision[22] (which involved violations of U.S. sanctions by a Dutch company through conduct involving Iran) further illustrates that under the Speedy Trial Act, judges cannot review the terms of a DPA, including the jurisdictional theories upon which they rest. This allows the Executive Branch to adopt a far-reaching interpretation of the FCPA without being subject to judicial review.

In the anti-corruption context, the controversy in France centers more on why French companies were the subject of U.S. enforcement actions rather than the basis upon which they were brought. Commentary has shifted from legal analysis to economic warfare rhetoric, and the topic has become politicized[23].

2.1.1.2. Examples of FCPA Enforcement[24]

Examples suggest that although the DoJ and SEC have not been hesitant to pursue FCPA enforcement actions against foreign companies, these actions do not appear controversial from a jurisdictional standpoint.

In 2008, Siemens paid a criminal fine of $450 million to the DoJ and $350 million in disgorgement of profits under its agreement with the SEC to resolve FCPA violations. Jurisdiction over Siemens and its subsidiaries was established on the basis that, trading stocks on the New York Stock Exchange, Siemens was an "issuer" as that term is used in the FCPA.

In 2014, Alstom paid a $772 million criminal penalty to U.S. authorities to resolve charges related to foreign bribery, in violation of the FCPA[25]. To assert their jurisdiction over this Paris-based company, U.S. authorities noted that, since "shares of Alstom's stock were

[21] See e.g., United States v. HSBC Bank USA, N.A., No. 16-308 (2d Cir. 2017).
[22] United States v. Fokker Servs. B.V., No. 15-3016, 2016 WL 1319226, at *1 (D.C. Cir. Apr. 5, 2016).
[23] In France, several congressional reports along this line have been published. See: P. Lellouche et K. Berger, Rapport d'information n° 4082 de l'Assemblée nationale sur l'extraterritorialité de la législation américaine, enregistré à la présidence de l'Assemblée nationale le 5 octobre 2016; P. Bonnecarrère, Rapport d'information du Sénat n° 17 sur l'Extraterritorialité des sanctions américaines, enregistré à la présidence du Sénat le 4 octobre 2018; R. Gauvain, Rapport établi à la demande du Premier ministre Édouard Philippe sur "Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale", 26 juin 2019.
[24] Selection of examples as of December 2018.
[25] https://www.justice.gov/file/189331/download (retrieved on 30 November 2020)

listed on the New York Stock Exchange" during the relevant period, it was an "issuer" as prescribed by the FCPA. In addition to the parent being an "issuer", the conduct involved two U.S. subsidiaries, Alstom Power and Alstom Grid, headquartered in Connecticut and New Jersey respectively.

In 2016, Amsterdam-based VimpelCom agreed to pay a $230 million U.S. criminal fine. The action was brought against VimpelCom, an entity that was deemed an "issuer" and against several subsidiaries of that entity.

In 2018, Société Générale settled with both U.S.[26] and French authorities[27] in connection with conduct involving Libyan officials. Société Générale maintained a subsidiary financial services company and a branch located in New York, New York, and was a "person" as that term is used in the FCPA.

The U.S. DoJ initiated the proceedings against Société Générale in 2014 and was followed, two years later, by the French Parquet national financier ("PNF"). The Société Générale case illustrates a form of cooperation between foreign agencies. It also shows the U.S. willingness to delegate part of the prosecution to the country with the strongest nexus.

2.1.2. Impact of the OECD Convention

Although the FCPA was adopted in 1977, the DoJ only began enforcing it relatively recently. This approach coincides with adoption of the 1997 multilateral OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"), in the development of which the U.S. played a leading role. The OECD Convention provisions were added to the FCPA in 1999. Today, the OECD Convention has 44 signatories, including eight non-OECD countries.

The question arises whether the OECD Convention actually encouraged extraterritoriality in the enforcement of anti-corruption law. Article 4 of the OECD Convention provides:

[26] https://www.justice.gov/opa/press-release/file/1068521/download (retrieved on 30 November 2020).
[27] https://www.economie.gouv.fr/files/files/directions_services/afa/24.05.18_-_CJIP.pdf (retrieved [on 30 November 2020]).

Article 4 Jurisdiction

> *1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.*
>
> *2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.*
>
> *3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.*
>
> *4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.*

Reading Article 4(1) of the OECD Convention, one may well ask whether it contemplates extending jurisdiction to foreign corruption cases. The OECD Convention is an international treaty that provides a basis for exercising extraterritorial jurisdiction.

2.1.3. Recent Evolutions

The U.S. has been, and remains, the most active jurisdiction in extraterritorial anti-corruption enforcement. However, it is no longer the only jurisdiction to enforce its anti-corruption law extraterritorially. In the last decade or so, new extraterritorial enforcers have emerged, including Brazil, China, France, Germany, the Netherlands, and the UK, among others.

The causes of reform and heightened international enforcement activity in these individual countries are varied, but the overall explanation is that, instead of deferring to U.S. leadership, these countries have made fighting corruption overseas a priority of their own. It would appear that U.S. practice of extraterritorial enforcement in anti-corruption matters has induced other jurisdictions to introduce greater extraterritoriality in their laws and in the way they apply them. For example, in preparing to overhaul the country's anti-corruption framework, French legislators acted on the assumption that if France became more active in

enforcing its anti-corruption laws against French companies, then the U.S. authorities would hesitate before investigating and prosecuting French companies over which it may plausibly have jurisdiction. Taking a more mercantilist view, some French law-makers advocated that the fines should be paid to the French, not the U.S., Treasury.

Each domestic anti-corruption framework is somewhat distinctive in its approach to the extraterritorial application of anti-corruption laws.

In 2010, the UK adopted the Bribery Act in part as a result of the U.S. enforcement action in the *BAE* case[28]. British authorities had initially begun to investigate BAE for possible corruption overseas, but that investigation was halted following a request of the UK Government. The Bribery Act represented a paradigm shift in the UK. It introduced a DPA mechanism, inspired by—though different from – the U.S. DPA, that made "failure to prevent corruption" a criminal offence while expressly extending the extraterritorial reach of these obligations.

The Bribery Act applies to any entity incorporated in the UK and to any entity carrying out business in the UK, irrespective of the place of incorporation. In addition, it makes any entity covered by the Bribery Act liable for actions taken by "associated persons", regardless of their connection with the UK. What "carrying out business in the UK" means and should mean is obviously prone to contention.

Significant changes have also been introduced into French law in recent years. Two factors played a key role in driving French law reform: (i) the OECD peer review system that highlighted France's lack of progress in fighting corruption overseas and (ii) a perception in France that the U.S. was disproportionately active in resolving foreign bribery cases involving French companies. The "Sapin II" reform introduced the notion of a settlement agreement (*convention judiciaire d'intérêt public*) into French law for select corporate offences, extended French jurisdiction over certain offences[29], and created an administrative sanctions regime to punish and prevent corruption. A new agency distinct from criminal prosecution authorities,

[28] United States v. BAE Systems Plc, Court Docket Number: 10-CR-035-JDB (February 4, 2010, in the District of Columbia) (not an FCPA case *per se*. Charges of export control violations with a corruption component).

[29] Sapin II allows prosecution of French citizens committing acts of bribery or influence peddling abroad even without any complaint filed by the alleged victims, and regardless of any official denunciation by the State where the offence was perpetrated, as was required to date. Prosecution of foreigners usually residing in France for acts of bribery and influence peddling committed abroad is also permissible.

the French Anti-Corruption Agency, was established to enforce these new compliance obligations. Sapin II requirements were also given extraterritorial effect.

Interestingly, Article 21 of Sapin II added that French anti-corruption law applies to any person "living in France or exercising all or part of its economic activity on French territory"[30].

This state of affairs is dynamic, however, as enforcement practices and priorities depend on how officials see these issues. Some countries have sophisticated anti-corruption laws but do not enforce them. Active enforcement also depends on the independence of prosecutors and the judiciary.

2.2. Overall Assessment

FCPA enforcement evidently has had a standard-setting impact and incentivized other countries, including the UK and France, to reform their anti-corruption framework and exercise a greater measure of extraterritoriality. A global consensus, in large part driven by the efforts of the OECD, has emerged over the years that corruption is a scourge that needs to be addressed globally.

Some degree of tolerance of extraterritoriality in the fight against corruption stems from the fact that key participants in international trade view that combat as beneficial to them. Fighting corruption has been on the global agenda, including at the G20 level for a few years, and has strong foundations in multilateral international agreements (e.g. the OECD Convention, the UN Convention against Corruption, the Council of Europe Conventions, the African Union Convention on Preventing and Combating Corruption). Corruption and bribery are offenses that are more or less defined similarly in a significant number of jurisdictions.

This is not to say that anti-corruption efforts are as energetic as they might be. Anti-corruption laws are enforced unevenly, even within OECD jurisdictions, which can create some free-rider situations.

This scenario raises a series of questions, among them whether the response to excessive extraterritorial enforcement of anti-corruption law should be more extraterritorial provisions of that kind? Also, if the fight against corruption is being waged from the perspective of policy-makers, what does it mean as a practical matter for business?

[30] "Une personne résidant habituellement ou exerçant tout ou partie de son activité économique sur le territoire français".

2.3. Current Challenges

A consensus seems to be emerging as to nature and scope of the jurisdiction that States may exercise in prescribing and enforcing anti-corruption norms. While there is a degree of assent to the principle of extraterritorial jurisdiction in the anti-corruption context, several challenges have arisen out of increased use of extraterritoriality in this domain.

2.3.1. Concurrent Extraterritorial Situations

The proliferation of domestic anti-corruption legislation having extraterritorial reach has practical consequences. Obviously, certain companies, particularly those with global operations, may find themselves subject to several different States' anti-corruption regimes having exterritorial reach. Such a scenario poses both theoretical and practical problems.

How should companies deal with that exposure? How does one determine, in the language of Article 4(3) of the OECD Convention, the "most appropriate jurisdiction for prosecution"? Does that phrase mandate that a suspected corrupt practice be prosecuted by a single jurisdiction rather than multiple jurisdictions?

At present, there exist no multilateral initiatives governing the allocation of jurisdiction when a given enterprise is subject to claims emanating extraterritorially from multiple countries. Neither does there exist an instrument defining the cooperation between enforcement authorities in that particular context. Administrative cooperation through bilateral Mutual Legal Assistance Treaties is the main channel, but it can be long and inconclusive. Efforts have been made, beginning in the U.S. with the *Rosenstein Memo*, to avoid a "piling on" of sanctions in cases of multijurisdictional investigations but these efforts to date are still embryonic.

Arguably, therefore, if a particular enforcement authority has jurisdiction over a given alleged corrupt practice, and is already exercising it, the U.S. should not itself ordinarily pursue the matter, absent compelling circumstances such as a solid belief that the foreign jurisdiction cannot be counted on to perform its tasks adequately. In other words, it should exercise a form of self-restraint. While this would appear to be a sound approach, it is unfortunately not consistently followed; it is at best followed informally and on a strictly case-by-case basis. This solution fails to provide predictability to businesses.

2.3.2. Lack of Substantive or Procedural Harmony

While the OECD Convention unquestionably means to promote the criminalization of foreign corruption and promote cooperation among jurisdictions, it does not systematize it.

Anti-corruption enforcement follows different mechanisms from jurisdiction to jurisdiction. These differences can have significant consequences in the multi-jurisdictional context. Some jurisdictions employ voluntary disclosure mechanisms, while others do not. Some prosecutors reward cooperation in the investigation, while others do not. Even among countries that employ out-of-court settlements in their anti-corruption regime, there are significant differences.

For instance, UK DPAs must be submitted to judicial review in which the judge must, among other things, find that the DPA at hand is fair, reasonable, proportionate, and in the interest of justice. The French settlement agreement also needs to be submitted to judicial scrutiny, but is conducted under a much narrower standard. In both the UK and French DPA systems, the company must agree to a statement of facts, while in the Dutch settlement system, in which a resolution with prosecutors is likewise possible, neither a statement of facts nor judicial involvement is required.

As a result, for instance, businesses having something to disclose, by way of potentially improper conduct, may not know how and where to disclose. They may also not know whether to participate in government investigations in various jurisdictions, or be able to anticipate the effects that will attach depending on the outcome of these investigations.

Another challenge is the treatment by one enforcement jurisdiction decision of a prior determination by another. The application of double jeopardy or *non bis in idem* principles in international anti-corruption has been particularly perplexing. In the absence of a multilateral agreement on the subject, the current practice has been to tolerate parallel or simultaneous resolutions.

2.3.3. Building Tailored Compliance Programs

Companies operating globally are evidently subject to a wide array of anti-corruption legislation. Faced with the intensified enforcement of anti-corruption laws in many countries, particularly in capital-exporting jurisdictions, companies have developed mechanisms, mostly through internal policies and procedures that address these obligations across the geographic

area where they are present. Articulating multiple compliance standards may entail significant transaction costs.

2.4. Possible Solutions

Several solutions come to mind for responding to the challenges posed by the extraterritorial application of anti-corruption norms.

2.4.1. Inventory of Extraterritorial Application of Key Anti-Corruption Laws

In order to better navigate a regulatory environment defined by multiple claims to extraterritorial jurisdiction, it may be helpful to map out the extraterritorial provisions of the key legislation and analyze to what extent these may overlap.

2.4.2. Non-Binding Guidance

Assuming several countries may have a valid claim to extraterritorial jurisdiction in a given case, a methodology could be developed, even in the form of non-binding guidance, to resolve the conflict of concurrent extraterritorial jurisdiction.

2.4.3. More Active Role of the EU in Anti-Corruption

The issue of international cooperation raises the question of the role of the EU. In 2014, the EU published its first Anti-Corruption Report which suggested that the Commission was taking a greater interest in the subject generally. The Commission specifically discussed introducing an anti-corruption clause in the Transatlantic Partnership Agreement. Given its role in providing development aid, the Commission may also be interested in adopting anti-corruption considerations in that context.

Presumably, the EU could find a basis in the Lisbon Treaty to take action for the whole internal market. Should there be a General Foreign Corrupt Practices Regulation? Would an EU regulation concerning foreign corruption displace the extraterritorial legislation of its Member States?

3. ECONOMIC SANCTIONS REGIMES

3.1. Background

First developed after World War I in the hopes of limiting the recourse to armed force – and by extension war – [31], the use of economic sanctions has grown significantly throughout the 20th century and into the 21st century to the point of becoming in the last three decades an essential political and diplomatic tool[32].

Broadly defined, international sanctions are coercive measures instituted unilaterally or collectively by State(s) as a punitive measure taken against other States, their organs, or affiliated entities and individuals, who, in the eyes of the State(s) imposing the sanctions, committed an internationally wrongful act justifying the imposition of sanctions. In that sense, international sanctions are instituted in response to a perceived breach of international law.

The nature of international sanctions can vary (they may be cultural, diplomatic, economic, etc.) and so can their objectives (cessation of the internationally wrongful act, compensation for damages suffered, etc.). Economic sanctions are a specific type of international sanctions comprising a wide range of measures, which are typically categorized as commercial sanctions (e.g. embargos, boycotts), financial sanctions (mainly assets freeze) and targeted sanctions (aka "smart sanctions", which focus on specific individuals and entities). They generally partially limit (via selective sanctions) or completely prohibit (via comprehensive sanctions) trading relationships and transactions with designated States/entities/persons.

Economic sanctions are commonly divided into two categories: multilateral sanctions which are endorsed by several States, and unilateral sanctions which are adopted by a single State. Multilateral sanctions can be adopted by a regional system (e.g. the EU) – even though some authors argued that such sanctions should be regarded as unilateral sanctions [33] – , some other group of countries, or an international organization (the most common procedure being the one provided in Article 41, chapter VII of the UN Charter)[34].

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[31] "A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force." Extract from a speech of President Woodrow Wilson given in 1919 in Indianapolis.

[32] See, for instance: D. Cortright, G. A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Lynne Rienner, Boulder, Colorado, 2000, XIV, p.274.

[33] L. F. Damrosch, "Enforcing International through Non-Forcible Measures", Collected Courses of the Hague Academy of International Law, vol. 269, p. 46.

[34] Article 41, chapter VII of the UN Charter provides: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the

Although it is impossible within the compass of this Report to paint a complete picture of all the existing active sanctions programs, given their considerable number and variety, examining some of them can help appreciate how diverse and widespread economic sanctions can be.

3.1.1. UN International Sanctions

There are currently in place fourteen sanctions regimes adopted under the UN Charter[35]. These sanctions programs are not in themselves directly applicable. Under Article 41 of the UN Charter, member States of the UN are responsible for implementation of these sanctions programs. In the UN system, it behoves the U.S., as well as Member States of the EU, to adopt the implementing measures necessary to enforce UN sanctions.

The most emblematic UN sanctions program is most likely the one enacted against North Korea, principally on account of its number and scope. The UN condemned North Korea for conducting nuclear tests and launching ballistic missiles. As a result, in the last fourteen years, the UN Security Council adopted seventeen resolutions in connection with North Korea[36], pursuant to which the export and import of arms, gold, precious metals and diamonds are prohibited, including dual-use goods. Moreover, many individuals are the subject of asset freezes and other financial measures or travel bans.

Economic sanctions, however, sometimes fail to be adopted at the UN level because a permanent member of the Security Council exercises its veto powers to block them[37]. In these cases, States enact economic sanctions of their own. States may likewise adopt economic countermeasures without UN involvement. Both the U.S. and the EU have enacted sanctions programs independently of the Security Council.

Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

[35] The UN Security Council's active sanctions regimes are the following: Somalia and Eritrea, Al-Qaida, ISIL (Da'esh) and associated individuals, groups, undertakings and entities, Iraq, Democratic Republic of the Congo, Sudan, Lebanon, Democratic People's Republic of Korea, Libya, Afghanistan, Guinea-Bissau, Central African Republic, Yemen, South Sudan, Mali.

[36] Resolutions No. 1718 (2006), 1874 (2009), 1928 (2010), 1985 (2011), 2050 (2012), 2087 (2013), 2094 (2013), 2141 (2014), 2207 (2015), 2276 (2016), 2321 (2016), 2345 (2017), 2356 (2017), 2371 (2017), 2375 (2017), 2397 (2017), 2407 (2018).

[37] It was almost systematically the case during the Cold War. More recently, China and Russia vetoed UN resolutions that were meant to impose sanctions against Syria.

3.1.2. U.S. Sanctions

In the U.S., economic sanctions can be adopted by Congress or by the President through Executive Orders. In this second case, the President's power mainly derives from two federal laws: the International Emergency Economic Powers Act ("IEEPA") when a "state of emergency" is declared, and the Trading With the Enemy Act ("TWEA") in times of war.

Regardless of who enacts them, a distinction is commonly drawn between secondary sanctions, which are widely viewed as *per se* extraterritorial, and primary sanctions, which are not. This division is meant, practically speaking, to indicate who is subject to which sanctions regimes and what extraterritoriality means in the particular economic sanctions context in question.

While U.S. primary sanctions are in principle aimed only at U.S. persons, secondary sanctions implement general prohibitions against targeted individuals and entities and are meant to apply *erga omnes*, with or without a nexus to the U.S. Illustratively, before the U.S. withdrawal, under the JCPOA[38] the EU completely repealed its sanctions against Iran, whereas the U.S. lifted them only partially and gradually. In this respect, the U.S. kept primary sanctions (meant for U.S. persons) active but lifted almost all secondary sanctions (which were applicable to everyone, including Europeans).

3.1.2.1. Primary Sanctions

Primary sanctions are intended to only apply to "U.S. persons"[39] which, in many sanctions programs, cover:

- U.S. citizens;
- permanent resident alien;
- any entity organized under the laws of the U.S.; or
- any person physically in the U.S.

This scope of application should not raise any particular objection, considering that it is a strict implementation of the nationality and territoriality principles.

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[38] The JCPOA is an agreement between Iran and the five permanent members of the UN Security Council, Germany and the EU. It was signed on 14 July 2015 and endorsed by the UN Security Council Resolution 2231 (2015). It entered into force on 16 January 2016 after the International Atomic Energy Agency (IAEA) certified that Iran was complying with its obligations. Even though President Donald Trump withdrew from this agreement on 8 May 2018, it is still in force between the other signing countries.

[39] See, for instance, the Executive Orders No. 13835 (Venezuela), 13810 (North Korea), 13712 (Burundi), 13399 (Syria), which apply to "any U.S. person".

U.S. sanctions also cover entities that are "owned or controlled" by a U.S. person, such as a U.S. person who:

- holds a 50 percent or greater equity interest by vote or value in the entity;
- holds a majority of seats on the board of directors of the entity; or
- otherwise controls the actions, policies, or personnel decisions of the entity.

This notion of "control" – which is generally associated with the nationality principle – is more debatable. For instance, in its sanctions programs against Cuba and Iran, the U.S. considers that subsidiaries of a U.S. firm are "owned or controlled" by a U.S. person and must therefore comply with U.S. sanctions programs, unlike the EU which deems that subsidiaries are independent entities with their own legal personality, and therefore not covered. These represent distinctly different presumptions.

Of all U.S. economic sanctions, the comprehensive embargo targeting Cuba represents undoubtedly one of the most controversial[40]. The Helms-Burton Act of 1996 has been widely contested – including among U.S. scholars[41] – for its extraterritorial reach. Title III of this legislation grants U.S. nationals – including those who have been naturalized – whose property has been confiscated without compensation by the Castro regime a cause of action against all companies – wherever located in the world – which "traffics" in such property. However, in accordance with the settlement reached by the U.S. and the EU[42], U.S. presidents had always suspended this provision, until President Donald Trump decided to activate this provision for the first time.

Finally, because the Office of Foreign Assets Control ("OFAC") considers that it has jurisdiction over any transaction in U.S. dollars and therefore cleared through the U.S. financial system[43], U.S. sanctions regimes can have an even broader scope of application and cover almost all business dealings in the world.

[40] Every year since 1992, the UN General Assembly adopts a resolution calling the U.S. to end its sanctions against Cuba. See the latest one: Resolution A/73/L.3 "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba", available at https://undocs.org/A/73/L.3 (last visited 14 June 2019).
[41] See, for instance: Lori F. Damrosch, "Enforcing International through Non-Forcible Measures", *op.cit*; A. F. Lowenfeld, "Congress and Cuba: The Helms-Burton Act", *American Journal of International Law*, 1996, Vol. 90, No. 3, pp. 419-434; J. A. Meyer, "Second Thoughts on Secondary Sanctions", *University of Pennsylvania Journal of International Law,* 2009, Vol. 30, p. 965 *et seq*.
[42] See *infra* p. 96.
[43] See *infra* p. 90-31.

For all these reasons, the EU tends to consider that U.S. primary sanctions can be just as extraterritorial as secondary sanctions.

3.1.2.2. Secondary Sanctions

Secondary sanctions are "economic restrictions designed to deter third-country actors from supporting a primary target of unilateral sanctions"[44]. To do so, the U.S. resorts to three types of measures: general prohibitions, restrictions directly aimed at foreign persons and secondary boycotts.

The U.S. enacts general prohibitions, that is, restrictions that are not only applicable to U.S. persons, but to any person. For instance, pursuant to the Iran Sanctions Act ("ISA"), it is forbidden for "a person"[45] to invest more than US$20 million per year in the Iranian petroleum sector. Both U.S. and non-U.S. persons who violate these provisions can be sanctioned.

Some U.S. sanctions programs directly address non-U.S. persons. Executive Order 13,846[46], among others, expressly targets "foreign financial institution[s]" and compels them in effect to comply with U.S. legislation.

Similarly, U.S. sanctions targeting Iran and Russia prohibit foreign parties from re-exporting certain goods incorporating U.S. controlled components. The sanctions programs against Iran, for instance, provide that non-U.S. persons are prohibited from re-exporting U.S. goods and technologies unless they were incorporated in a foreign-made product and if they represent less than 10% of such product[47]. By using this so-called "*de minimis* content rule," the U.S. regulates conducts of non-U.S. persons outside the U.S. (i.e. conducts over which the U.S. should *a priori* not have jurisdiction) based on the fact that U.S. components are involved. First used in the case of the Russian pipeline, these types of measures have been highly criticized by the EU. Indeed, these provisions could scarcely be justified by the personality principle since they are aimed at non-U.S. persons and that it is hardly arguable that "things" are "nationals" of a country.

A secondary boycott is a "legislation directed specifically at sanctioning foreign companies that do business with or in certain embargoed countries in particular

[44] J. A. Meyer, "Second Thoughts on Secondary Sanctions", *op.cit*.
[45] As provided in Section 5 of the Iran Sanctions Act of 1996.
[46] This Executive Order reinstated against Iran the secondary sanctions that were lifted by the JCPOA.
[47] 31 C.F.R. § 560.205 – Prohibited reexportation of goods, technology, or services to Iran or the Government of Iran by persons other than United States persons; exceptions.

circumstances"[48]. To do so, the U.S. prohibits U.S. persons from trading with foreign parties that themselves deal with entities subject to U.S. sanctions. They are in that sense indirect and consist in outcasting foreign parties that maintain commercial and financial relationships that are not allowed under U.S. legislation.

The most emblematic example is the Specially Designated Nationals and Blocked Persons List ("SDN List") established by the OFAC. Even though addressing U.S. persons, such sanctions may extend, practically speaking, to any person, because even a non-U.S. person that trades with an entity/person placed on the SDN List will be sanctioned by being also added to that list.

Illustratively, the *Deutsche Forfait AG*[49] case is worth mentioning. This German company was added to the SDN List for allegedly trading with the National Iranian Oil Company ("NIOC"), an Iranian entity that was on the SDN List. U.S. persons were thus no longer allowed to have any connection with Deutsche Forfait AG. In reverse, it meant that Deutsche Forfait A.G. was no longer allowed to access the U.S. market and U.S. financial system. To be removed from that list, Deutsche Forfait A.G. had to agree, among other things, to comply with U.S. sanctions[50]. This example illustrates how non-U.S. persons must comply with U.S. secondary sanctions and therefore why they are considered extraterritorial, even though nominally issued in the first instance only against U.S. parties.

To conclude, secondary sanctions do not manifest in themselves the U.S.'s exercise of extraterritorial jurisdiction. Indeed, by implementing secondary sanctions, the U.S. attaches major economic consequences to the infringement of its sanctions programs such as being excluded from the U.S. market or U.S. financial system. Even the U.S. aspires to impact outside normative activity and change the behavior of foreign companies, secondary sanctions do not truly represent an extraterritorial exercise of jurisdiction but simply have an extraterritorial effect.

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[48] H. L. Clark and L. W. Wang, *Foreign Sanctions Countermeasures and Other Responses to U.S. Extraterritorial Sanctions*, Dewey Ballantine LLP Report, August 2007, p. 4.

[49] See https://www.dfag.de/en/df-deutsche-forfait-ag-removed-from-ofac-sanctions-list-without-having-to-pay-a-fine/.

[50] On this case, see : P. Dehghani, "Extraterritorialité – L'efficacité des programmes de sanctions économiques américaines illustrées à travers l'accord international conclu avec l'Iran", *Revue de droit bancaire et financier, septembre 2016*, n° 5, étude 17, § 12.

3.1.3. EU Restrictive Measures

The use of unilateral economic sanctions is not a U.S. monopoly. Indeed, as previously stated, the EU likewise adopts restrictive measures outside Article 41, chapter VII of the UN Charter. There are three types of European restrictive measures: UN sanctions, mixed sanctions and autonomous sanctions. Most of these restrictive measures are adopted through Council regulations and are therefore directly applicable in all EU Member States.

The main difference between U.S. sanctions and EU restrictive measures lies in the comparatively precise extraterritorial reach of the latter. Indeed, most European restrictive measures have the following scope. They apply:

- within the territory of the Union;
- on board any aircraft or any vessel under the jurisdiction of a Member State;
- to any person inside or outside the territory of the Union who is a national of a Member State;
- to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;
- to any legal person, entity or body in respect of any business done in whole or in part within the Union[51].

3.2. Overall Assessment

The controversies originating in the extraterritorial application of unilateral sanctions are not recent. Indeed, tensions resulting from extraterritoriality of U.S. sanctions arose notably in 1982 with the Soviet Pipeline crisis and in 1996 with the adoption of the Helms-Burton Act and the D'Amato-Kennedy Act. However, a new dynamic seems to have emerged: first, because the U.S. enforces its sanctions against foreign companies more severely than in the past; second, because a disagreement over certain economic sanctions, as a policy matter, has arisen between the U.S. and its allies.

[51] See, for instance, Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Council Regulation (EU) No. 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No. 442/2011, Council Regulation (EU) No. 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela.

3.2.1. Cases Relating to the Enforcement of U.S. Sanctions.

The notion of "U.S. person," as used in many U.S. sanctions programs to define their scope of application, can be very broad and cover individuals and entities with otherwise limited ties to U.S. territory. More generally, U.S. authorities tend to consider that such programs target not only "U.S. persons," but also persons or situations having a nexus with the United States. The extraterritorial application of U.S. sanctions is therefore also induced by the way U.S. authorities enforce them.

3.2.1.1. The BNP Paribas Case

In the *BNP Paribas* case[52], U.S. authorities based their jurisdiction on the bank's "nexus" with the U.S. rather than its status as a "U.S. person." Even though not a "U.S. person," BNP Paribas had to settle with U.S. authorities for infringing U.S. embargos against Iran, Cuba and Sudan because it had used the U.S. dollar to transact with sanctioned countries – and thus it had cleared dollars through the U.S. financial system. Although the bank did not come within U.S. jurisdiction because of its nationality or its ownership or control, it was deemed subject to U.S. law because of its connection to the U.S. financial system.

Beyond the unprecedented amount of the fine (nearly 9 billion dollars), the nexus used by U.S. agencies to assert jurisdiction – the clearing of U.S. dollars through the U.S. financial system associated with use of the U.S. dollar currency – prompted controversy and revived the debate on extraterritoriality in France. BNP Paribas was prosecuted, and entered a guilty plea, based on its alleged illegal use of the U.S. dollar, which the DoJ considered to be a sufficient nexus to the U.S., even though the transactions at issue involved non-U.S. parties and were conducted outside of the U.S. The *BNP Paribas* case raised the fundamental question whether the clearing of a currency inherent in use of such currency is a permissible basis for the exercise of extraterritorial jurisdiction under international law. Unlike the U.S., the EU tends to believe that it is not.

The underlying issue is therefore the "reasonableness" of the nexus used by the U.S. to exercise its jurisdiction. Indeed, Europeans tend to think that the clearing of a currency,

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[52] In 2014, BNP Paribas pleaded guilty to the infringement of several U.S. embargos. BNP Paribas and the U.S. DoJ settled for 8.974 billion dollars, which was the highest amount a European bank had to pay to U.S. authorities. See: https://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/statement-of-facts.pdf (retrieved on 16/11/20)

especially the dollar, does not constitute a genuine connection, notably because that would give the U.S. a quasi-universal jurisdiction over international trade[53].

3.2.1.2. The HSBC Case.

In 2012, HSBC, a British bank, settled with U.S. authorities for infringing U.S. sanctions against Iran, Burma, Sudan, Cuba and Libya[54]. HSBC violated, among other things, the prohibition that is made to foreign persons to export or reexport U.S. goods, technologies and services to Iran, Burma, Sudan and Libya. The nexus used by U.S. agencies was the same as in the *BNP Paribas case*, i.e. the clearing of U.S. dollars through the U.S. financial system for transactions with sanctioned parties.

However, the HSBC case had smaller repercussions, possibly because the amount of the fine was much lower[55]. In this regard, it should be noted that the amounts of the fines essentially hinge on the total amount of the alleged infringing transactions. Moreover, U.S. agencies usually take into account aggravating or mitigating circumstances such as knowledge of the violation or cooperation with the authorities afterwards[56].

The approach taken by U.S. authorities in these and similar cases in effect forced many European firms to reconsider their dealings with sanctioned countries. Many refrained from investing in Iran, even after the U.S. lifted its secondary sanctions, mostly because of their perception that primary U.S. sanctions would still apply to them.

3.2.2. Divergent Policies

Unilateral economic sanctions differ intrinsically from anti-corruption regulation in terms of the legitimacy of their purpose. Anti-corruption efforts are predicated on good governance, on ensuring a level playing field, and on ethical considerations generally. They also derive support from numerous international conventions, and may be viewed as simply implementing those conventions. Combatting corruption is viewed as a "noble cause", embraced almost universally in principle.

By contrast, the purposes behind economic sanctions by no means garner universal support. Rather, they are seen as directed to promoting the particular interests – whether

[53] M. Audit, R. Bismuth, A. Mignon-Colombet, "Sanctions et extraterritorialité du droit américain : quelles réponses pour les entreprises françaises ?", *La semaine juridique*, 2015, n° 1-2, pp. 64-65.
[54] https://www.treasury.gov/resource-center/sanctions/civpen/documents/121211_hsbc_settlement.pdf. (retrieved on 30 November 2020).
[55] The amount of the fine paid by HSBC to U.S. authorities was 1.931 billion dollars.
[56] 31 C.F.R. 501 Appendix – Economic Sanctions Enforcement Guidelines.

political, economic or other – of individual States. Obviously, this critique is not directed at UN sanctions, which are aimed at maintaining peace worldwide and benefit from an international legitimacy[57] that unilateral sanctions programs lack.

Despite the criticisms that some authors addressed to the tool itself, economic sanctions have proven results in terms of efficacy. For instance, an agreement could probably not have been reached with Iran if it was not for the economic pressure that resulted from the sanctions targeting Iran, although it could be argued that those sanctions were more efficient because they were multilateral. This Report does not condemn economic sanctions as a tool but aims to show the consequences that flow when sanctions are designed to promote divergent policies.

In this respect, it should be noted that extraterritorial application of economic sanctions seems to prompt disputes when said sanctions express divergent policies. For instance, U.S. sanctions regime against North Korea, like the one against Iran, applies to "foreign financial institutions". Yet, since the EU also has a comprehensive program of sanctions against this country, the rules do not clash and no concerns over extraterritoriality emerge. This Report focuses mostly on certain U.S. sanctions against Iran, Cuba and Russia that caused the greatest political and diplomatic tensions throughout the last thirty years or so.

It should also be noted that all unilateral sanctions do not trigger diplomatic tensions. Their acceptance by others depend on the objective they pursue[58]. In that sense, the tool – and the criticisms that it will face – is largely connected to the policy. When the goal of the sanctions or the wrongfulness of the act committed by the target State are largely shared by the international community, the sanctions adopted by a State unilaterally will be much easily accepted, even if they entail an extraterritorial effect. On the contrary, if the policy justifying the sanctions is perceived as unduly and narrowly self-serving, it may be widely disapproved and the sanctions may be highly controversial.

From a European perspective, U.S. economic sanctions represent a political tool and may embody an overreach of U.S. foreign policy. They are also viewed as opportunistic, given the absence of precise criteria and especially the lack of demonstrable impact on U.S. territory. Viewed as especially problematic is the practice of making a party's use of the dollar as currency in the relevant transactions as an adequate nexus with the U.S., a practice viewed as

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[57] In this regard, they are often considered as international public order (*ordre public international*).
[58] A. F. Lowenfeld, *International Economic Law*, Oxford University Press, 2002, p. 754; L. F. Damrosch, "Enforcing International through Non-Forcible Measures", *op.cit.* p. 35 and seq.

quintessentially extraterritorial. Whether truly extraterritorial or not, the U.S. is viewed as "weaponizing" its currency[59] and its dominant position in the global economy to impose its laws, which is a power that no other country has access to.

Found also especially objectionable was the U.S. decision to reestablish secondary sanctions on European firms, forbidding them to continue doing business with Iran, following the U.S.'s unilateral withdrawal from the JCPOA. The sanctions adopted against Iran after the U.S.'s unilateral withdrawal from the JCPOA are truly extraterritorial inasmuch as they apply to anyone, regardless of their connection to the U.S[60]. Representatives of the U.S. Government – among them the President of the United States – admonished European firms about their noncompliance with U.S. sanctions against Iran, warning them that they would be prosecuted if they continued trading with Iranian parties. This decision and the sanctions that followed were received by the EU as an impermissibly extraterritorial application of U.S. law, especially considering that the JCPOA was a multilateral agreement adopted with the support of the United Nations and one to which the U.S. had itself been a party.

From a U.S. standpoint, however, sanctions are a matter of national security and may therefore be enforced against all companies doing business with the U.S., no matter how thin the nexus, or how disingenuous their application in the eyes of others. Viewed from that angle, U.S. sanctions are not extraterritorial since all firms fined by U.S. authorities were tied, one way or another, to the U.S. The U.S. considers extraterritorial application to be critical to a sanctions regime's very efficacy. Ultimately, firms have a difficult choice to make: either they do business with the U.S., or they trade with prohibited countries, but they cannot do both.

3.3. Current Challenges

3.3.1. Legal Uncertainty

The extraterritorial application of primary and secondary economic sanctions produces legal uncertainty for non-U.S. companies. As noted, companies can fall within the scope of U.S. sanctions without understanding the basis on which they do so. This failure of comprehension is due in part to the variety and complexity of U.S. sanctions regimes[61] but also

[59] See: J. P. Zoffer, "The Dollar and the United States' Exorbitant Power to Sanction", *American Journal Of International Law Unbound*, 2019, Vol. 113, pp. 152-156; S. Katzenstein, "Dollar Unilateralism: The New Frontline of National Security", *Indiana Law Journal*, 2015, Vol. 90, p. 293-351.
[60] Executive Order No. 13846 (Iran).
[61] By their very nature, economic sanctions are temporary measures which means that they are always in motion. Hereof, it might be hard for non-U.S. company to adapt to all the regular changes and adjustments.

to the thinness of the nexus that may be invoked by U.S. authorities in asserting their jurisdiction. In this second regard, it may indeed come as a surprise for European firms that they must comply with U.S. sanctions when they have no tie to the U.S. other than the use of the dollar in an underlying transaction.

Legal uncertainty is, of course, exacerbated by the fact that it is often scarcely possible to have no connection with the U.S., given the extent to which U.S. and European economies are linked. Thus, in order to deal with sanctioned parties without incurring sanctions, firms must somehow be virtually detached from the U.S., which may be practically speaking impossible for multinationals, as well as for SMEs whose suppliers may be found exclusively in the U.S. It is even harder for banks or insurers to be fully isolated from the U.S., because they cannot guarantee that all their clients comply with U.S. sanctions. In the end, the only way to deal both with the U.S. and prohibited parties without incurring the risk of sanctions is to be granted a license[62] by the U.S. authorities – but such exemptions are quite difficult to obtain.

3.3.2. Contradictory Rules

The extraterritorial application of legal norms may result in submitting firms to overlapping, or worse, contradictory rules. In the field of economic sanctions, this mainly means that some commercial and financial relationships will be prohibited by one State, while authorized by another.

The divergent approaches of the U.S. and the EU on subsidiaries are an enlightening example of this pitfall. Indeed, as previously mentioned, European subsidiaries of a U.S. parent have to comply with U.S. sanctions programs against Iran and Cuba. However, article 11 of the European blocking statute[63] provides: "This Regulation shall apply to: […] (2) any legal person incorporated within the Community"[64], which includes subsidiaries of U.S. companies. In sum, on the one hand, European subsidiaries of a U.S. parent must comply with U.S. sanctions

[62] OFAC, FAQ No. 74: "A license is an authorization from OFAC to engage in a transaction that otherwise would be prohibited. There are two types of licenses: general licenses and specific licenses. A general license authorizes a particular type of transaction for a class of persons without the need to apply for a license. A specific license is a written document issued by OFAC to a particular person or entity, authorizing a particular transaction in response to a written license application." Available at: https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#licenses (retrieved on 30 November 2020).
[63] See *infra* p. 96-97.
[64] Article 11 of the 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 O.J. (L309) 1.

regimes or else risk prosecution; on the other hand, they must not comply with those regimes or legislation or again risk prosecution.

On this issue, a French case of the Paris Court of Appeal[65] involving a French subsidiary of a U.S. firm and an Iranian party is also worth mentioning. In this case, the Iranian party decided to sue the French subsidiary for breaching its contract because the French company refused to execute it. The French party argued that U.S. law prevented them from doing it, considering that they were a subsidiary of a U.S. parent and had therefore to comply with U.S. economic sanctions. The Paris Court of Appeal concluded that the U.S. embargo was not applicable because it was neither a mandatory rule of the *lex fori*, nor a mandatory rule of the *lex solutionis*. The French subsidiary was therefore prohibited from executing its contract based on U.S. law, while obligated to execute it by French law.

3.3.3. Overcompliance

Extraterritorial application of primary and secondary economic sanctions, combined with the legal uncertainty they entail, also produces a "chilling effect" on what would otherwise be perfectly legitimate transactions, and as a result trigger overcompliance. Faced with a threat of sanctions, actors involved in international trade may be risk-averse and accordingly over-compliant. French banks and insurers in particular (probably on account of the *BNP Paribas* case) are peculiarly reluctant to finance or insure projects involving countries under U.S. sanctions (regardless of the legality of such projects), making it harder, not to say impossible, for those who were willing to invest in sanctioned countries to do so, even if they are not tied to the U.S. A new kind of clause is creeping into contracts with banks and insurance companies. So-called OFAC clauses ensure that counterparties comply with U.S. economic sanctions, or else find themselves in breach of contract.

3.3.4. Competition Distortion

The economic detriment felt by U.S. companies, and the U.S. economy as a whole, as a result of U.S. sanctions may be negligible, due to the fact that target countries play a modest role in the business of those companies. However, for Europeans, imposition of economic sanctions spell a very considerable loss of business opportunities (as is often alleged in the case of Cuba) and a distortion of competition. Of course, compliance may also consume resources and, to that extent as well, operate as a burden on European firms.

[65] Paris Court of Appeal, 25 February 2015, No. 12/23757.

3.4. Possible Solutions

Several solutions come to mind for responding to the challenges posed by the extraterritorial application of economic sanctions, and their consequences are very different.

3.4.1. Blocking Statutes

To neutralize U.S. extraterritorial legislation, the EU, following the examples of Canada and Mexico, adopted in 1996 a Council Regulation[66] prohibiting European firms from complying with certain extraterritorial instruments adopted by the U.S. under the name of the "D'Amato-Kennedy" and "Helms-Burton" legislation. These instruments did not combat all U.S. extraterritorial laws, but only the ones specified in its Annexe[67].

The EU Regulation was reactivated to oppose the U.S.'s withdrawal from the JCPOA. The European Commission then adopted a Delegated Regulation[68] which modified the Annexe by adding to the list of specified extraterritorial U.S. instruments the sanctions that were reinstated against Iran. Those amendments entered into force on 7 August 2018. Besides prohibiting European firms from complying with the specified U.S. extraterritorial legislation, the Regulation bars recognition and enforcement of judgments and administrative decisions which give effect to such legislation. Moreover, it provides a legal ground for European firms to recover damages suffered from application of specified extraterritorial legislation through a so-called clawback action.

Such measures may, however, be counterproductive by subjecting European firms to contradictory rules[69]. The Regulation has not yet been fully applied in the EU[70] and may well

[66] 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 O.J. (L309) 1.
[67] Following are the laws, regulations and other legislative instruments listed in the Annexe: National Defense Authorization Act for Fiscal Year 1993, Title XVII Cuban Democracy Act 1992, sections 1704 and 1706; Cuban Liberty and Democratic Solidarity Act of 1996, Title I, Title III and Title IV; Iran and Libya Sanctions Act of 1996; 1 CFR (Code of Federal Regulations) Ch. V (7-1-95 edition) Part 515 – Cuban Assets Control Regulations, subpart B (Prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties).
[68] Commission Delegated Regulation 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 O.J. (L199I) 11.
[69] See *supra* p. 94-95.
[70] To our knowledge, the European blocking statute has only been used once, in 2007, when Austria brought charges against BAWAG for closing accounts held by Cuban nationals. However, the U.S. granted BAWAG a license, the bank then reinstated the cancelled accounts and the Austrian authorities eventually dropped the charges. See: H. L. Clark and L. W. Wang, *Foreign Sanctions Countermeasures and Other Responses to U.S. Extraterritorial Sanctions*, *op cit.*, p. 23.

meet the same fate as the longstanding French blocking statute[71] which was considered irrelevant by the U.S. Supreme Court in the *Aerospatiale*[72] case due to the absence of enforcement in France.

Some authors have thus considered this blocking statute to be a "paper tiger"[73]. Nevertheless, the clawback action might, for the first time[74], be of use[75]. Indeed, based on this provision, European firms will be able to sue, in all EU Member States, any company that brought an action in the U.S. against them in accordance with the recently activated Title III of the Helms-Burton Act.

3.4.2. Exemptions

In parallel to adoption of the above-mentioned blocking statute, the EU chose to fight the D'Amato Kennedy and Helms-Burton Acts before the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO"). However, the U.S. and the EU found an arrangement and the dispute was dropped. This settlement could be reached because the U.S. agreed to give exemptions to European firms, rendering these sanctions programs inapplicable to them.

Moreover, the OFAC offers a possibility to file a request for a special license in order to achieve an operation that would normally be prohibited. Such licenses are granted on a case-by-case basis. This solution may be used by practitioners when they are confronted to conflicting obligations. For instance, a European subsidiary of a U.S. firm might have to manage a situation involving a wire with a nexus to Iran or to a blacklisted entity/person. Under U.S. law, they have to reject the transaction but if they do, they will be in violation of EU law. In this case, the best solution might be to block the transaction and ask for a license.

Exemptions of this kind may be a way to limit the extraterritorial reach of U.S. sanctions, as well as a means to protect foreign companies from further proceedings.

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[71] Law No. 80-538, 16 July 1980.
[72] *Société nationale industrielle aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987).
[73] "*Tigre de papier"* , B. Leurent, "Les implications des législations de sanction et de blocage sur les relations juridiques privées internationales », *in* Sanctions Unilatérales, Mondialisation du Commerce et ordre juridique International – À propos des lois Helms-Burton et d'Amato-Kennedy", *in* H. Ghérari, S. Szurek (ed.), CEDIN – Paris X Nanterre, Cahiers Internationaux, Montchrestien, 1998, p. 288.
[74] If invoked, this clawback action would certainly have been inoperative due to the rule of State immunity.
[75] See: G. De Rancourt and A. Goldsmith, "Helms-Burton: une contre-attaque possible pour les entreprises européennes", *La lettre des Juristes d'affaires*, 14 october 2019, n°1416, p. 8.

3.4.3. Countermeasures

In addition to blocking statutes, the EU could adopt countermeasures as authorized by the UN Charter, justifying them on the basis of the wrongfulness of the U.S.'s extraterritorial application of unilateral sanctions. Moreover, the EU could decide to mirror the U.S. and institute its own sanctions regimes, even going so far as to subject foreign firms to its jurisdiction based on use of the euro. To do so, the EU would need to have sufficient economic and political leverage.

3.4.4. Litigation

Extraterritorial application of primary and secondary economic sanctions may be litigated at two different levels: in domestic courts and before international dispute resolution bodies. At the national level, companies that find themselves under investigation in the U.S. for violating U.S. sanctions could choose to go to court rather than settle with U.S. authorities. Indeed, as explained before, U.S. courts have established a presumption against extraterritoriality[76]. Companies could thus challenge the U.S.'s exercise of jurisdiction in court. Obviously, the outcome of any legal action is by definition uncertain and few firms are willing to assume that risk, especially considering the potential losses (e.g. loss of a banking license) that might follow. Moreover, non-U.S. companies are often unfamiliar with the U.S. legal system and disinclined to incur the exceptionally great expense of litigation in a U.S. court.

At the international level, States may challenge the extraterritorial application of unilateral sanctions before international courts – notably the DSB of the WTO or the International Court of Justice ("ICJ"). Because such sanctions form an obstacle to free and fair trade, these could constitute a basis for submitting a dispute over them to the DSB of the WTO – as the EU did in 1996. More recently, Venezuela requested the establishment of a panel, arguing that U.S. sanctions against them are a violation of WTO's trade rules[77]. Chances of success of such action will most likely be thin considering the current paralysis of the WTO Appellate Body.

As for the ICJ, States could assert the unlawfulness of the extraterritorial application of unilateral sanctions under public international law, a major problem being that the U.S. – as well as France – have withdrawn from compulsory ICJ jurisdiction. Notwithstanding U.S.

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[76] See *supra* p. 73-75.

[77] United States – Measures Relating to Trade in Goods and Services, Request for the establishment of a panel by Venezuela, WT/DS574/2, 15 March 2019.

withdrawal, Iran recently submitted the unilateral withdrawal of the U.S. from the JCPOA to the ICJ, arguing that the U.S. violated a friendship treaty[78] from 1955[79]. On 3 October 2018, the ICJ mandated the U.S. to lift their sanctions related with humanitarian trade[80]. All such initiatives, in the transatlantic arena, risk seriously heightening tensions between the EU and the U.S. Almost immediately following issuance of the ICJ mandate, the U.S. terminated its friendship treaty with Iran.

3.4.5. Cryptocurrency & Alternate Financial Systems

Considering that the U.S. regards clearing U.S. dollars – which cannot be separated from use of the U.S. dollar – as a sufficient nexus to the U.S. territory to justify the imposition of sanctions, some States (e.g. Venezuela and Iran) have decided to create cryptocurrencies to circumvent U.S. sanctions.

Another solution would be to develop payment systems that are much less reliant on the U.S. dollar[81]. In this regard, following the reinstatement of U.S. sanctions against Iran, the EU created a Special Purpose Vehicle ("SPV"), called "INSTEX" (Instrument in Support of Trade Exchanges), which is meant to work similarly to a "clearing house", that is, a system of barter. Iran then founded a mirror entity, the Special Trade and Finance Instrument ("STFI"), but the latter will not be working until Iran complies with the recommendations of the Financial Action Task Force[82] ("FATF") – which has not been the case for now.

This mechanism is currently limited to agricultural and medical products, which are exempted of U.S. sanctions. It was used, for the first time, in March 2020 to deliver medical material to Iran to help it deal with the Covid-19 pandemic. Ultimately, it is intended to allow European firms to keep trading with Iran, in all sectors, without being subject to U.S. sanctions. However, even when fully operational, its efficiency might still depend on the ties that a

[78] Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957.
[79] On 17 July 2018, the ICJ issued a press release No. 2018/34 announcing that "Iran institutes proceedings against the United States with regard to a dispute concerning alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States, and requests the Court to indicate provisional measures".
[80] ICJ, 3 October 2018, General List, No. 175, Order, *Islamic Republic of Iran v. United States of America*, alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights.
[81] This is what China has been trying to do since 2009 with the Cross-border Interbank Payment System ("CIPS"). See: J. P. Zoffer, "The Dollar and the United States' Exorbitant Power to Sanction", *op.cit.,* More recently, Russia has likewise developed the System for Transfer of Financial Messages ("STFM").
[82] FATF (2012-2019), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, France, available at: http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html (retrieved on 16 November 2020).

company has with the U.S. In this respect, it will probably be more effective for SMEs which do not have interests in the U.S.

3.4.6. Multilateral Convention

The international discord generated by extraterritorial application of primary and secondary economic sanctions may conceivably be addressed on a multilateral level, that is, through an internationally agreed upon framework for the scope of application of their legislation. It is by no means clear that the U.S., the EU, China, Russia and the UK – to mention only some of the most difficult of negotiators – would agree on the applicable criteria. But even if they did, some of these criteria – such as essential national security interests or public policy – are ones on whose application States would rarely agree.

Regardless of how challenging this solution may be, it may in the long run be the preferred way to deal with extraterritoriality and all the issues that it triggers. Indeed, dialogue should obviously be preferred to retaliations and economic wars.

CONCLUSION

Underlying the expression "extraterritorial application of national legal norms" lies the notion that a State aims to regulate situations beyond its borders without a substantial nexus to its territory, arguably illegitimately extending its jurisdiction at the expense of what other States tend to view as their sovereignty. In an era of intense globalization, States understandably seek to exert control over parties found outside their territory. Such was one of the purposes of the FCPA. The U.S. not unreasonably sought to ensure that U.S. firms did not violate U.S. laws concerning corruption, even while acting on foreign territory. However, extraterritorial application of national legal norms has grown into a much more controversial phenomenon, since it now tends to govern conduct not only occurring beyond a State's borders but also conduct sometimes bearing scant relationship to the enacting State.

Even a regime that could be justified by the wrongfulness of the targeted conduct, such as corruption and bribery, may be implemented in a problematic fashion, for example, in a way that imposes disproportionate burdens or unduly sacrifices legal certainty. It may also proceed in the absence of consultation or coordination with countries that are indirectly affected, much less attempts at delineating enforcement jurisdiction among States. More controversial are regimes entailing the imposition of primary and secondary economic sanctions. They may be perceived as illegitimate not merely in the way they are implemented, but in their basic

rationale, commonly seen as nothing more than an extraterritorial imposition of public policy. These are the regimes whose legitimacy is most hotly contested. The situation is certainly not eased by the fact that economic sanctions are an instrument only used, and certainly only used effectively, by economically or politically powerful States. Nor is the launch of a "sanctions war" an attractive prospect.

Finally, extraterritoriality tends to affect more and more fields and modalities of international trade (antitrust, banking regulations, data protection, etc.). It is also used by more and more countries. For instance, China is contemplating enactment of an export-control law which embraces extraterritorial provisions. The most viable and long-term solution would be to address the problem at the multilateral level. That may be worth doing, however elusive success in eliminating tensions over extraterritoriality may be.