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Chapter 11
Limits on the Extraterritoriality of United States Export Control and Sanctions Legislation

Joop Voetelink

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Abstract The sovereignty of states is reflected in the notion of jurisdiction, empowering them to enact and enforce laws and regulations, and to adjudicate disputes in court. The jurisdiction of states and the exercise thereof is primarily territorial, limiting the exercise of state authority to their respective national territories except in specific situations. However, in an increasingly globalized and interconnected world, it would be hard to maintain that a state should be denied the right to exercise its sovereign powers beyond national borders when there are reasonable grounds for doing so. Consequently, the exercise of extraterritorial legislative jurisdiction has become more accepted, although it is limited to particular situations and circumstances. These have to do with the exercise of jurisdiction over nationals, vessels and aircraft registered in or pertaining to the legislating state, as well as certain activities aimed at undermining the state's security or solvency or which constitute crimes under international law. However, in principle it is not allowed to regulate activities

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of foreign nationals or entities operating wholly outside the legislating state's territory. One area where this has become increasingly prevalent is through the exercise of export controls over foreign nationals and legal persons. The United States (US) has long been engaged in the exercise of this type of extraterritorial jurisdiction and is, without doubt, the state that is most proactive in doing so. This chapter considers US extraterritorial claims with respect to its export control and sanctions legislation and explores the limits of this practice under public international law.

Keywords International law · export control · sovereignty · extraterritorial jurisdiction · sanctions · principles of jurisdiction · European Union · United States · Blocking Regulation

11.1 Introduction

On 1 January 2021, the US Senate, over President Trump's veto, passed the Protecting Europe's Energy Security Clarification Act (PEESCA) as part of the William M. (Mac) Thornberry National Defense Authorization Act for the Fiscal Year 2021.[1] PEESCA adds additional sanctions on Russian energy export pipeline projects, in particular, the Nord Stream 2 Project and the TurkStream Project.[2] US sanctions had already targeted both projects under the Countering Russian Influence in Europe and Eurasia Act of 2017 (CRIEEA)[3] and the Protecting Europe's Energy Security Act of 2019 (PEESA).[4] The latter directs the US President to impose sanctions[5] on any foreign person that knowingly provides pipe-laying vessels for the construction of Russian underwater pipelines, without coordination with allies of the US.[6] The mere threat of US sanctions led the Dutch-Swiss offshore company Allseas to suspend all its activities related to the Nord Stream 2 project almost overnight,[7] not much later followed by Norway's quality assurance firm DNV GL.[8] The examples show that

[1] President Trump vetoed the bill on 23 December 2020. The House of Representative voted to override the veto on 28 December 2020, followed by the Senate on 1 January 2021.

[2] The Nord Stream 2 Project is the nearly completed underwater natural gas pipeline between Russia and Germany. The TurkStream Project consists of two underwater pipelines between Russia and Turkey, one of which is already completed while the other is still under construction.

[3] Countering Russian Influence in Europe and Eurasia Act of August 2, 2017, Pub. L. 115-44, title II, 131 Stat. 898 (22 U.S.C. 9501 et seq.); part of Countering America's Adversaries Through Sanctions Act (CAATSA) of August 2, 2017, Pub. L. 115-44, 131 Stat. 886 (22 U.S.C. 9401).

[4] Pub. L. 116-92. part of the National Defense Authorization Act (NDAA) for 2020.

[5] Travel bans and blocking of assets.

[6] CRIEEA stipulates that the President may impose sanctions "in coordination with allies of the US", thus somewhat mitigating the extraterritorial impact of the statute (Section 232(a)). This phrase does not return in other secondary sanctions legislation.

[7] https://allseas.com/news/allseas-suspends-nord-stream-2-pipelay-activities/. Accessed 20 February 2021.

[8] Norway's DNV GL suspends Nord Stream 2 work over U.S. sanctions fear | Article [AMP] | Reuters Accessed 20 February 2021.

even the possibility of being the target of foreign sanction may deter a company from engaging in otherwise legitimate business.[9]

This type of sanctions is referred to as extraterritorial or secondary sanctions, as they are not aimed at the target state (as primary sanctions are) but instead subject foreign nationals and business entities to US legislative actions without a clear nexus with the US affecting the relations between third states and the target state. The US government has enacted secondary sanctions legislation repeatedly over the past few decades. The extraterritorial reach of US law is not restricted to sanctions, however.[10] US extraterritorial practice goes back to the 1940s when US courts exercised jurisdiction over foreign persons in antitrust cases. Also, legislation regulating the controls on the re-export of US origin military and dual-use goods and technology, introduced in the same period, included extraterritorial elements that are still part of US export control law. However, secondary sanctions go a good deal further than antitrust and export control legislation in that the actions of the foreign nationals or entities need not have any link with the US territory or legal order as is normally the case when exercising jurisdiction over foreign actions which originate outside a state's territory but are aimed at or have a significant effect on the legislating state's territory or legal order.

Although the extraterritorial application of domestic law has become an accepted practice in our increasingly interconnected and complex contemporary society, it is still a long-established principle of public international law that the jurisdiction of a state is primarily territorial in nature. Indeed, the unlimited exercise of a state's national jurisdiction beyond its national borders except where this is clearly accepted under international law may come into conflict with the sovereign equality of states, creating international tension and burdening foreign persons and business with regulations and penalties for engaging in activities which are often perfectly legal under the laws of their own state. Consequently, the extraterritorial US claims have been a recurring source of disputes between the US and its trading partners, notably the EU. As the French minister of Economy and Finance stated, "The European Union must be free to trade legitimately with the entities and countries it wishes, without extraterritorial provisions impeding its economic operators. It is a question of European sovereignty."[11]

The present chapter focuses on the extraterritorial aspects of US export control and sanctions legislation and explores the limits under customary international law of jurisdiction to lawfully impose obligations on foreign natural persons or corporations outside the US. By way of introduction, the chapter starts with an analysis of the

[9] Sometimes referred to as the chilling effect of secondary sanctions; Gordon 2016.

[10] Other fields of law not discussed in this chapter: that extraterritorial rules include securities law and foreign corrupt practices, in particular the Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, title I, 91 Stat. 1494 (codified in: 15 U.S.C. 78a et seq.).

[11] "L'Union Européenne doit pouvoir être libre de commercer légitimement avec les entités et avec les pays qu'elle souhaite, sans que des dispositions extraterritoriales ne viennent entraver ses opérateurs économiques. C'est une question de souveraineté européenne", cited in: Court of Appeal of Paris, International Commercial Chamber, 3 June 2020, Judgement in *SA T v* Société *N,* No. RG 19/07261—No. Portalis 35L7-V-B7D-B7VDG, Section 66.

concept of jurisdiction as a corollary of the principle of State sovereignty. Also, it establishes to what extent states are allowed under international law to exert their jurisdictional powers beyond national borders. Next, extraterritorial aspects of US legislation on the control of the export of goods and services as well as on sanctions are analyzed. As these claims have sparked a number of disputes with other states and especially the EU over the past few decades, the international responses to US legislation with an extraterritorial effect are examined next. Building on the reasons for these responses and the arguments brought forward the legitimacy of extraterritorial US legislation is analyzed in more depth. Finally, this chapter offers a synthesis and conclusion.

11.2 Jurisdiction of a State

Sovereignty is the supreme authority of states which entails that states are equal and independent.[12] From a legal point of view, this implies that there is no hierarchical order between them and, therefore, no state can exercise power over another state. Stemming from the notion of sovereignty are the principles of territorial integrity and non-intervention, obliging states to refrain from any action that breaches the sovereignty of another state, including acts that interfere with the internal affairs or international relations of that state.

Within a state, the principle of sovereignty reflects the unique power and authority to make laws, subject people and property to legal processes based on these laws and to compel compliance with the rules where necessary.[13] These three powers are referred to as the legislative, enforcement, and adjudicative jurisdiction of a state, which, together with the exercise thereof, are an essential characteristic of a state. Legislative or prescriptive jurisdiction is "the authority of a state to make law applicable to persons, property, or conduct" whether by legislation, by executive act, or by determination of a court.[14] Enforcement or executive jurisdiction allows a state "to exercise its power to compel compliance with the law".[15] Adjudicative or judicial jurisdiction expresses the authority to, "apply law to persons or things, in particular through the processes of its courts or administrative tribunal".[16] In the

[12] Permanent Court of Arbitration, 4 April 1928, The Island of Palmas case (or Miangas), United States v the Netherlands, Award of the Tribunal, p. 8. www.pca-cpa.org. Accessed 20 February 2021.

[13] Voetelink 2015, p. 116.

[14] Restatement of the law fourth 2018, Section 401(a) and Introductory Note. 'Determination of a court' is in particular relevant in common law systems where courts can make generally applicable common law; cf. Restatement of the law fourth 2018, Part IV Introductory Note.

[15] Ibid., Section 401(c).

[16] Ibid., Section 401(b).

literature, the latter type of jurisdiction is not always recognized as a separate form of jurisdiction.[17]

With a few exceptions, a state has full legislative, enforcement, and adjudicative jurisdiction within its territorial borders.[18] The exercise of jurisdiction can be limited by international agreement to which the state concerned is a party or by a rule of customary international law. An example is the concept of immunity which prohibits a state from exercising its adjudicative and enforcement jurisdiction over natural and legal persons, or their goods, enjoying immunity in that State.

11.2.1 Extraterritorial Jurisdiction

The other side of the jurisdictional coin is that the extraterritorial reach of a state's jurisdiction is regulated and to a considerable extent restricted under international law. Any attempt by a state to exercise its legal authority beyond national borders finds its limits in "the sovereign territorial rights of other states"[19] as, in principle, jurisdiction and the exercise thereof is territorial in nature.[20] However, strict adherence to the territoriality rule can potentially hamper international relations as the interdependency of economies has become enormous today. Moreover, ongoing globalization entails that the scope of national interests transcends national borders and can include international elements. Therefore, it would be impossible to completely separate national jurisdictions from one another.

A distinction must be made between the various forms of jurisdiction. As the extraterritorial application of a state's enforcement jurisdiction (including adjudicatory jurisdiction) can have a significant impact on another state's sovereign rights, it is generally territorial. Without the consent of the other state, a state cannot exercise its enforcement jurisdiction in the other state's territory.[21] With respect to legislative jurisdiction, states are allowed to extend the scope of their laws to extraterritorial activities with the other state's "consent, invitation or acquiescence" or under a permissive rule of international law as set out in more detail in the next sections.[22]

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[17] Mann 1964. Bianchi, for example, regards adjudicative jurisdiction as an element of the enforcement jurisdiction, Bianchi 1992, pp. 372 and 373. Crawford views adjudicative jurisdiction as the actualization of legislation while the carrying out of a judgement or sentence is an expression of enforcement; Crawford 2019, p. 441, fn. 4. As adjudicative jurisdiction does not play a prominent role in the extraterritorial application of export control law, the present chapter will focus on legislative and enforcement jurisdiction.

[18] US Supreme Court, Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812).

[19] ECHR, 12 December 2001, Banković and others v. Belgium and 16 others, App no 52207/99, Section 59.

[20] PCIJ 7 September 1927, The case of the S.S. Lotus, Series A. No. 10, pp. 18–19.

[21] Restatement of the law fourth 2018 Part IV Introductory Note and Section 432.

[22] Banković and others v. Belgium and 16 others, App no 52207/99, Section 60.

11.2.2 Principles of Jurisdiction

Under customary international law, a state is allowed to exercise legislative jurisdiction extraterritorially when a genuine connection exists between the state seeking to regulate and the persons, property, or conduct being regulated.[23] That connection is reflected in a number of recognized grounds or principles of jurisdiction that provide for exceptions to the general rule that jurisdiction is territorial in character. These include the nationality principle allowing states to regulate the actions of persons and entities possessing its nationality, including vessels and aircraft registered in that state. Another recognized basis for exercising extraterritorial legislative jurisdiction is the right to criminalize actions aimed at undermining state security or the integrity of its currency and official documents. Finally, certain acts have become recognized as crimes under international law giving all states a right to criminalize them under its national law. The next sub-sections discuss these principles as well as the territoriality principle in more detail. Beyond these recognized situations the exercise of extraterritorial jurisdiction is widely considered to be impermissible in the absence of a territorial connection.

11.2.2.1 Territoriality

As state sovereignty and territory are inextricably linked, the principle of territoriality is the central element in the contemporary jurisdictional framework.[24] It reflects first and foremost the right of a state to enact laws applicable within its territory.[25] However, the principle is also relevant to cross-border events that partially take place outside the legislating state's border. Under the generally accepted principle of objective territoriality, the state where an essential element of an action that commenced abroad was completed, can assert its legislative jurisdiction over the event.[26] The classic example is the firing of a firearm in the territory of one state killing a person on the other side of the border.

Derived from this notion of objective territoriality, is the so-called 'effects doctrine', developed by US courts in antitrust cases.[27] This doctrine allows the assertion of legislative jurisdiction over acts committed abroad by foreign persons or companies that are in accordance with foreign laws but produce a substantial and

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[23] Restatement of the law fourth 2018, Section 407, comment.

[24] Ryngaert 2015, p. 36.

[25] A State's territory encompasses its land territory, internal waters, the territorial sea and the airspace over these areas; see Articles 1 and 2 of the Convention on International Civil Aviation; Chicago, 7 December 1944 (Vol. 15 UNTS 1948, No. 102) and Articles 2(2) and (3) of the United Nations Convention on the Law of the Sea; Montego-Bay, 10 December 1982 (Vol. 1833 UNTS 1994, No. 31363).

[26] Crawford 2019, p. 442.

[27] The 'effects doctrine' has been accepted as early as 1945 in the Alcoa case: United States v. Aluminum Corp. of America, 148 F.2d 416 (2d Cir. 1945).

intended economic effect on the regulating State's commerce. Today, the 'effects doctrine' remains in respects controversial[28] although it appears to have gained considerably more acceptance than when it was first asserted, in particular in antitrust law.[29]

11.2.2.2 Nationality

Historically, jurisdiction was primarily based on personality rather than territoriality.[30] Today, the nationality principle continues to play an important role in the jurisdictional framework. Generally, a distinction is made between the nationality principle (or active personality principle) and passive personality principle. The former is linked with the nationality of the person or entity performing an act abroad that need not have any direct relation with the territory of the legislating state. According to the principle, a state can assert legislative jurisdiction over its nationals outside its territory.[31] An example is Article 18(c) of the EU sanctions regulation on cyber-attacks that states that the Regulation shall apply "to any natural person inside or *outside* the territory of the Union who is a national of a Member State".[32]

The nationality principle is also applicable to the international activities of companies. Article 18(d) of the same EU Regulation holds that the Regulation also applies, "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". This particular provision makes clear that the nationality of a corporation for application of the Regulation depends on the state where it was established.

Application of the active personality principle is well-accepted as opposed to the application of the passive nationality principle that focuses on the nationality of the victim of an act performed abroad. Under this principle, a state can apply its legislative jurisdiction to certain acts performed outside its territory harming its nationals. Although the passive personality principle is still controversial, its use has become more accepted with respect to certain crimes, especially terrorist-related crimes.[33] For instance, Article 6(2)(a) of the Terrorist Bombings Convention instructs

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[28] Crawford 2019, p. 447.

[29] Cohen-Tanugi 2015, p. 11. See for instance the Gencor case in which the Court of First Instance of the EU holds that application of a particular EU Regulation "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community". ECJ 25 May 1999, Gencor Ltd v Commission of the European Communities, Judgment of the Court of First Instance (Fifth Chamber, extended composition); European Court Reports 1999 II-00753, Case T-102/96, ECLI:EU:T:1999:65, at paras 89–92).

[30] Ryngaert 2015, p. 49ff.

[31] Ryngaert 2015, p. 104.

[32] Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States (OJ L 129 I, 17/5/2019, p. 1/12).

[33] Crawford 2019, p. 445.

state parties to establish jurisdiction over acts set forth in the Convention when "the offence is committed against a national of the State.[34]

11.2.2.3 Protective and Universality Principles

The protective principle, also referred to as the security principle,[35] is an old and well-accepted foundation for legislation with extraterritorial effect.[36] It is not based on the status of the person over whom a state asserts jurisdiction, but instead on conduct in another state irrespective of the nationality of the perpetrator jeopardizing[37] the national security or solvency of the legislating state. The notion of national security is defined rather narrowly. Consequently, a state can only assert legislative jurisdiction based on this principle when key state interests are at stake. Examples include violence aimed at overthrowing its government or against key state officials and activities, espionage or the counterfeiting of its currency or national documents. As such an act does not necessarily affect the interests of the State where the act was initiated and, therefore, may not be subject to that state's laws, extraterritorial application of the legislative state's laws seems warranted.[38]

Universal jurisdiction is concerned with legislation criminalizing recognized crimes under international law, such as piracy, slavery, war crimes, genocide, crimes against humanity, and certain acts of terrorism. The jurisdictional principles discussed above either have a direct or an indirect link between an act and the state asserting jurisdiction. This is not necessarily the case with the principle of universality. This principle is based on the idea that the nature of the crimes, or of the circumstances under which they take place, are deemed to be offensive to the global community at large warranting action by any state, although in practice, most states require some link with the act or actor. The classical example of an act that allows the assertion of universal jurisdiction is piracy on the high seas. Following World War II, states have concluded various international agreements obliging all states parties to extend their jurisdiction over the international crimes included in these agreements, such as genocide and grave violations of the laws of war.[39]

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[34] International Convention for the Suppression of Terrorist Bombing, New York, 15 December 1997 (Vol. 2149 UNTS 2003, No. 37517), entered into force 23 May 2001.

[35] Crawford 2019, p. 446.

[36] Ryngaert 2015, p. 114.

[37] No actual harm needs to have resulted from the act covered by the extraterritorial legislation; Ryngaert 2015, p. 114.

[38] Ryngaert 2015, p. 114.

[39] Articles 49 and 50 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva, 12 August 1949 (Vol. 970 UNTS 1950, No. 970). Similar provisions are included in the other three Geneva Conventions and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Bern, 12 December 1977 (Vol. 1125 UNTS 1979, No. 17512) and Convention on the Prevention and Punishment of the Crime and Genocide; 9 December 1948 (Vol. 78 UNTS 1951, No. 1021).

Later, other crimes were made subject to universal jurisdiction as well, such as attacks on civil airliners, aerial hijacking and attacks on international officials. These acts are subject to multiple bases of jurisdiction and states have agreed either to prosecute or extradite suspects of such offences. As these acts are not of a universal character in the traditional sense, jurisdiction over the acts is referred to as quasi-universal jurisdiction.

11.3 United States Export Control Legislation

The US has long applied its laws extraterritorially, for example, in the field of antitrust law and securities law. The extraterritorial reach of US law is also felt in the field of export control law (see Chap. 5). Starting in the 1940s, the US has enacted laws controlling the export of commodities and services, partly having an extraterritorial effect in order to prevent goods from reaching destinations denied by US law. These provisions have been amended and extended over time and are still in force today, regularly leading to discussions about the legality of their reach. Even more questions were raised when the US included in its sanctions programs so-called secondary sanctions that as well as impacting the targeted foreign state or non-state entity, also subjects foreign nationals and business entities to US legislative actions without a clear nexus with the US affecting the relations between third states and the target state.

Extraterritorial legislation would be unwarranted when allied trading partners share exactly the same concerns and interests and are prepared to fully align domestic legislation in the field of export control and sanctions. However, even in the Cold War period, it proved to be impossible to fully align US security and foreign policy goals with the interests and economic defense policies of other Western states. Therefore, the US may have felt extraterritorial legislation to be a more viable option to manage national export concerns.[40] This section looks into these specific US rules, which can be roughly divided into four interconnected strands of legislation[41] of which the first three will be discussed below.

The first controls the export, re-export, and in-country transfer of most US origin commercial, dual-use, and less-sensitive military goods and technology. The second strand is concerned with the export, re-export, and retransfer of, as well as brokering in, military goods, services, and technology.[42] The third strand encompasses economic sanctions. Finally, the export of nuclear material, equipment and technology is subject to the Atomic Energy Act of 1954 (AEA).[43] Because of its

[40] Schaap and Ryngaert 2015, p. 10.

[41] Restatement of the law fourth 2018, Section 812, Reporters' Notes 2 and 4.

[42] In terms of the Arms Export Control Act and implementing regulations: defense articles (items, software and technical data) and defense services.

[43] Formerly the Atomic Energy Act of 1946, Aug. 1, 1946, ch. 724, 60 Stat. 755 (42 U.S.C. 2011 et seq.).

limited extraterritorial reach, this specific strand of legislation is not addressed in this chapter.

11.3.1 Dual-Use Export Controls

Traditionally, the US had put controls on exports in times of armed conflict or in special emergency situations only.[44] Consequently, at the onset of World War II, before it had actually entered the war, the US had enacted legislation to authorize the control of exports of munitions and other goods essential to the national defense effort,[45] extending the export controls to all commodities in 1942.[46] After the war had come to an end, the US continued to control these exports.[47] Today the Export Controls Act of 2018[48] (ECA) is the statutory authority for these controls providing the President with the authority to implement the export control on commercial, dual-use goods, and less-sensitive military goods and technology. The ECA is administered by the Department of Commerce Bureau of Industry and Security (BIS) and implemented by the Export Administration Regulations (EAR), which includes the Commerce Control List (CCL) listing all EAR-controlled items (Part 774).[49]

From the start, US export controls included extraterritorial elements. For example, the Export Control Act of 1949 and its implementing regulations were in part applicable "to "any person" within or without the United States".[50] In addition, the transshipment of US exports from one country to another as well as the release of technical data of US origin by persons and companies situated abroad were restricted by the Act.[51] These provisions were no dead letters and actually led to administrative action taken against foreign persons and companies for acts committed outside the US.[52]

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[44] Joint Resolution of April 22, 1898, No. 25 (30 Stat. 739) authorizing the President to "to prohibit the export of coal or other material used in war from any seaport of the United States until otherwise ordered by the President or by Congress"; enacted by Congress three days prior to the declaration of war against Spain. Berman and Garson 1967, p. 791.

[45] Act to Expedite the Strengthening of the National Defense, Act of July 2, 1940, ch. 508, Section 6, 54 Stat. 714. Silverstone 1959, p. 331.

[46] Act of June 30, 1942, ch. 461, 56 Stat. 463. As the statutes were intended to be temporary, they had to be extended every year.

[47] Initially, the controls were based on the Export Control Act of 1949. This statute was replaced by the Export Administration Act of 1969, which, in turn, was superseded by the Export Administration Act of 1979.

[48] Export Controls Act of 2018, Pub. L. 115-232, div. A, title XVII, subtitle B, part I (Sec. 1751–1768), 132 Stat. 2209 (50 U.S.C. 4811 et seq.). Part of the Export Control Reform Act of 2018, Pub. L. 115-232, div. A, title XVII, subtitle B (Sec. 1741–1781), Aug. 13, 2018, 132 Stat. 2208 (50 U.S.C. 4801 et seq.)

[49] 15 C.F.R Section 730 et seq.

[50] Berman and Garson 1967, p. 866.

[51] Berman and Garson 1967, p. 867.

[52] Although criminal proceedings under export control legislation are possible as well, Berham and Garson note that up until 1967 no foreign nationals were held criminally liable for a violation

An example is the 1953 case against a Dutch trade company and its partners. They were charged with having violated the Export Control Act of 1949 by unlawfully diverting and transhipping antibiotics and insecticides.[53] As a result, the US authorities revoked their licenses and denied them further trade activities with the US (denial of export privileges).

Additional rules with extraterritorial effect were introduced as export control legislation developed. A far-reaching step was made in 1982, after Polish military leaders had declared martial law on 12 December 1981 and suspended the operations of the free labor union 'Solidarity'. In response, the US unilaterally imposed a string of sanctions on Poland as well as the Soviet Union for its support of the repression in Poland[54] including the June 1982 sanctions targeting the construction of the Soviet Union's natural gas pipeline from Siberia to Western Europe (the Soviet Pipeline Regulations).[55] The latter sanctions had an unprecedented extraterritorial reach. Foreign subsidiaries of US firms were restricted from exporting wholly foreign-origin equipment and technology. Furthermore, foreign companies with no US connection were prohibited from exporting foreign-made products that were manufactured with technology acquired through licensing agreements with US companies, whether or not the technology had been subject to US controls at the time of export.[56]

When European companies pressed by their governments continued to export controlled pipeline equipment, honoring existing contracts, the US Department of Commerce issued temporary denial orders suspending the privileges of the companies involved to conduct business with the US in the future.[57] Industry was hit hard. Consequently, the European Community, member States, and Japan vehemently opposed the sanctions (see Sect. 11.4.1). Five months later, on 13 November 1982, international protest and subsequent negotiations led to the lifting of all export measures and the termination of administrative and court proceedings.[58]

The ECA of 2018, currently in force, does not specify its jurisdictional reach. There is no doubt though that certain parts of the Act and the EAR apply extraterritorially. Section 4812(a)(1) ECA authorizes the President to control "the export,

committed abroad which is entirely legal in the place where it is committed; Berman and Garson 1967, p. 866.

[53] 6 November 1953, Order of the Dept. of Commerce, Bureau of Foreign Commerce, Case No. 166, Johannes M.A. Klaasen; 18 Fed. Reg. 7179 (November 11, 1953). Silverstone 1959, p. 339.

[54] E.g. Moyer and Mabry 1983, p. 60ff. These measures were implemented in regulations issued pursuant to the Export Administration Act of 1978 (47 Fed. Reg. 141, 144 (1982)).

[55] The Soviet Pipeline Regulations amending the Export Administration Regulations, 47 Fed Reg 27250; Moyer and Mabry 1983, p. 69ff.

[56] Moyer and Mabry 1983, p. 70.

[57] Abbot 1984, p. 89. International Trade Administration, Department of Commerce, Orders to U.S. Foreign Subsidiaries in France, Italy, United Kingdom Concerning the Denial of Export Privileges for Soviet Gas Pipeline Equipment," International Legal Materials 21, no. 5 (September 1982): 1098–1105.

[58] 30 December 1982, Moyer and Mabry 1983, pp. 83–84.

re-export,[59] and in-country transfer of items subject to the jurisdiction of the United States, whether by United States persons or by foreign persons". As the term re-export includes activities abroad, this provision makes clear that export controls can apply to foreign nationals outside US territory. Moreover, the phrase 'items subject to the jurisdiction of the US' further extends the reach of the provision as US origin controlled commodities, technology, and services retain US nationality. Section 734.3(a) EAR lists the items that are subject to the EAR, which include, *inter alia,* "(2) All US origin[60] items wherever located; (3) Foreign-made commodities that incorporate controlled US-origin commodities, foreign-made commodities that are 'bundled' with controlled US-origin software, foreign-made software that is commingled with controlled US-origin software, and foreign-made technology that is commingled with controlled US-origin technology;[61] … (4) Certain foreign-made direct products of US origin technology or software, as described in Section 736.2(b)(3) of the EAR".

In other words, "US export controls 'follow the part'", meaning that a foreign national handling US origin EAR controlled goods abroad is subject to US export control legislation.[62]

Consequently, foreign nationals involved in re-export activities are subject to the EAR, in particular Section 736.2(b) which prohibits "the re-export of controlled items to countries for which a license would be required or to countries which are subject a general prohibition or embargo by the US".[63] Also, ECA and EAR will be applicable to foreign-made commodities if it contains a *de minimis* level of commercial or dual-use US origin components as set out in Section 734.4. EAR.

Provisions of ECA and EAR can be enforced. Section 4819 ECA makes it in general unlawful for 'a person' to violate ECA and EAR while 'no person' may engage in specific unlawful acts. Clearly, this provision does not exclude foreign nationals abroad. Section 764.2 EAR on violations uses similar language. As in the past, US authorities have enforced these rules against foreign persons. An example is the renewal of an order temporarily denying export privileges of a number of foreign companies[64] in the matter that involved the reexport of US-origin aircraft and aircraft parts.[65]

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[59] "The term "re-export" includes—(A) the shipment or transmission of the item from a foreign country to another foreign country, including the sending or taking of the item from the foreign country to the other foreign country, in any manner; and (B) the release or transfer of technology or source code relating to the item to a foreign person outside the United States" (50 USC Section 4801(9)).

[60] US origin is not defined in ECA and EAR.

[61] This subsection is subject to the *de minimis* level of U.S. content as set out in Section 734.4. EAR.

[62] Little et al. 2015, p. 1 and p. 4.

[63] Little et al. 2015, p. 8.

[64] The original denial order was signed in 2008 and was regularly renewed.

[65] 29 May 2020, Dept. of Commerce, Bureau of Industry and Security, Order Renewing Order Temporarily Denying Export Privileges, 85 Fed. Reg. 34405 (June 4, 2020).

11.3.2 Military Export Controls

The Arms Export Control Act of 1976 (AECA)[66] governs the export of defense articles and services. It is implemented by the International Traffic in Arms Regulations (ITAR),[67] which includes the United States Munitions List (USML) of ITAR-controlled items, and is administered by the Department of State Directorate of Defense Trade Controls (DDTC). The AECA also contains the statutory authority for the Foreign Military Sales (FMS) program. This program enables eligible foreign governments and international organizations to purchase defense articles and services directly from the US government instead of from a private contractor (the latter procedure is referred to as Direct Commercial Sales, DCS). FMS-sales are not subject to the ITAR but controlled by the Security Assistance Management Manual (SAMM).[68] This manual is an internal Department of Defense instrument supplemented by internal security assistance manuals of the various service branches covering details unique to their organizations.

Although the AECA, like the ECA, does not specify its jurisdictional reach, some of its provisions have a clear extraterritorial element. For instance, Section 2778(c) AECA penalizes any person who violates certain provisions of the Act or the ITAR. The term 'any person' allows prosecution of foreign nationals before US courts. Furthermore, some parts of the ITAR are applicable to foreign persons or to both US and foreign persons.[69] An example is Section 123.9(a) ITAR that, *inter alia*, deals with re-exports[70] and retransfers.[71] This provision does not refer to either a US person or a foreign person. As re-exports and retransfers by definition can take place abroad, the provision also affects foreign persons abroad.

ITAR includes various provisions on re-export that are applicable to foreign persons abroad and affect their control over ITAR controlled goods.[72] For instance, Section 123.10(a) ITAR holds that in order to get a license for the export of specific

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[66] Arms Export Control Act of 1976, Pub. L. 90-629, 82 Stat. 1320 (22 U.S.C. 2751 et seq.).

[67] 22 C.F.R Section 120–130.

[68] The electronic version, ESAMM. https://www.samm.dsca.mil/listing/chapters. Accessed 20 February 2021.

[69] 22 C.F.R. Section 120.14 states: "If a provision in this subchapter does not refer exclusively to a foreign person (Section 120.16) or U.S. person (Section 120.15), then it refers to both".

[70] 22 C.F.R. Section 120.19 Re-export means: (1) An actual shipment or transmission of a defense article from one foreign country to another foreign country, (2) Releasing or otherwise transferring technical data to a foreign person who is a citizen or permanent resident of a country other than the foreign country where the release or transfer takes place (a "deemed re-export"); or (3) Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to the ITAR between foreign persons. (b) Any release outside the United States of technical data to a foreign person is deemed to be a re-export to all countries in which the foreign person has held or holds citizenship or holds permanent residency.

[71] 22 C.F.R. Section 120.51 Retransfer means: (1) A change in end use or end user, or a temporary transfer to a third party, of a defense article within the same foreign country; or (2) A release of technical data to a foreign person who is a citizen or permanent resident of the country where the release or transfer takes place.

[72] Little et al. 2015, p. 6.

defense articles[73] a Non-transfer and use certificate (Form DSP-83) is required, to be executed by the foreign consignee, foreign end-user, and the applicant. The certificate stipulates that "the foreign consignee and foreign end-user will not re-export, resell or otherwise dispose of the significant military equipment enumerated in the application outside the country named as the location of the foreign end-use or to any other person unless authorized". Moreover, the notion that US export control legislation 'follows the parts' also applies to defense articles and services. Although not specified in either AECA or ITAR, DDTC applies the so-called 'see-through' rule.[74] This rule entails that if an ITAR controlled defense article is integrated into a larger system or end-item, the controls do not disappear and continue to apply to the defense article,[75] even if it has become part of a foreign commercial system or product.[76] So, as an example, an aircraft or missile designed, developed, and built outside the US containing one or more defense articles is not subject to ITAR itself, but the ITAR controlled parts are. As a result, the US can block or delay the sale of that foreign-built aircraft or missile.[77] In a study on the impact of US export control on the Joint Strike Fighter Project the reach of the ITAR was called "excessive" and frustrating international business.[78] Therefore, it may not come as a surprise that foreign governments sometimes seek to purchase military equipment that does not contain ITAR-control parts[79] and that foreign producers of military equipment seek to develop new products without US controlled parts;[80] the 'ITAR-free' movement.[81]

Approval for the export of the defense services as mentioned in Section 120.9(a) ITAR is subject to the conclusion of specific agreements, generally characterized as: Manufacturing License Agreements, Technical Assistance Agreements, Distribution

[73] I.e., "significant military equipment and classified articles, including classified technical data".

[74] Fergusson and Kerr 2020, p. 16. Some support for this rule can be found in AECA and ITAR, Little et al. 2015, p. 9.

[75] From 2013 on, some parts, including items like fasteners (e.g., screws, bolts, nuts) washers, spacers, etc. are excluded from the rule when they are not 'specially designed'; cf. Fergusson and Kerr 2020, p. 16.

[76] An example of the application of this rule can be found in the 2006 Consent Agreement between DDTC and The Boeing Company, 'Designation of Defense Articles', p. 3 file:///G:/printen%20of%20overzetten/Boeing_ConsentAgreement_06.pdf. Accessed 20 February 2021.

[77] In 2018 the U.S. initially blocked the sale of the French Scalp cruise missile to Egypt. https://www.defensenews.com/global/europe/2018/03/09/missile-sale-from-france-to-egypt-depends-on-us-permission-dassault-head-says/ Accessed 20 February 2021.

[78] Moore et al. 2011, pp. 35–36. One interviewee stated, ITAR is like "one drop of cyanide in a bucket of water. Once you've put the smallest drop in, everything becomes contaminated".

[79] A tender for a new assault rifle for the German Bundeswehr included an ITAR-free exclusion criterion. https://www.welt.de/wirtschaft/article213002794/Ruestungsindustrie-Europa-will-sich-von-den-Vereinigten-Staaten-emanzipieren.html Accessed 20 February 2021.

[80] The solar-powered Skydweller drone built by Italian Defense company Leonardo; https://www.defensenews.com/unmanned/2019/11/12/leonardo-invests-in-fully-electric-skydweller-drone/.

[81] The coming EAR-free era. WorldECR 11 March 2020. https://www.worldecr.com/archive/the-coming-ear-free-era/ Accessed 20 February 2021. Also: Rüstungsindustrie: Europa will sich von den Vereinigten Staaten emanzipieren—WELT Accessed 20 February 2021.

Agreements, or Off-shore Procurement Agreements (Section 124.1(a) ITAR). By signing the agreement, the contracting parties, including foreign licensees, agree to comply with all applicable sections of the ITAR.

Like the ECA, the AECA and the ITAR have been enforced against foreign persons abroad. In the 1987 Evans-case[82] the US District Court for the Southern District of New York in 1987 upheld the validity of the exercise of extraterritorial jurisdiction under the AECA. Also, in several other cases, the DDTC has taken administrative action against foreign persons. For example, in 2020 Airbus SE, a company organized under the laws of the Netherlands, was charged with, *inter alia,* unlawfully reexporting and retransferring ITAR controlled articles.[83]

11.3.3 US Economic Sanctions

In the US the immediate decision to impose a sanction is almost always laid down in Executive Orders issued by the President. Such Orders are based on one or more statutes. Traditionally, the Trading with the Enemy Act of 1917[84] (TWEA) was the principal statutory basis for US sanctions. After the enactment of the International Economic Powers Act of 1977[85] (IEEPA), this statute has taken over that role. Other statutes, such as CRIEEA, PEESA, and PEESCA mentioned in the Introduction, can provide an additional legal basis to impose sanctions.[86] Also, the Presidential Executive Orders can authorize the heads of departments, in particular the Secretary of the Treasury, to issue any regulation that may be necessary to implement the sanctions measures. Finally, the export control regulations discussed above, such as the EAR and ITAR, include requirements that overlap with OFAC's sanctions programs.[87]

US sanctions are organized into sanctions programs that are primarily administered and enforced by the Department of the Treasury's Office of Foreign Assets Control (OFAC). As part of its enforcement efforts, OFAC maintains a number

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82 United States v. Evans, 667 F. Supp. 974 (S.D.N.Y. 1987). https://law.justia.com/cases/federal/district-courts/FSupp/667/974/2158497/ Accessed 20 February 2021.

83 Proposed Charging Letter Airbus SE, sys_attachment.do (state.gov). Accessed 20 February 2021.

84 Trading with the Enemy Act of 1917 of Oct. 6, 1917, ch. 106, 40 Stat. 411 (50 U.S.C. 4301 et seq.).

85 International Economic Powers Act of 1977, Pub. L. 95-223, title II, Dec. 28, 1977, 91 Stat. 1626 (50 U.S.C. 1701 et seq.). IEEPA is the statutory basis for most sanctions.

86 Gordon et al. 2019, p. 109ff.

87 EAR: 15 C.F.R. Section 744.10 and Section 744.21, and Section 746 (Embargoes and other special controls). ITAR: 22 C.F.R. Section 126.1 (Prohibited exports, imports, and sales to or from certain countries).

of sanctions list, including the Specially Designated Nationals (SDN) list[88] of individuals and companies whose assets have been frozen or 'blocked'.[89]

Over the past decades, the US has established an intricate web of sanctions programs.[90] The majority are primary sanctions that target other States, individuals,[91] groups,[92] and economic sectors by prohibiting US persons from engaging in sanctionable activities with them. Typically, a US person is defined to include: any US citizen or permanent resident alien, wherever located; entity organized under US law; or any person in the United States. However, US persons are sometimes defined much broader, pulling foreign companies within reach of US law, as will be explained below.

Moreover, primary sanctions and the rules that specifically apply to US persons can also affect foreign nationals and companies when they get involved in sanctioned transactions where there is a US nexus.[93] Such a situation can occur where such as a transaction in breach of a sanctions program involves US persons or US origin goods, services or technology, or is processed through the US financial system.[94] Thus, the foreign person violates US sanctions laws and can be held liable by OFAC.[95] The consequences can be quite severe as, for example, ING Bank NV experienced in 2012. The bank, incorporated in the Netherlands, agreed to a settlement of $619 million in forfeitures and fines with OFAC for illegally processing dollar transactions through

[88] Available at: https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx, Accessed 20 February 2021. Other lists include the Non-SDN Menu Based Sanctions (NS-MBS) List; Correspondent Account or Payable-Through Account Sanctions (CAPTA) List; Sectoral Sanctions Identifications (SSI) List; and the Foreign Sanctions Evaders (FSE) List. The Consolidated List includes the parties on the SDN List as well as some of the other lists.

[89] "List of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs.": https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists Accessed 20 February 2021. As a result, these assets may not be transferred, paid, exported, withdrawn or otherwise dealt in. McVey 2019, p. 2.

[90] For an overview of US sanctions programs, see: https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx. Accessed 20 February 2021.

[91] Such as supporters of terrorism, narcotic traffickers, and even associates of the International Criminal Court; Casey et al. 2020, p. 22.

[92] Including: political parties, corporations, and terrorist organization; Casey et al. 2020, p. 22.

[93] Sultoon and Walker 2019, p. 4.

[94] Gordon 2019, p. 14; McVey 2019, pp. 4–5.

[95] Note that a violation can be prosecuted under criminal law as well which is the responsibility of the Department of Justice. Both procedures can take place simultaneously.

financial institutions located in the US.[96] In 2014, the Paris-based BNP Paribas Bank reached a settlement of no less than $8.97 billion.[97]

Non-US persons outside the US can also violate US rules by 'causing' others to violate US sanctions as the sanctions programs generally prohibit transactions "...that evade or avoid, have the purpose of evading or avoiding, cause a violation of, or attempt to violate prohibitions imposed by OFAC under various sanctions authorities".[98] Further, non-US persons can violate US primary sanctions by providing material assistance and support or knowingly facilitating significant transaction to sanctioned parties, or act for or on behalf of a designated actor.[99] Also prohibited are transactions with parties listed on the SDN List. Primary sanctions can, therefore, have an extensive reach and may even have an extraterritorial effect. Some US sanctions, however, explicitly apply to US persons as well as foreign nationals outside the US but may not necessarily have a clear US nexus. This section will further focus on these so-called secondary sanctions.

The Foreign Assets Control Regulations of 1950[100] were the first of the US secondary sanctions. Based on the TWEA, the Regulations sanctioned trade with some Communist States[101] by any person within or subject to the jurisdiction of the US.[102] The term 'subject to the jurisdiction of the US' extended the meaning of US person to include foreign companies 'owned or controlled' by persons subject to US jurisdiction.[103] Other secondary sanctions specifically targeting Cuba followed, such as the Cuban Assets Control Regulation of 1963 (CACR),[104] the 1992 Cuban Democracy Act,[105] and the 1996 Cuban Liberty and Democratic Solidarity Act

[96] See: https://home.treasury.gov/system/files/126/06122012_ing_agreement.pdf Accessed 20 February 2021. ING Bank had violated: the Cuban Assets Control Regulations (CACR), 31 C.F.R. part 515, the Iranian Transactions Regulations (ITR), 31 C.F.R. part 560; the Burmese Sanctions Regulations (BSR), 31 C.F.R. part 537; the Sudanese Sanctions Regulations (SSR), 31 C.F.R. part 538 (now-repealed), and the Libyan Sanctions Regulations (LSR), 31 C.F.R. part 550 (now repealed).

[97] See Press release Dept. of Justice, 30 June 2014. https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial Accessed 20 February 2021. Emmenegger 2016, p. 632.

[98] Gonzalez and Fiorill 2019, p. 153. Based on the penalties provision of 50 U.S.C. IEEPA Section 1705(a). Rathbone et al. 2013, p. 1111, see International Economic Powers Enhancement Act, Pub.L. No. 110-96, Section 2(a), 121 Stat. 1011 (2007), amending 50 U.S.C. Section 1705(a).

[99] Rathbone et al. 2013, p. 1059, 1102–1103, 1111–1112; McVey 2019, pp. 9–10; and Sultoon and Walker 2019, p. 4.

[100] 31 C.F.R. part. 500 (1981).

[101] Such as China, North Korea and communist-controlled parts of Vietnam.

[102] Marcuss and Richard 1981, p. 462.

[103] Berman and Garson 1967, pp. 867–868.

[104] 31 CFR Part 515; replacing the 1962 Cuban Import Regulations (Berman and Garson 1967, fn 8).

[105] Cuban Democracy Act of 1992, Pub. L. 102-484, div. A, title XVII, Oct. 23, 1992, 106 Stat. 2575 (22 U.S.C. 6001 et seq.); also known as the Torricelli Act.

(LIBERTAD). The latter, better known as the Helms-Burton Act,[106] provoked the fiercest reaction from US trading partners. The statute included several extraterritorial measures. Most significantly, Title III permitted US nationals to bring suit against domestic as well as foreign companies found to be 'trafficking' in property confiscated by the Cuban government after the revolution and claimed by US citizens.[107] Additionally, foreign persons were prohibited from selling goods in the US containing any parts originating in Cuba.

Another series of US sanctions targets Iran. The Iranian Assets Control Regulations of 1981[108] was the first of the secondary sanctions, followed by the Iran and Libya Sanctions Act of 1996 (ILSA),[109] the Accountability, and Divestment Act of 2010 (CISADA),[110] the Iran Freedom and Counter- Proliferation Act of 2012,[111] the Iran Threat Reduction and Syria Human Rights Act of 2012,[112] and the Iranian Transactions and Sanctions Regulations.[113] Initially, the extraterritorial applications of the US sanctions legislation did not lead to any conflicts with US trading partners as Iran became subject to almost identical UN and EU sanctions anyway.[114] In 2015, most nuclear-related sanctions were waived or lifted after Iran signed the Joint Comprehensive Plan of Action (JCPOA),[115] limiting its nuclear capabilities. In 2018, however, the US unilaterally withdrew from the JCPOA and subsequently re-imposed all sanctions.[116] Non-US companies that had initiated or resumed business with Iran after the secondary sanctions had been lifted, suddenly found themselves in the position that transactions allowed under domestic law could become subject to US sanctions.

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[106] Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. 104-114, 110 Stat. 785 (22 U.S.C. 6021 et seq.).

[107] Wrongful trafficking activities include: participating in the purchase, sale, transfer of confiscated property, as well as managing, leasing, possessing, using, or entering into a commercial arrangement using or otherwise benefitting from confiscated property 22 U.S.C. Section 6091(b)(2)(1996).

[108] 31 CFR pt. 535 (1981).

[109] Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, Section 1, 110 Stat. 1541, 1541 (1996). Later renamed: Iran Sanctions Act of 1996. The act imposed, *inter alia*, sanctions on any foreign person or entity that invested more than $20 million in Iran or Libya to support the development of petroleum resources.

[110] Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, 124 Stat. 1312 (22 U.S.C. 8501 et seq.).

[111] Iran Freedom and Counter-Proliferation Act of 2012, Pub. L. 112-239, div. A, title XII, subtitle D (Section 1241 et seq.), 126 Stat. 2004 (22 U.S.C. 8801 et seq.).

[112] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, Aug. 10, 2012, 126 Stat. 1214 (22 U.S.C. 8701 et seq.).

[113] 31 C.F.R Sections 560.101–904 (2013).

[114] Harvard Law Review 2011, p. 1251.

[115] Joint Comprehensive Plan of Action; Vienna, 18 October 2015; came into effect 16 January 2016; Annexed to UN Doc S/RES/2231 (2015). Signatories: Iran, China, France, Russia, UK, U.S., Germany and the EU.

[116] Executive Order 13846 of 6 August 2018, Reimposing Certain Sanctions with respect to Iran (83 Fed Reg 38939 7 August 2018).

Various States and the EU have vigorously opposed the secondary sanctions on Cuba and Iran, as will be discussed in the next section. International criticism has not, however, stopped the US from continuing its extraterritorial practice as recent secondary sanctions show, such as the sanctions targeting the Russian energy export pipelines to Europe, as referred to in Sect. 11.1.[117]

11.4 Analysis

This section will examine the legality of the broad territorial reach of US export control and sanctions legislation on the basis of the principles of jurisdiction. As discussed in Sect. 11.2.2, the principles reflect a genuine connection between the regulating State and the persons, property, or conduct being regulated.[118] In other words, US extraterritorial rules must demonstrate a clear link between the foreign person or corporation that is regulated and the US in order to be compatible with public international law.

The previous section may have given the impression that US legislation is predominantly extraterritorial. The opposite is true though as a canon of statutory construction called ‘the presumption against extraterritoriality’ limits the exercise of legislative jurisdiction.[119] The US Supreme Court reaffirmed this presumption in Aramco-case”,[120] stating that, “It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”. In Morrison v. National Australia Bank[121] the Court referred to this case and concluded, “When a statute gives no clear indication of an extraterritorial application, it has none.” As established above, there is no doubt about the legislator’s intent about the extraterritorial reach of US export control and sanctions legislation. Consequently, its extraterritorial application is lawful under US law. Another question is whether public international law, in particular, the principles of jurisdiction allow the broad extraterritorial reach of the US laws.

[117] Another example are secondary sanctions on Hong Kong; Hong Kong Autonomy Act of 2020, Pub. L. 116-149, 134 Stat. 663 (22 U.S.C. 5701).

[118] Restatement of the law fourth 2018, Section 407, comment.

[119] Dodge 2020, para 15ff; Restatement of the law fourth 2018, Section 04.

[120] US Supreme Court 16 January 1991, EEOC v. Arabian American Oil Co., 499 US 244 (1991), 248. https://supreme.justia.com/cases/federal/us/499/244/ Accessed 20 February 2021.

[121] US Supreme Court 24 June 2010, Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010). https://supreme.justia.com/cases/federal/us/561/247/ Accessed 20 February 2021.

11.4.1 Export Controls

The extraterritorial application of the export controls as set out in the ECA, the AECA, the EAR and the ITAR seem hard to reconcile with any of the principles of jurisdiction. For an important part, the relevant provisions are based on the US origin of the controlled items. The idea is that items that have left US territory keep the US nationality. However, the principles of jurisdiction that are based on personality or nationality refer to natural persons and business entities incorporated under domestic law. An item does not possess a personality and consequently, extraterritorial jurisdiction cannot be based on the nationality principle.

Some controls may be justified under the protective principle. After all, export control law deals with the export of military and sensitive items that could impact national security. However, export can also be controlled for other reasons than national security (e.g., protection of human rights, economy, or foreign policy). Moreover, the reach of US export control law is quite broad, especially of the ECA and EAR. They cover numerous items the export of which would not jeopardize US national security. Enforcing foreign policy preferences through sanctions does not fall within the recognized ambit of national security. Therefore, the protective principle does not provide sufficient ground to justify the majority of the export control rules.

Yet, the extraterritorial provisions of the ECA, the AECA, and their implementing regulations do not seem to trouble allied trading partners too much and, in general, are not a source of conflict.[122] Perhaps the best explanation is that the US does not rely on the direct application of export control laws vis-à-vis foreign trading partners. Instead, it can be argued that the extraterritorial rules apply to a foreign buyer or user because he has voluntarily consented to the application of the rules by submitting forms such as end-use(r) certificates or signing a contract in which the relevant extraterritorial provisions are incorporated.[123] Some rules would not even apply without the voluntary consent of a foreign person. The 'see through rule', for example, that the DDTC applies with respect to articles containing ITAR-controlled items, is policy based and not laid down formally. In my opinion, such a policy 'rule', cannot be regarded as exercise of extraterritorial jurisdiction by a State.

The 'submission clauses' or 'Export Control Clauses' can be very specific and cannot be modified.[124] For instance, service agreements concluded under the ITAR[125] contain a provision stating that the parties will comply with all applicable sections

[122] There are exceptions, such as the protest following the enactment of the Soviet pipeline regulations.

[123] It must be admitted that accepting the US terms and conditions can be a forced choice as foreign customers are often highly dependent on the US defense industry.

[124] Rosanelli 2014, p. 5. Lebedoff and Raievski 1983, p. 487, fn 27 provides an older example of such a clause.

[125] As Manufacturing License Agreements and Technical Assistance Agreements do not require a prior license, no submission by a foreign person is possible as part of the license application process. Instead, the submission is sought in the contractual documents.

of the ITAR. In addition, several ITAR-clauses are verbatim included in the agreement.[126] Thus, it can be said that the foreign person is directly bound by the terms of the contract or form he signed; through the provisions of these instruments, he is only indirectly subject to the extraterritorial rules.

Although the literature is sometimes critical about these 'submission clauses',[127] it must be noted that foreign governments are often also engaged in the process and sign these clauses on a regular basis. This is especially true for arms sales to foreign governments or international organizations under the FMS-program. The statutory basis of the program is the AECA, which is not implemented by federal regulations but a Department of Defense manual, the SAMM. In my opinion, this type of document cannot have extraterritorial effect, legally binding foreign persons, not to mention foreign States.

The design of the program clearly shows that this is not intended either. Foreign buyers and the US government have to conclude a unique government-to-government contract referred to as the Letter of Order and Acceptance (LOA).[128] The standard terms and conditions, which are an integral part of every LOA, stipulate that the foreign purchaser agrees not to transfer title or possession of the purchased items without the prior consent of the US government (Section 2.4). Also, the purchaser agrees to permit the US government to conduct end-use monitoring verification with respect to the use, transfer, and security of the articles and services transferred under the LOA (Section 2.7). These provisions merely restate the obligation under the AECA, the LOA itself, however, is the legal instrument that binds the parties.

That is not to say that US extraterritorial practice has not met any opposition at all.[129] Lowe, for instance, refers to formal objections to US legislation with extraterritorial effect that the UK and eleven other States raised in 1961.[130] In the UK, extraterritorial application of US antitrust laws, in particular with respect to the shipping industry, led to the enactment of the Shipping Contracts and Commercial Documents Act of 1964, which was superseded by the Protection of Trading Interests Act (PTIA) in 1980.[131] In general terms, the latter act enables the UK to prohibit compliance with orders of foreign authorities; mandates the non-enforcement of certain foreign judgements by British courts; and allows British nationals and companies recovery of the 'penal' part of multiple damage[132] awarded against them in foreign

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[126] As required by Section 124.8 ITAR 'Clauses required both in manufacturing license agreements and technical assistance agreements' and Section 124.9 ITAR 'Additional clauses required only in manufacturing license agreements'

[127] Bianchi 1992, p. 394 and Michigan Law Review 1983, p. 1326.

[128] Defense Security Cooperation Agency 2020, https://www.dsca.mil/resources/publications Accessed 20 February 2021.

[129] On occasion, US export controls were challenged in foreign court cases; e.g. Polier 1970, early cases include: The American Presidents Line case (Hong Kong 1951), Moens v. Ahlers, North German Lloyd (Belgium 1964), and Fruehauf Corp. V. Massardy (France 1965).

[130] Lowe 1980, p. 260.

[131] Other States, e.g., Australia, Canada, and France, also enacted statutes rejecting another State's extraterritorial legislation; Coughlan et al. 2006, p. 59.

[132] So-called 'treble damages'.

courts ('claw back clause').[133] The PTIA thus aims to protect British citizens and companies from the extraterritorial reach of foreign laws[134] and raises the risks for private extraterritorial lawsuits for multiple damages. Although US antitrust laws prompted the passage of the PTIA, the Act has also been invoked in the field of export control and sanctions, e.g., in response to the Soviet Pipeline Regulations.[135]

Because of the unprecedented extraterritorial reach of these specific regulations, the European Community (EC), its member States, and Japan vigorously opposed the export controls. The EC concluded that the measures were unlawful "since they cannot be validly based on any of the generally accepted bases of jurisdiction in international law".[136] In particular the EC found the control theory, used to assert jurisdiction over foreign companies under control of US persons, not consistent with the Barcelona Traction case.[137] Consequently, the nationality principle could not serve as a basis of jurisdiction over these companies. Neither could this principle be invoked to assert jurisdiction over US goods and technology as it was generally accepted that they have no nationality.[138] The protective principle could not be applicable either as the extraterritorial provisions of the Regulations were adopted for the purpose of foreign policy instead of national security.[139] Finally, the EC considered the contractual submission clauses a misuse of the freedom of contracts in order to circumvent the jurisdictional principles.[140]

In the only recorded court case on the application of the Soviet Pipeline Regulations (Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.) the court also came to the conclusion that US extraterritorial exercise of jurisdiction "would not appear to be justified by the nationality principle". Consequently, the court ordered Sensor, a Dutch subsidiary of a US company, to comply with its contractual obligations notwithstanding the Soviet Pipeline Regulations.[141]

In general, the literature was rather critical about the extraterritorial reach of the Regulations as well and also concluded that generally accepted principles of jurisdiction impose limits on the exercise of jurisdiction to regulate conduct outside the regulating State's territory.[142]

The dispute over these extraterritorial Soviet Pipeline Regulations was settled by diplomatic means and led to the lifting of the measures that hurt the foreign

[133] Lowe 1980, p. 273.

[134] The PTIA is not directed at the US, but is on almost all occasions invoked against U.S. extraterritorial laws.

[135] Kuyper 1984, p. 73.

[136] On 12 August 1982 the EC presented a Note to the U.S. Department of State together with the legal "European Communities: Comments on the U.S. Regulations concerning trade with the U.S.S.R."; European Communities 1982, para 30.

[137] European Communities 1982, para 7.

[138] European Communities 1982, para 8.

[139] European Communities 1982, para 13.

[140] European Communities 1982, para 11.

[141] District Court the Hague, 17 September 1982, Judgment in Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.; International Legal Materials 22, no. 1 (January 1983), pp. 66–74.

[142] Lowenfeld 2003.

trading partners most. Although this action eased international tensions, it could not take away all European concerns,[143] as US export control legislation continued to include the extraterritorial elements that were already part of the system before the enactment of the Soviet Pipeline Regulations. Nevertheless, the extraterritorial reach of US export control did not lead to further major disputes.

11.4.2 Sanctions

Attention shifted to the increasing extraterritorial reach of US sanctions. It must be noted, however, that the US is not under all circumstances a proponent of secondary sanctions. When the Arab League implemented a boycott of the newly established State of Israel in 1948, the US opposed this secondary boycott[144] and since 1977, prohibits US companies from complying with any (non-US approved) boycott.[145]

This policy has, however, not stopped the US from progressively expanding its extraterritorial sanctions which resulted in several disputes with its allied trading partners,[146] notably the EU. The first of the disputes arose over the extraterritorial reach of the ILSA and especially the Helms-Burton Act. After expressing its concern about the latter statute and its intent to defend EU's legitimate interests[147] the EU filed a complaint with the Dispute Settlement Body of the World Trade Organization (WTO).[148] Moreover, the EU adopted the 'Blocking Regulation' or 'Blocking Statute'[149] to provide EU economic operators "protection against and to counteract the effects of the extra-territorial application of the laws specified in the Annex" such as the Helms-Burton Act and the ILSA (Article 1).[150] The Regulation includes the requirement to report activities that are affected by extraterritorial

[143] Kuyper 1984, p. 76. Text delivered by Sir Roy Denman, Head of Mission, Delegation of the European Commission and Peter Hermes, Ambassador, Federal Republic of Germany; 28 April 1983 Aide-Mémoire. http://aei.pitt.edu/5477/1/5477.pdf Accessed 20 February 2021.

[144] Weiss 2017.

[145] 15 C.F.R Section 760.

[146] The UK invoked the PTIA again; Davidson 1998, p. 1425.

[147] Demarche, Delegation of the European Commission, International Legal Materials 35, no. 2 (March 1996): 398–400.

[148] The EU argued that the extraterritorial application of the Helms-Burton Act was inconsistent with the U.S. obligations under the 1994 GATT and GATS; Annex 1A, General Agreement on Tariffs and Trade (GATT) and Annex 1B, General Agreement on Trade in Services (GATS) of the Marrakesh Agreement Establishing the World Trade Organization; Marrakesh, 15 April 1994 entered into force 1 January 1995 (Vol. 1867 UNTS 1995, No. 31874).

[149] 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, OJ L 309, 29/11/1996, pp. 1–6.

[150] Canada and Mexico passed similar legislation to counter the U.S. extraterritorial sanctions; e.g., Rathbone et al. 2013, p. 1073. Recently, the Chinese Ministry of Commerce adopted MOFCON Order No. 1, "Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and other Measures", which entered into force on 9 January 2021 (translation at: http://english.mofcom.gov.cn/article/policyrelease/questions/202101/20210103029708.shtml). Accessed 20 February 2021.

sanctions (Article 2) and provides for a non-recognition and non-execution of foreign judgements or orders giving effect to the sanctions (Article 4). More important, it prohibits compliance with the extraterritorial sanctions (Article 5)[151] and establishes a 'clawback' procedure (Article 6).

The WTO suit never went forward, however, as the US and the EU settled the dispute in April 1997 by Memorandum of Understanding (MOU).[152] Under the MOU, the US accepted to waive Title III of Helms-Burton Act. Furthermore, the US and the EU concluded the Transatlantic Partnership on Political Cooperation in May 1998 in which they agreed 'to resist' the passage of new extraterritorial sanctions.[153] Because of these arrangements, the Blocking Regulation, which remained in effect, did not have to be invoked.[154]

Things changed dramatically when the US withdrew from the JCPOA and subsequently re-imposed its sanctions on Iran which partially have extraterritorial reach. In reaction, the EU updated the Blocking Regulation by including in its Annex the re-imposed US extraterritorial sanctions.[155] Shortly thereafter, President Trump decided not to renew the waiver with respect to Title III of the Helms-Burton Act, fully activating the statute on 2 May 2019[156] much to the dismay of the EU.[157] A

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[151] See also Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 199 I, 7/8/2018 L 199, pp. 7–10).

[152] Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, 36 International Legal Materials 36 (1997) 529–530.

[153] US/EU Joint Statement on Transatlantic Partnership on Political Cooperation May 18, 1998; in Clinton 1998. Public Papers of the Presidents of the United States, 1998, 804–806.

[154] As U.S. secondary sanctions remained in place the EU continued to protest them. Harvard Law Review 2011, p. 1249.

[155] Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 199 I, 7/8/2018, pp. 1–6. See also: Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 199 I, 7/8/2018, pp. 7–10).

[156] President Donald J. Trump Is Taking A Stand For Democracy and Human Rights In the Western Hemisphere | The White House. Accessed 20 February 2021.Consequently, the waiver came into effect again 2 May 2019.

[157] Council of the EU, 'Declaration by the High Representative on behalf of the EU on the full activation of the Helms-Burton (LIBERTAD) Act by the United States' (2 May 2019). www.consilium.europa.eu/en/press/press-releases/2019/05/02/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-full-activation-of-the-helms-burton-libertad-act-by-the-unitedstates/ Accessed 20 February 2021; EU External Action Service, 'Joint Statement by Federica Mogherini and Cecilia Malmström on the decision of the United States to further activate Title III of the Helm Burton (Libertad) Act' (17 April 2019). https://eeas.europa.eu/headquarters/headquarters-homepage/61183/joint-statement-federica-mogherini-and-ecilia-malmstr%C3%B6m-decision-united-statesfurther_en Accessed 20 February 2021.

new dispute is looming with the extraterritorial legislation impacting the European participation in the Nord Stream 2 Project. However, as the views of the EU Member States on the project differ widely, the EU has not yet been able to reach consensus on broadening the reach of the Blocking Regulation by including in its Annex the PEESA and PEESCA.

The EU and its member States have continuously stressed their position that the US extraterritorial sanctions are contrary to international law. In the words of the French Minister for Europe and Foreign Affairs: "the increasing use by the US of extraterritorial provisions … is unjustified, unjustifiable and contrary to international law".[158] Also, every year, the UN General Assembly calls upon States to "refrain from promulgating and applying laws and measures such as the Helms-Burton Act … the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation".[159]

Indeed, the majority of the extraterritorial sanctions provisions do not have a sufficient nexus with the US to be consistent with the international law of jurisdiction. More specifically, the principles of jurisdiction, notably the territoriality, nationality, and protective principle, do not provide a sufficient basis to justify the broad extraterritorial reach of the sanctions.

ING, BNP Paribas, and many other banks were fined because they processed dollar transactions through the US financial system. The US asserted jurisdiction over the transactions because payments in US currency imply that the transactions pass through its territory because US correspondent bank accounts were used.[160] In addition, processing illegal transactions within the US caused the US correspondent banks to violate US laws. Both arguments rely on the territoriality principle. In the literature, such a broad interpretation of this principle has met with much criticism as the clearing of an amount of money through a US based bank on its way between two foreign accounts cannot be regarded as a sufficient jurisdictional nexus.[161]

A considerable number of secondary sanctions regulations extend the meaning of 'US person' to include companies incorporated abroad but 'owned and controlled' by a US person (the control theory). Such a claim is based on the nationality principle. As discussed above, under public international law, the nationality of a corporation is separate from its shareholders and is determined by its place of incorporation.[162] Therefore, the US cannot rely on the nationality principle to assert jurisdiction over foreign-incorporated companies 'owned and controlled' by a US

[158] "le recours croissant, par les États-Unis, à des dispositions extraterritoriales … est injustifié, injustifiable et contraire au droit international", cited in: Court of Appeal of Paris, International Commercial Chamber, 3 June 2020, Judgement in SA T v Société N, No. RG 19/07261—No. Portalis 35L7-V-B7D-B7VDG, Section 64.

[159] UN Doc A/RES/74/7 of 12 November 2019: Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba. Preamble and para.2.

[160] Emmenegger 2016, p. 654.

[161] Emmenegger 2016, p. 655; Ruys and Ryngaert 2020, p. 20ff.

[162] As the ICJ established in the Barcelona Traction case.

person.[163] International critique notwithstanding the US continues to rely on the control theory.[164]

Nationality also comes into play with respect to sanctions provisions that prohibit the reexport from a third country by non-US persons of US origin goods, technology, or services that are subject to US export controls. As mentioned earlier, under public international law, only natural and legal persons possess nationality. Therefore, the US cannot establish a jurisdictional link with a US origin item that has left country.[165] Of course, a foreign person involved in the reexport of a US controlled item may be bound by US rules through a submission clause in a contract or license form.

Nowadays, the principal statutory basis for US sanctions is the IEEPA. In order to impose sanctions under this statute the President first has to declare the existence of an "unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States".[166] Extraterritorial sanctions legislation based on the existence of a national security threat may be justified pursuant to the protective principle. This principle only applies, however, where the threat is quite severe jeopardizing key State interests (see Sect. 11.2.2.3). Most US sanctions imposed with reference to the national security threat do not meet this relatively high threshold.[167] Furthermore, the US employs sanctions for a variety of other reasons than the protection of national security, for instance, to achieve foreign policy or quasi-military objectives, for economic and commercial reasons, or to fight the proliferation of weapons of mass destruction or terrorism.[168] Therefore, a reference to the protective principle to justify US extraterritorial sanctions is not convincing in most situations.

In establishing the legality of US extraterritorial sanctions, some authors also take into account the consequences for non-US persons of violating these sanctions while abroad. They argue that absent a treaty provision to the contrary, it is within the discretion of the US to deny a foreign person access to its economic or financial system. There is no rule of international law requiring a State to grant a foreign corporation the right to conduct business within its territory (see Chap. 5, Sect. 5.3.3.2). Thus, the denial of privileges of doing business within the US in response to a violation

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[163] Court d'Appel, Paris, 22 May 1965, Fruehauf Corp v. Massardy; in Marcuss and Richard 1981, p. 466; District Court the Hague, 17 September 1982, Judgment in Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.; International Legal Materials 22, no. 1 (January 1983): 66–74.

[164] Ruys and Ryngaert 2020, p. 19.

[165] Ruys and Ryngaert 2020, p. 20. Already in 1953 the Supreme Court of Hong Kong had held that goods imported from the U.S. and stored on Hong Kong soil were no longer 'subject to the jurisdiction of the United States' as defined in the U.S. Foreign Assets Regulations. To hold otherwise, the court said, 'would be to create an incursion into the sovereign rights of Hong Kong which … could never have been the intention of the draftsman'. American President Lines, Ltd. v. China Mutual Trading Co., Ltd. and the Hong Kong & Kowloon Wharf and Godown Co., Ltd. (19531 A.M.C. 1510.l), cited in: Marcuss and Richard 1981, pp. 466–467.

[166] 50 U.S.C. Section 1701(a).

[167] Ruys and Ryngaert 2020, p. 27 with respect to US sanctions on Cuba and Iran.

[168] Rathbone et al. 2013, pp. 1066–1067.

of extraterritorial US sanctions is a legitimate exercise of territorial sovereignty.[169] However, more far-reaching punitive measures such as civil and criminal penalties, are only allowed under international law where the sanctions have a sufficiently strong connection with the US[170] These arguments are certainly not without merit. It must be noted, however, that denial of privileges may have a punitive character as it can have a far more significant impact on a foreign company than a severe monetary penalty because of the scope of the US market and the dominance of its financial system. Moreover, the sanctions can still affect the sovereign rights of third states.

11.5 Synthesis and Conclusion

The sovereignty of states is reflected in the concept of jurisdiction which encompasses the powers of a state to make laws applicable to persons, property, or conduct (legislative jurisdiction), to exercise its powers to compel compliance with the law (enforcement jurisdiction), and to apply laws to persons or thing through the processes of its courts or administrative tribunals (adjudicative jurisdiction). Jurisdiction and the exercise thereof is in principle territorial as the extension of the reach of domestic laws beyond national borders may impact the sovereignty of other states. However, the ongoing globalization, including the increasing interdependency of national economies, make it impossible to keep national jurisdictions fully separated. Consequently, states can exercise their legislative powers extraterritorially based on the principles of jurisdiction, which express a genuine link between the legislating state and the subject of the legislation. The main principles of jurisdiction are based on nationality, vital state interests, and the universal character of certain acts.

US export control and sanctions legislation has long had extraterritorial effect, resulting in a number of conflicts with its foreign trading partners. The extraterritorial parts of the AECA, the ECA and their implementing regulations, notably the EAR and the ITAR, focus on the re-export and transfer of US origin items abroad by non-US persons. One of the key concepts is the notion that US export controls 'follow the part' extending the jurisdiction over such an item when it has left US territory, even when it has been incorporated in a new foreign-built object. As goods do not possess a nationality, the extraterritorial reach of these provisions cannot be based on the national principle or any other principle of jurisdiction. Still, these provisions have not given rise to coordinated foreign protests in general. The lack of foreign response may be explained by the perception that the extraterritorial effect of the rules is negated by the submission of foreign persons involved in the handling of US origin items abroad to the US rules through export control clauses in contracts and export permits and forms.

Much more controversial is the increasing use by the US legislator of a variety of extraterritorial sanctions provisions that extend the reach of certain statutes to foreign

[169] Ruys and Ryngaert 2020, p. 11ff.

[170] Ruys and Ryngaert 2020, p. 16ff.

persons and corporations abroad. In many situations, there is no, or at best a tenuous nexus with the US. Consequently, allied trading partners, notably the EU, vehemently oppose these extraterritorial rules. The EU strongly believes that the extraterritorial sanctions are contrary to international law, and EU officials have time and time again stressed this point. The primary legal weapon shoring up EU's opposition to the US sanctions is the Blocking Regulation which had been enacted in response to the 1996 Helms-Burton Act and updated after the US re-imposed its extraterritorial sanctions on Iran in 2018.[171] To date, the Blocking Regulation has not proved as effective as was hoped for and has only been applied occasionally.[172] Therefore, the EU is exploring ways to make better use of the Regulation as well as creating new tools, such as intervening in foreign proceeding in support of EU companies and individuals.[173]

The imposition of US foreign policy objectives on its foreign trading partners through secondary sanctions shows that "law cannot be divorced from politics or power" as the International Court of Justice once concluded.[174] However, one single state cannot change international law singlehandedly. Therefore, the EU must continue to resist US extraterritorial claims in close cooperation with like-minded states and international organizations.[175] Past experiences have shown that the concerted diplomatic efforts to reverse (the effects of) secondary sanctions can be successful.[176] However, the need for the US to enact extraterritorial sanctions legislation will only be taken away when the US and its allied trading partner are prepared to better coordinate their foreign policy objective.

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[171] The UK has retained the Blocking Regulation and the Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 199 I, 7/8/2018, pp. 7–10). Together with its domestic implementing legislation (*inter alia*, the Protection of Trading Interests Order), as amended (Protecting against the Effects of the Extraterritorial Application of Third Country Legislation (Amendment) (EU Exit) Regulations 2020), it forms the UK's 'Protection of Trading Interests Legislation'.

[172] Jennison 2020, p. 174; Ruys and Ryngaert 2020, p. 82.

[173] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2021) 32 final of 19 January 2021 The European economic and financial system: fostering openness, strength and resilience, p. 18.

[174] ICJ 20 February 1969, North Sea Continental Shelf, Judgement, I.C.J. Reports 1969, pp. 42–43.

[175] For an overview of (possible) EU responses, see Study European Parliament 2020.

[176] Lowenfeld 2003, p. 363.

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